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DUNBAR *v.* HOWELL.

4-2473

Opinion delivered June 6, 1932.

[redacted]

J. V. Bourland, for appellant.

Paul M. Lynch, for appellee.

SMITH, J. On July 13, 1931, Mrs. Bessie Howell filed suit in the Sebastian Chancery Court, Fort Smith District, against E. C. Dunbar and his wife to foreclose three separate mortgages executed to her by them. Each mortgage secured a separate debt and conveyed a different lot as security therefor. Summons issued as is provided by law, and was duly served the day after the

issuance thereof. After service of summons, a receiver was appointed by order of the court to take possession of the mortgaged property. The receiver qualified as the law requires, and collected certain rents, a report thereof being later made and confirmed by the court.

No answer was filed, and a decree was entered ordering the foreclosure of the mortgages, and pursuant to this decree a sale was had by a commissioner named for that purpose. The decree of foreclosure directed that the sales be made on a credit of three months and that the purchaser be required to give bond, with approved security, for the purchase money, with lien retained upon the property sold as security.

Tom Dunbar, a brother of E. C. Dunbar, was the highest bidder at the commissioner's sale, and all three lots were sold to him. He failed to comply with his bid by executing the bond which the decree of sale required. The sale occurred at Fort Smith, and Tom Dunbar asked that he be given two or three days in which to return to his home in Dardanelle and secure the execution of the bond which the decree of sale required. The commissioner refused to give the three days' time requested, but did give three hours, and when Tom Dunbar failed to complete his bid by executing the bond required the commissioner, on the same day, reoffered the lots for sale and sold them to Mrs. Howell, the plaintiff in the action, for $500 each, or the total sum of $1,500, which was only $25 less than the sum total of Tom Dunbar's bid.

The commissioner filed on October 3, 1931, a report of the sale, which came on for confirmation at the same term of the court. Exceptions were filed to this report, which have been lost and do not appear in the record. There was filed a response to these exceptions, which does appear in the record.

An order was entered at the October, 1931, term of the court which recites that on October 7, 1931, a day of that term, the exceptions came on to be heard, and that "this is the date and hour previously fixed for the hear-

ing of said exceptions of which plaintiff and defendants had notice," and that the plaintiff appeared, but the defendants did not, and that "the cause is submitted upon the exceptions of the defendants and plaintiff's response thereto, and the testimony of witnesses, and on the whole record, from all of which the court finds the issues of law and fact in favor of the plaintiff." The testimony, which this order recites was heard by the court, has not been brought into the record. Upon this finding the exceptions to the report were overruled, and the report of sale was approved and confirmed.

Later a "motion for review and amendment" was filed by E. C. Dunbar, which recites that the motion is in the nature of a bill of review. This motion recites the various reasons why the report of sale should not have been approved, and, among others, that Dunbar had no notice of the hearing of the report. Testimony was heard on this motion and the response thereto, which has been brought into the record before us. It was alleged in the response that objections and exceptions to the report were made which had not been originally made.

Upon hearing this motion and the response thereto the court prepared a written opinion, which was incorporated in the decree rendered therein and from which is this appeal. This opinion contains the following recitals:

"OPINION OF THE COURT.

"Referring to the matter we had on hearing this morning in the case of *Bessie Howell* v. *E. C. Dunbar et al,* No. 8192; I have gone into the matter very carefully and read the motion to substitute exceptions for those filed in the case on the 5th day of October, 1931, and relying principally upon my own memory as to what the exceptions contained at that time, I shall be compelled to deny the motion to substitute the exceptions filed today for the ones filed at that time and alleged to have been lost.

"The original motion, or exceptions, in the case were filed some time near the 5th of October, and, upon proof being made on the 7th day of October that the attorney for defendants had been notified that there would be a hearing on his exceptions, the hearing was had and proof taken with regard to all matters in the exceptions as filed at that time. The exceptions were overruled, and, upon request of the defendant, an appeal to the Supreme Court was granted. At the same time the court signified that, while the court was in session, the case, on his motion, would be reopened and any additional testimony might be heard, but attorney for defendant said that would not be necessary; that he would just go on with the appeal.

"I find that the new exceptions proposed to be substituted for the original ones to contain many matters that were not in the original exceptions. The original exceptions were practically as testified to, I think, today by Mr. Wood—in substance, at least. I think he covered about all the issues raised at that time; so, that being the case, it is necessary that I deny the motion to substitute the substituted exceptions."

The findings of fact there recited do not appear to be contrary to the preponderance of the evidence.

The original decree overruling the exceptions to the report of sale and approving the sale was rendered October 7, 1931, and the transcript on the appeal from that decree was filed December 21, 1931, and the record has been amended to bring before us the subsequent proceedings above recited. We have before us all the papers and proceedings in the cause save only the original exceptions to the report of sale, and we find no irregularity calling for the reversal of the decree approving the report of sale and ordering deed to be made pursuant thereto.

It appears that the decree of foreclosure was rendered fifty-one days after service of summons was had. In the meantime there had been several adjourned ses-

sions of the court. The rendition of the decree under the facts herein stated was authorized by act 290 of the Acts of 1915, page 1081.* This is an act entitled "An Act to regulate pleading and practice in the Circuit and Chancery Courts of the State of Arkansas," and was construed in the case of *Tuggle* v. *Holman Real Estate Co.,* 126 Ark. 25, 189 S. W. 169. It was there held (to quote a headnote in that case) that: "Under Kirby's Digest, § 6188, as amended by act 290, p. 1081, Acts of 1915, the answer or defense to any complaint or cross-complaint must be filed before noon of the first day the court meets in regular or adjourned session where the summons has been served twenty days in any county in the State; and judgment by default may be rendered on any day of any regular or adjourned session when the defense has not been filed on or before noon of the first day of court twenty days after service of summons. (For good cause, however, the trial court has a discretion to allow further time.)" See also, *Southwest Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2d) 373.

As defendants were in default of an answer when the decree of foreclosure was rendered, the decree was properly rendered. It may be said, moreover, that no valid defense to the foreclosure suit is alleged.

We are also of the opinion that the exceptions to the report of sale were properly overruled, and that no error was committed in approving the report. We do not know upon what testimony that action was taken, and we know only that testimony was heard which has not been brought into the record.

As an original proposition, the only reasons requiring discussion for not approving the report of sale are: (1) that the decree of foreclosure was prematurely rendered; (2) that the commissioner should have given Tom Dunbar the time requested to comply with his bid; (3) that the report was heard and confirmed without notice; and (4) that the sale was for a grossly inadequate

*Crawford & Moses' Digest, §§ 1208, 1285. (Rep.)

price. But, as has already been stated, the decree was not rendered prematurely. There was no error in refusing Tom Dunbar the time requested to complete his bid. The terms of sale were provided in the decree of sale and in the notice thereof, and the purchaser should have been prepared to comply therewith. Had the time requested been given, and had the purchaser failed to comply with his bid, a resale might and probably would have been necessary. The law contemplates that the sale shall be made on the day advertised, and the execution of the bond on that day was a part of the sale, and the purchaser should have been prepared to execute the bond on that day. See § 41, chapter Judicial Sales, 35 C. J., page 29. The court found that the exceptions were heard at the time appointed for that purpose. And, as to the inadequacy of price, it suffices to say that the bid of Tom Dunbar for all the lots was only $25 more than the bid approved by the court.

Upon a consideration of the entire record, the decree appears to be correct, and it is therefore affirmed.

HARRIS (LESTER) *v.* STATE.

Crim. 3802

Opinion delivered June 20, 1932.

George T. Humphries and *Oscar E. Ellis,* for appellant.

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

HART, C. J. Lester Harris prosecutes this appeal to reverse a judgment of conviction against him for grand larceny.

The principal assignment of error is that the evidence is not legally sufficient to sustain the verdict.

According to the testimony of O. C. Cockrum, at the time of the trial, he lived in the west end of Fulton County; and sometime before this, when he lived in the east end of Baxter County, four hogs were stolen from him. Upon investigation, he found his hogs in a field of Mrs. Harris and identified them by their color, earmarks, and a scar on the right foot of one of them. He instituted a replevin suit for the hogs against Richmond and Lester Harris and obtained possession of them. Several relatives and neighbors testified that they examined the hogs and knew them by their color, flesh marks and general appearance, and that they belonged to the prosecuting witness. Some of the witnesses testified that one of the hogs had been caught in a steel trap, which left a peculiar scar on the right forefoot, by which they were able to identify the hog. They were full-blooded red Duroc hogs, and there were no other hogs of that kind and color in that part of the country.

The evidence on the part of the defendant tended to show that the hogs belonged to his brother, Richmond Harris, who had raised them. He testified that the ear-

mark on the hog with the scar on the right forefoot was his own. He admitted, however, that the hogs were found in the field of his mother, Mrs. Harris, and that he lived in Fulton County, Arkansas.

According to the evidence for the State, the hog had been recently stolen, and that was a fact to be taken into consideration by the jury in determining the guilt or innocence of the defendant.

The prosecuting witness, in addition to the testimony he gave which we quoted above, testified that the hogs ranged from his home in Baxter County, across the line into Fulton County, near where they were found after having been stolen. It would make no difference whether the theft of the hogs occurred in Baxter County or in Fulton County. By the common law, larceny is a crime committed by the movement of the stolen property from one county to another, and the indictment may be had in any county in which the stolen property may be carried. *State* v. *Alexander and Moore,* 118 Ark. 357, 176 S. W. 315.

The evidence for the State tended to show that the hogs were stolen from the prosecuting witness, and soon afterwards they were found at the farm of the defendant's mother, where he lived, in Fulton County, Arkansas, and that one of the hogs was in the defendant's mark.

The evidence for the State, if believed by the jury, was sufficient to warrant a verdict of guilty. *Dennis* v. *State,* 88 Ark. 418, 114 S. W. 926; *Starnes* v. *State,* 128 Ark. 302, 194 S. W. 506; and *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701.

Another assignment of error is that the court erred in instructing the jury. We do not deem it necessary to set out the instructions complained of. It is sufficient to say that the court defined larceny within the meaning of § 2490 of Crawford & Moses' Digest. The court also explained to the jury that all persons present aiding and abetting in any felony may be deemed principal offenders and indicted and punished as such. This conforms to § 2311 of Crawford & Moses' Digest; and there was no

error in so instructing the jury, because, under the evidence for the State, the jury might have found that Lester Harris was present, aiding and abetting his brother, Richmond Harris, or that he took the hog with the scar on the right forefoot himself and carried it to his mother's farm with the intention of stealing it. The jury might have believed that there was no reasonable explanation of his story of the stolen property, and that, if it was in his mark, it had been marked after it was taken by him. It is true that he testified that the earmark was his own; but the jury might have believed the prosecuting witness in this particular, who testified that he was familiar with the earmarks, and that one of the hogs was in the earmark of the defendant.

It is next insisted that the court erred in remarks made to the jury while they had the case under consideration. The record shows that, after the jury had been out for sometime considering the case, the court called them back into the courtroom and asked how they stood as to numbers. On being informed that the jury stood eight to four, he related an anecdote which the counsel for the defense construed as meaning that the minority should yield to the majority. The court then expressly told the jury that it did not mean that any juror should yield his honest conviction to the balance of the jury. On the other hand, the court impressed on them the fact that each juror should render a verdict according to his own conviction. The language of the court would remove any possible prejudice which might have resulted from the language first used.

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

HARRIS (RICHMOND) *v.* STATE.

Crim. 3803

Opinion delivered June 20, 1932.

[redacted]

George T. Humphries and *Oscar E. Ellis,* for appellant.

Hal L. Norwood, Attorney General, *Robert F. Smith* and *Pat Mehaffy,* Assistants, for appellee.

SMITH, J. This appeal is from the judgment of the Fulton Circuit Court sentencing appellant to a term of one year in the penitentiary for the larceny of four hogs, the property of O. C. Cockrum.

For the reversal of this judgment, it is first insisted that the venue was not proved. It has been many times decided that it is essential to prove the venue of a crime, that is, the place of its commission, in order that it may

appear that the court trying the case has jurisdiction. It is ordinarily so easily proved that many prosecuting officers neglect to prove it except inferentially. It is, however, a fact which may be inferred from all the circumstances shown by the testimony, and we hold the venue to be proved when the place of the commission of the crime appears from all the testimony in the case to have been within the county (or in the district of the county) in which the indictment was returned. *Atwood* v. *State,* 184 Ark. 469, 43 S. W. (2d) 70.

There is some uncertainty as to whether the hogs were stolen in Fulton County or in the adjoining county of Baxter. But we think the jury was warranted in finding from a preponderance of the evidence that the larceny was committed in Fulton County. The owner of the hogs testified that he lived two and one-half miles west of Viola, which village we judicially know is in Fulton County, and an inspection of the maps of the county, with reference to the public surveys, shows that village to be about ten miles east of the line between Fulton and Baxter counties. The owner testified that his hogs ran at large "east of my place and near the county line," and, when asked when and where he lost the hogs, he answered in May or June, 1931, and "in this county and State." As the trial was being had in Fulton County, the inference is inescapable that this is the place in which the witness said the larceny had been committed. We therefore hold that the venue was sufficiently proved.

There was a question as to the identity of the hogs and their ownership by Cockrum. But this question was submitted to the jury under correct instructions, and is settled by the jury's verdict. According to the State's testimony, one of the hogs had been caught in a steel trap, and still had the scar of the trap on his right front leg, and the marks of all the hogs had been recently changed. Without further recital of the testimony, we announce our conclusion that it was legally sufficient to support the jury's verdict.

Among other instructions, the court gave one numbered 4, which reads as follows: "You are instructed, gentlemen, that any person who stands by, aids and abets and encourages in the commission of a felony, being present, is deemed in law a principal, and punished as such." Upon objection being made to this instruction, the court said: "The court withdraws this instruction from your consideration, in view of the fact that in this case, in the trial of this defendant, there is no evidence on which to submit that instruction."

As an abstract declaration of the law, the instruction is correct, and no objection can be made except that it was abstract. But, even so, there was no prejudicial error in giving it, as it was promptly withdrawn upon objection being made to it, and this action cured the error. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995.

The most serious question in the case relates to the condition of the record. As certified in the original transcript, the judgment recited that the cause was heard before seven members of the regular panel and five jurors selected from a special venire, their names not being recited. Section 6378, Crawford & Moses' Digest. Upon this point being raised, a writ of certiorari issued upon the suggestion of the Attorney General that there had been a diminution of the record. Upon the return of this writ the clerk of the Fulton Circuit Court has certified a judgment in proper form, which contains the names of the five bystanders, together with those of the seven members of the regular panel, it being recited in the judgment that all members of the jury had qualified as jurors and that the jury had been duly sworn.

In the reply brief of counsel for appellant there appears a copy of an affidavit of counsel for appellant to the effect that, as originally entered, the judgment did not recite the names of the jurors. It does not appear, however, when, where or with whom this affidavit was filed, and it has not been made a part of the record in this case.

The judgment of the circuit court cannot be impeached in this manner. We have before us, under the seal of the clerk of the Fulton Circuit Court, a judgment conforming to the law, and we must take it as being correct.

In the case of *Hagerman* v. *Moon,* 68 Ark. 283, 57 S. W. 935, it was said: "Parties aggrieved by errors in the record of the circuit court, and desiring to have them corrected, should apply to that tribunal for correction, and not to this court. This is not the proper forum in which to institute such proceedings."

In the case of *Memphis Land & Timber Co.* v. *Board of Directors of St. Francis Levee District,* 70 Ark. 409, 68 S. W. 242, it was said: "We must presume that the transcript of the case filed here is a true and perfect copy of the record. If incorrect or incomplete, it should have been corrected by appropriate proceedings. This has not been done, and we cannot go outside the record for facts, but must determine the case from the facts as they appear in the record."

We have here no such question as was presented in the case of *Cochran* v. *State,* 169 Ark. 503, 275 S. W. 895. There an indictment for receiving stolen goods as copied in the transcript, and, as certified by the clerk, failed to contain an allegation that the goods were received by the defendant with the intent to deprive the true owner thereof. An attempt was made by certiorari to correct the indictment to show that, as originally drawn, it contained an allegation that the defendant received the stolen goods with the intent to deprive the true owner thereof, and that by some means the allegation was omitted from the indictment when it was copied into the transcript. Evidence was taken before the circuit court and presented to this court, upon which we were asked to correct the record in this court, and to supply the omission in the indictment. We held that we could not do this, as the authority to supply a lost record or to correct a mutilated one is vested in the court in which the case was pending at the time the paper was lost or mutilated.

Here we are not asked to correct or supply a record. On the contrary, we are asked to ignore a record which has been properly certified to us, and this we cannot do.

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

COCKRUM *v.* STATE.

Crim. 3797

Opinion delivered June 20, 1932.

J. Curtis Higginbotham, Eugene H. Schoonover and *William J. Schoonover,* for appellant.

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

MEHAFFY, J. Appellant was convicted of the crime of perjury in Randolph County, Arkansas, and his punishment fixed at one year in the State penitentiary.

The indictment charged that appellant falsely swore and subscribed to an affidavit before a notary public who was authorized to administer oaths, and that said affidavit was to be, and was, used in a motion for a new trial in a cause in the Randolph Circuit Court. It charged that appellant swore in said affidavit that on one occasion Massey jumped up from his chair, kicked his so-called paralyzed leg into the air, and that Massey told appellant his leg was not hurt, and that it perfectly appeared to appellant that he was telling the truth, for he used it naturally enough, and walked without the slightest limp. It was also charged that the affidavit stated that the appellant positively knew that Massey was stalling and faking his injury; that he recovered from his slight injury long before the trial was held.

The indictment charged that the statements in the affidavit were false, and known by appellant to be false, and were feloniously, wilfully, corruptly and falsely made.

The motion for a new trial, in which the affidavit was used, was in the case of *Massey* v. *Phoenix Construction Company.* Massey had obtained a judgment and a motion for new trial had been filed in the Randolph Circuit Court, and the affidavit was used for the purpose of securing a new trial.

At the beginning of the trial the following occurred:

"Mr. Jackson: Your Honor, I believe the defendant admits the execution of the affidavit; that it was in Randolph County, Arkansas; that it was material to the issue; that Miss Cecelia Jansen was a qualified and acting notary public. I believe you admit all of the allegations except the truth of the statements made in the affidavit?

"Mr. Schoonover: Yes, sir.

"The Court: As the court understands it, the only question is whether or not the statements made in the affidavit are true?

"Mr. Jackson: I believe that is right.

"Mr. Schoonover: Yes, sir.

"The Court: Then the only question is whether or not the statements are true or false. Proceed, gentlemen."

There was therefore no evidence introduced except upon the issue as to whether or not the statements in the affidavit were true.

Massey testified that he was injured in his leg; that his leg and foot were paralyzed; that he could not use it, and testified that all of the statements in the affidavit made by appellant were untrue. A number of physicians and other witnesses testified corroborating Massey.

Bill Cockrum, the appellant, testified that he made the statements alleged in the indictment, and that they were true, and testified about when he saw Massey, saw him using his foot, and testified that Massey told him he was not injured. The appellant was corroborated in part by a number of witnesses. The testimony was in conflict, and it will not be set out in full.

At the close of the evidence, the appellant requested the court to direct the jury to return a verdict of not guilty. This request was overruled, and the appellant filed motion in arrest of judgment, and motion for new trial, both of which were overruled, and exceptions saved. The case is here on appeal.

Appellant says there are three general errors urged for a reversal of this case: One, that the indictment is fatally defective; two, that the court erred in overruling appellant's motion for an instructed verdict; three, that the court erred in admission of certain testimony.

It is first contended by appellant that the plain inference is that the petition for a new trial, in which the affidavit was used, was pending before the judge of the cir-

cuit court, rather than in the circuit court itself, and that the circuit judge would have no jurisdiction.

The indictment, after stating the cause which was pending in the Randolph Circuit Court, contains the following allegations: "That the said Randolph Circuit Court and the judge thereof, before whom the said petition for a new trial in said cause was pending, had jurisdiction of the persons and subject-matter in each of said causes."

It is perfectly clear from the indictment that the cause in which the motion for a new trial was filed was in the Randolph Circuit Court, and it appears equally clear that the motion for new trial was pending in the Randolph Circuit Court, and the added words, "and the judge thereof," do not indicate that it was not being heard by the court. Those words were unnecessary, of course, but they did not change the effect of the allegations that the petition was before the Randolph Circuit Court.

Appellant calls attention to 21 R. C. L. 262 *et seq.*, and 30 Cyc. 407 and 411. These authorities have no application here.

Our statute defines perjury as follows: "Perjury is the wilful and corrupt swearing, testifying or affirming falsely to any material matter in any cause, matter or proceeding before any court, tribunal, body corporate or other officer having by law authority to administer oaths."

It is contended, however, by the appellant that the authorities above referred to by him show that perjury cannot be predicated on an *ex parte* affidavit not required or authorized by law. A sufficient answer, however, to this is that the affidavit in this case was authorized by law.

Appellant then calls attention to a number of authorities holding in effect that it should be shown either that the affidavit was intended by the accused for use in the proceeding with which it is sought to connect it, or that it was subsequently so used by him or some one with his consent.

The indictment in this case shows that the affidavit was to be so used, and was used, in a motion for a new trial.

Section 2590 of Crawford & Moses' Digest prescribes what shall be set forth in an indictment for perjury. It is as follows: "In indictments for perjury, it shall be sufficient to set forth the substance of the offense charged, and by what court or before whom the oath or affirmation was taken, averring such court or person to have competent authority to administer the same, together with the proper averments to falsify the matter wherein the perjury is charged or assigned, without setting forth any part of the record, proceeding or process either in law or equity, or any commission or authority of the court or person before whom the perjury was committed, or the form of the oath or affirmation, or the manner of administering the same."

The indictment in this case is sufficient.

Section 3013, Crawford & Moses' Digest, provides: "The indictment is sufficient if it can be understood therefrom:

"First: That it was found by a grand jury of a county impaneled in a court having authority to receive it, though the name of the court is not accurately stated.

"Second: That the offense was committed within the jurisdiction of the court, and at some time prior to the time of finding the indictment.

"Third: That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce the judgment on conviction, according to the right of the case."

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 rule is that in indictments for perjury, the false testimony or statement for which the defendant is indicted may be shown by the indictment to be material,

either by direct averment or by allegation from which their materiality appears." *Loudermilk* v. *State,* 110 Ark. 549, 162 S. W. 569.

The appellant next contends that the court erred in refusing his request for an instructed verdict. As we have already said, the evidence is in conflict, but Massey, the injured party, testified positively as to his injuries. Dr. J. C. Lamm testified that he examined Massey prior to the civil suit, and that his leg and foot were paralyzed; that, if the injury produced the condition he found, there was no way to relieve the effects, and that he did not think he could have used the leg or moved it at all.

Dr. George W. Brown testified that he examined Massey and that his lower limb was paralyzed. Dr. M. A. Baltz testified to the same effect, as did Dr. H. H. Price. Dr. Reyburn also testified that Massey seemed to have paralysis of the lower limb. Dr. J. W. Brown testified contradicting appellant, Bill Cockrum. There was therefore substantial evidence tending to show that the statements made by Cockrum in the affidavit were untrue. Of course, whether they were true or not was a question of fact for the jury on conflicting evidence.

It is next contended by the appellant that the court erred in admitting certain testimony. The first objection is to the testimony of R. J. Baker, and appellant says it was error to permit the witness to read all the affidavit to the jury. He contends that there was no necessity for allowing proof of the affidavit when appellant admitted making the same. There could not be any prejudicial error in this testimony, and it did not bring any foreign issues into the case.

It is also contended that the court erred in permitting the jury to examine Massey's legs, and appellant says that the jurors are not experts. However, whether experts or not, the jury could have some idea of the extent of the injury, and also as to whether appellant or Massey was telling the truth in their testimony. It could not have resulted in any prejudice to the appellant. His

only contention was that the statements made in the affidavit were true.

Objection is then made to the testimony of Mrs. Massey, who testified that her husband had been unable to use his limb. There was no error in this. The question was whether he was paralyzed, and this was competent testimony.

We have very carefully examined all the evidence, and we find no prejudicial error in the admission of testimony. The weight to be given to the evidence and the credibility of the witnesses are for the jury. We find no error, and the judgment is affirmed.

TARLETON DRAINAGE DISTRICT No. 15 *v.* AMERICAN INVESTMENT COMPANY.

4-2676

Opinion delivered June 20, 1932.

Ingram & Moher, for appellant.

G. W. Botts, for appellee.

BUTLER, J. In 1917 the appellant district was organized under the provisions of § 3607 *et seq.* of Crawford & Moses' Digest for the purpose of constructing a drain in the Southern District of Arkansas County. After the original district was organized, the assessment of benefits levied and bonds sold, the commissioners discovered that other lands would be benefited by the making of the improvement, and, under the provisions of § 3614 of the Digest, caused the benefits accruing to said lands to be assessed reporting the same to the court with a description of the lands and praying that the assessments be confirmed and the district extended so as to include the lands described.

The county court caused the notice required by said section to be published, but, on account of typographical errors in the notice furnished the printer, one tract of land was entirely omitted, and section 33, which was intended to be included, was described as section 3. The lands sought to be included and correctly described in the report of the commissioners filed with the court, were the west one-half of section 26, west one-half of southeast section 26, east one-half of section 27, all of section 33, northeast one-fourth of section 34, township 3, range 2 west, while the notice as shown by the proof of publication omitted the west one-half of section 26, and, instead of describing the whole section as section 33, described it as section 3. These errors appear not to have been noticed, for when the matter came on for hearing before the court the prayer of the petition was granted, the assessments confirmed and the boundaries of the district extended as

prayed for in the report and the assessments extended against the lands therein described.

This order was made at the October term, 1919, of the county court. Afterward, on a petition filed by the commissioners, additional bonds of the said district were authorized in the sum of $3,000, and the revenues of the district as extended were pledged therefor. The annual installments of the assessment of benefits were extended on the tax books against the lands above described for the years 1919 to 1922, both inclusive, and paid by the landowners without protest. Inadvertently the clerk of the court omitted to extend the annual installments of the assessed benefits on the tax books for the years 1923 to 1927, both inclusive. The original commissioners had moved away or died, and it became necessary to appoint a new board in the latter part of 1927. This board caused an audit to be made, and the omission above mentioned was discovered. By appropriate proceeding the delinquent assessments were extended on the tax books, and, not having been paid, this suit was brought to recover the taxes delinquent.

It was the contention of the appellees (landowners) in the court below that:

(a) The notice published in an annexation proceeding which left out one tract and misdescribed another was jurisdictional and fatal to all subsequent proceedings.

(b) That appellant's right to subject the lands to the payment of said assessments was barred by the three year statute of limitation.

(c) That the failure of appellant to attach a certified list of the lands to its complaint was jurisdictional, and the court had no jurisdiction to hear and determine this cause.

The appellant contended in the court below and also in this court that the landowners were estopped from setting up the defense interposed in this suit because of their acquiescence in the order of the court extending the district and approving the assessments by having

paid the installment of benefits for four years without protest.

The commissioners reported, and the court found, in 1919 that the contemplated improvement would benefit the lands of the appellees to the extent of the benefits assessed, and on a hearing of this case the preponderance of the evidence established the fact that these lands, because of their slashy and low and flat character, were valueless before the improvement was made, and that the drain constructed has made the lands fit for tillage. When the order was made including the lands of appellees in the district, the drain was extended so as to practically parallel the northeast quarter of section 34 and touch the south boundary of the west one-half of section 26, and a lateral drain was made to approximately the center of section 33. This appears from a plat filed and introduced in evidence.

By reason of the annual installments extended against the lands of appellees for the years 1919 and 1920 as early as January, 1920, they had knowledge that the drains were being constructed so as to drain their property. An additional bond issue of $3,000 necessitated by the extension of the district was issued and sold, which became a burden not only upon the lands of the appellees, but upon all the lands of the district. It is clear therefore that they acquiesced in the action of the commissioners and accepted the benefits to their lands without protest.

As early as the case of *Rector* v. *Board of Improvement,* 50 Ark. 116, 6 S. W. 519, it was decided that property owners might estop themselves from questioning the validity of the organization of an improvement district by remaining silent while the improvements are being made when they had an opportunity to speak. In that case, the court said: "The assessment being made for the special benefit and improvement of his and the other real property in the district, he cannot stand by and receive the benefit of the improvement in the enhanced value of his property, and refuse to pay his proportion

of the assessment, on the faith of which it was made. Under such circumstances it would be his duty to speak and assert his rights, and, failing to do so, he would thereby waive them. Having failed to speak when, in the exercise of good faith, he ought to have done so, he will not be permitted to do so, when, in the exercise of the same good faith, he ought to remain silent."

In *Harnwell* v. *White*, 115 Ark. 99, 171 S. W. 108, the court in effect held that mere silence of the property owner with respect to illegality of an improvement district would not estop him from subsequently questioning its validity; but, where he does some affirmative act which induces persons to spend money or surrender substantial rights on the faith of such conduct, there is no reason for not applying the doctrine of estoppel to his conduct.

In *Brownfield* v. *Bookout*, 147 Ark. 555, 228 S. W. 51, it was held that where a person with actual or constructive knowledge of the facts by his words or conduct induces another to believe that he acquiesces in a transaction or that he will offer no opposition thereto, and the other, in reliance on said belief, alters his position, the former is estopped from repudiating the transaction.

The facts of this case bring it within the principle announced in the cases above cited. Here the appellees, because of the assessments made in 1920, had actual knowledge that their lands had been included in the district. They paid these assessments without protest when, if they desired to object, it was their duty to make such objection known and not to acquiesce by the payment of the annual assessments while the drains were being extended to their benefit, and when an additional indebtedness was incurred which would work an increased burden on the remaining landowners of the district, if, after the improvement was made, the appellees might repudiate the extension of the district, having recognized its validity and permitted the work to progress to completion without demur.

We are therefore of the opinion that the contention of the appellant is well taken. This makes it unnecessary to discuss the first question raised by appellee, and we consider only questions (b) and (c).

(b) It was the duty of the commissioners to see that the clerk extended the annual installments of the assessed benefits on the tax books. The lien for the assessments attached in 1919, when the order of the court was made approving the benefits to the lands as assessed by the commissioners, and the installment for any one year was due and payable within the period of time in that year in which the general tax for the preceding year would have been payable. Section 3618, Crawford & Moses' Digest. The annual assessment payable in 1923 therefore would be due and payable within the period from the first Monday in January to and including the 10th day of April, 1923, and became delinquent after said last mentioned date and thus for each of the years succeeding. As no suit for the collection of delinquent taxes shall be brought after three years from the date the same became delinquent (Act 506, 1923, § 2), it follows that the instant suit is barred against all of the taxes which became delinquent three years before the suit was instituted, and appellees' claim in this particular should be sustained. In this connection we do not agree with the contention of the appellant that the installment for any one year was not due and payable until the year following, but think the language of the act makes it clear that the installment for any one year is payable in that year within the regular tax paying time and not in the following year. *Tallman* v. *Board, etc.,* 185 Ark. 851, 49 S. W. (2d) 1039.

There is no merit in the contention made by the appellant that the question of limitation was not raised in the court below. The complaint as amended showed on its face that the assessments due for the years 1923-4-5-6 were delinquent for more than three years before the filing of the complaint and barred. Therefore the question of limitation could be raised by demurrer. This

was done, and the decree recites that the cause was submitted upon the pleadings and testimony and that the demurrer was overruled.

(c) We also find no merit in the contention of the appellees that the complaint in the instant case was insufficient in that it failed to have attached to it a certified list of the lands delinquent. The record shows there was such a list attached to the amended complaint to which answers were made by appellees. See also *Moore* v. *Long Prairie Levee Dist.*, 153 Ark. 85, 239 S. W. 380.

It follows from the views expressed that the decree of the trial court must be reversed, and the cause remanded for further proceedings in accordance with the principles of equity and with this opinion.

COOPER *v.* STATE.

Crim. 3808

Opinion delivered July 11, 1932.

D. H. Howell and *Partain & Agee,* for appellant.

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

HART, C. J. Chester Cooper prosecutes this appeal to reverse a judgment of conviction against him for grand larceny rendered upon the verdict of a jury.

The principal assignment of error is that the evidence is not legally sufficient to support the verdict. According to the testimony of B. L. Hodges, he lived in Van Buren, Crawford County, Arkansas, for forty-one years, and was in business there. On January 4, 1932, he purchased a license tag for an A model four-door Ford sedan, and paid $20 for the tags. The tags or plates were taken from his car and later recovered. He first missed them from his car in Van Buren, where it was parked in front of his store. He frequently drove his car from Van Buren to the city of Fort Smith, and missed his license tags or plates about the first of February, 1932. He had washed his car a few days before and did not miss the license plates then. He thinks he would have missed them if they had not been on the car.

According to the testimony of the sheriff and one of his deputies, they found the license plates or tags in the car of Chester Cooper in Van Buren, Arkansas, soon after they had been stolen. There was a Texas license on the car in which they were found. He examined the car because he went to it to arrest Cooper on another charge. According to the testimony of Raymon Irvin, he sold the car to appellant about January 10, 1932, and there were no license tags or plates for that year on it. The sheriff also testified that he saw appellant's car before he left there on the first of February, 1932, and it did not have any license plates on it. The appellant told him when arrested that the Texas plate was on the car

when he bought it. The trial of the case was had on the 24th of March, 1932, and the sheriff and his deputy both testified that they had found the license tags in the appellant's car in the city of Van Buren, Crawford County, Arkansas, about four or six weeks before. No evidence was offered in behalf of the appellant.

The evidence was legally sufficient to support the verdict. This court has held that unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn, and constitutes legally sufficient evidence of guilt, although it is improper for the trial court to give an instruction as to its sufficiency. *Yelvington* v. *State,* 169 Ark. 359, 275 S. W. 701; and *Howard* v. *State,* 185 Ark. 132, 46 S. W. (2d) 31.

But it is insisted that the venue was not proved because the prosecuting witness admitted that he frequently drove his car over to Fort Smith, and the license plates might have been stolen there. In the first place, the evidence of the prosecuting witness shows that he first missed the license plates in front of his place of business in Van Buren, Crawford County, Arkansas, and that he had washed his car a few days before, and that he would have noticed then that the license plates were missing if such had been the case. Then, too, the jury might have inferred that, if the license plates had been stolen in the city of Fort Smith, highway officers would have noticed that he was driving a car without license plates when he went home. Hence we are of the opinion that the evidence was legally sufficient to warrant the jury in finding that the license plates were taken from the car in Van Buren.

However, it would not have made any difference had they been stolen in Sebastian County. The reason is that larceny is a crime committed by the movement of the stolen property from one county to another, and the indictment may be had in any county in which the stolen property may be carried. *State* v. *Alexander and Moore,* 118 Ark. 357, 176 S. W. 315, and *Harris* v. *State, ante*

p. 6. The theft of automobile license plates costing more than $10 is grand larceny. *Cowan* v. *State,* 171 Ark. 1018, 287 S. W. 201.

It is next insisted that the court erred in giving on its own motion instruction No. 5. The court gave to the jury, on its own motion, five instructions, and instruction No. 5 contains five paragraphs. It instructs the jury upon the questions of presumption of innocence, reasonable doubt, and credibility of the witnesses. It is earnestly insisted that the giving of the instruction constitutes reversible error because it is framed in five paragraphs, and that each of them should be considered a separate instruction, and that, when this is done, the last paragraph constitutes reversible error because it does not instruct the jury on the question of reasonable doubt. We do not agree with counsel in this contention. The issue in this case was simple. In another paragraph of instruction No. 5, the court fully instructed the jury on the questions of the presumption of innocence and reasonable doubt. There could be no grounds for thinking that the mind of any reasonable man would be misled by the instruction.

It is next insisted that the court erred in refusing to give, at the request of the defendant, instruction No. 3, which reads as follows: "You are instructed that the defendant is not charged with receiving stolen property, and, even though you find the tags were stolen by some person and later received by the defendant, it will be your duty to acquit the defendant under this indictment."

We do not think there was any error in this regard. No evidence whatever was introduced by appellant. The sole question presented to the jury was whether the evidence adduced by the State was legally sufficient to warrant the jury in convicting appellant of larceny. There was no evidence in the case whatever upon which an instruction as to receiving stolen property could be predicated. The instruction was wholly abstract, and was warranted to mislead the jury. For the reasons given,

the case of *Thomas* v. *State,* 175 Ark. 279, 298 S. W. 1021, relied upon by counsel for appellant, is not in point, and has no application to the facts in the case at bar.

Therefore the judgment will be affirmed.

EAST ARKANSAS LUMBER COMPANY *v.* MOSS.

4-2637

Opinion delivered July 11, 1932.

[redacted]

[redacted]

L. Hunter and *Carl L. Hunter,* for appellant.

Ward & Ward, for appellee.

HART, C. J., (after stating the facts). It is first insisted by counsel for the defendant that the great pre-

ponderance of the evidence shows that the accident occurred wholly on account of the negligence of the plaintiff, and that the trial court erred in not granting the defendant a new trial. This may be true, and still there is no reversible error on this account. It has been held repeatedly to be the duty of the trial court to set aside the verdict and grant a new trial where it is of the opinion that the verdict of the jury is contrary to the weight of the evidence. On the other hand, after the jury has weighed the evidence, and the trial court has given its approval of the finding of the jury by refusing to grant a new trial on the ground that the verdict is contrary to the evidence, it is the duty of this court to uphold the verdict where there is any evidence of a substantial character to support it. *St. Louis, Southwestern Railway Company* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768; and *Chalfant* v. *Haralson,* 176 Ark. 375, 3 S. W. (2d) 38, and cases cited.

The testimony of the plaintiff was as to matters about which she had personal knowledge. She testified that the truck of the defendant was driven so that it collided with her car in which she was sitting and which was parked in a driveway on the premises of the defendant corporation, where she had been on business. She testified that the extension bed of the truck hit her car before her husband had started to move it, and that the collision knocked off the knob of the door next to which she was sitting and broke her arm, which was lying on top of the lowered window of the door of the car. It is insisted by counsel for the defendant that it was a physical impossibility for the accident to have happened in this way, but the testimony of plaintiff shows that, if her arm was lying in the position that she indicated to the jury it might have been, and was struck by the extension bed of the truck of the defendant, which was being driven through the driveway by one of its servants. Her testimony warranted the jury in finding a verdict in her favor on the question of the negligence of the defendant. It

cannot be said as a matter of law that she was negligent in sitting in her car in the driveway of the defendant's place of business with her arm extending to some extent beyond the window of her car. The question of her contributory negligence in this regard was for the jury. Therefore we find that the evidence was legally sufficient to warrant the verdict. *Wells* v. *Sheppard,* 135 Ark. 466, 205 S. W. 806; and *Kittrell* v. *Wilkerson,* 177 Ark. 1174, 9 S. W. (2d) 788.

It is next insisted by counsel for the defendant that the judgment must be reversed because one of the jurors was related to the plaintiff within the prohibited degree of consanguinity. One of the defendant's grounds for a new trial was that one of the jurors was related to plaintiff's counsel within the degree of consanguinity, disqualifying him as a juror, and that such fact of relationship was not discovered by the defendant until after the verdict had been returned and judgment rendered. It is insisted that the juror was disqualified because it is generally known that in damage suits of this sort the attorney of the plaintiff has a contingent fee. There is no proof of this, however, in the record. There is no evidence in the record that the juror was asked questions for the purpose of ascertaining his qualifications. A new trial will not be granted on account of the disqualification of the juror by reason of the relationship to the appellee where the bill of exceptions does not disclose that on the *voir dire* any questions were asked as to relationship of the jurors to the parties. *Jones Bros. Hardware Company* v. *Mears,* 182 Ark. 533, 32 S. W. (2d) 313, and cases cited.

A mere statement in a motion for a new trial that questions were asked the jury and answers made, with no showing in the record, and no evidence supporting the motion for a new trial, is insufficient to raise a question as to the juror's disqualification. *Van Fleet-Ellis Corporation* v. *Higginbotham,* 182 Ark. 812, 32 S. W. (2d) 800.

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

WHITLOW *v.* ROGERS WHOLESALE GROCERY COMPANY.

4-2597

Opinion delivered July 11, 1932.

Duty & Duty, for appellant.

Earl Blansett, for appellee.

McHANEY, J. Appellee brought this action against R. H. Whitlow, now deceased, in which his administrators have been substituted as appellants, to recover the value of certain merchandise sold and delivered to the Sleepy Valley Hotel, at Monte Ne, near Rogers, Arkansas. Prior to the sale of the merchandise, Whitlow had conveyed the property to his son, but continued to handle it as if he owned it, and contracted with one Charles Fredericks to operate the hotel, together with a golf course and swimming pool, for one-half the net earnings. Fredericks entered into possession, made certain repairs on the hotel, named it the Sleepy Valley Hotel, and opened the account with appellee May 2, 1930. The account continued to August 26, 1930, during which time numerous purchases were made by Fredericks and five credits given for payments made by him, leaving a balance due, exclusive of interest, of $207.19. It is shown that credit was extended on the credit rating of Mr. Whitlow, but

there is no evidence in this record that either he or Fredericks suggested to appellee any connection of Whitlow with the operation of the hotel. Appellee made no inquiry of either as to whether Whitlow would be responsible for the goods, but simply assumed such to be the fact because it was well known that he was the owner of the hotel property. Liability of Whitlow was and is asserted on the ground that he permitted Fredericks to hold him out to the public as principal and that Fredericks was his agent in the operation of the property. This claim is based on the fact that the latter was put in possession, operated the property for a time under the name "Sleepy Valley Hotel, R. H. Whitlow Estate. C. Fredericks, Manager." One or more signs were placed along the highway reading in the upper part, "R. H. Whitlow, Estate. Charles Fredericks, Manager," and underneath "Sleepy Valley Hotel." Advertisements were placed in the Rogers paper to the same or similar effect. A trial resulted in a verdict and judgment against Whitlow for the amount of the account with interest.

For a reversal of the case, it is insisted by counsel that the court erred in refusing to direct a verdict in Whitlow's favor because there was no substantial evidence to support it. In this we think counsel are correct. The trial court permitted the case to go to the jury on the theory that Whitlow held Charles Fredericks out to the public, or permitted Fredericks to hold himself out as the agent of Whitlow to incur debts. The fact that Whitlow owned the property and that Fredericks operated it would not of itself be sufficient to establish the relation of principal and agent. With reference to the signs and advertisements in which Whitlow's name appeared in connection the word "Estate" and with "Charles Fredericks, Manager" was not sufficient of itself to show this relationship. Whitlow denied that he had anything to do with the signs or advertisements, knew nothing about them, did not authorize Fredericks to put them out or to use his name in connection therewith; that he did not see the advertisements nor au-

thorize their publication; that he had nothing to do with the operation or conduct of the hotel. This evidence is undisputed, but it is insisted that the above matters were sufficient to take the case to the jury on the question of whether he permitted Fredericks to hold himself out as his agent. The testimony relating to the signs and advertisements was admitted over Whitlow's objections and exceptions, and it is now urged that it is incompetent in the absence of a showing of knowledge by Whitlow. We pass that question by as we have reached the conclusion that, even though it be competent, it is insufficient to establish a holding out of Fredericks as his agent. It would have been a simple matter for appellee to have made inquiry of either of the parties as to Whitlow's connection, if any, with the operation of the hotel. This was not done. A reasonable construction of the signs and advertisements is that the property was known as the R. H. Whitlow Estate, and that Fredericks was the manager. With only such information, we think it would be the duty of those seeking to hold the former for the debts of the latter to make further inquiry as to the actual relationship existing between them. In *U. S. Bedding Co.* v. *Andre,* 105 Ark. 111, 150 S. W. 413, this court held that one who deals with an agent is put upon notice of the limitations of his authority, must ascertain what that authority is, and, if he fails to do so, he deals with the agent at his peril. In that case they were dealing with an agent, a traveling salesman. Here the effort is to show agency by estoppel. For a distinguishment of the difference between implied agency or implied authority of a known agent and agency by estoppel, see 2 C. J. p. 444. Fredericks at no time represented to appellee that he was Whitlow's agent, nor did Whitlow so state, but the relation was assumed from the facts stated.

We have reached the conclusion the evidence was insufficient, and that the court erred in refusing Whitlow's request for a directed verdict.

Reversed and remanded for a new trial.

BRISTOW *v.* BRISTOW.

4-2602

Opinion delivered July 11, 1932.

[redacted]

J. B. Perrymore, J. D. Benson and *O. D. Thompson,* for appellant.

J. P. Clayton and *G. C. Carter,* for appellee.

BUTLER, J. The parties to this litigation lived together as man and wife in this State until 1911, at which time they separated and appellee removed to Texas, where, in January, 1914, he obtained a divorce. The decree awarding him a divorce contained no reference to his property. Years later, after appellee's health had failed, he returned to this State, and on November 10, 1930, brought this suit against his former wife to recover possession of certain real estate, both rural and urban.

The complaint alleged the joint ownership of the real estate there described, but testimony was offered touching the title to only three town lots the title to which had been conveyed to appellee individually. The judgment rendered from which is this appeal makes no reference to the rural property.

Appellant defended upon the grounds that she took title to the property under a parol agreement to that effect and through adverse possession for many years. She testified that, after a conference in 1911 with ap-

pellee, who was then her husband, it was agreed that he should deliver to her the possession of all his real estate, a portion of which was incumbered, and that she should become the owner thereof. The consideration for this agreement was the assumption of payment by appellant of the debts upon the property secured by liens thereon and the payment of certain unsecured personal debts then owing by appellee amounting to several hundred dollars, and the additional agreement on her part to take care of and educate their three children. Appellant testified that these obligations had all been performed, and was corroborated by the two children now living, the third having died.

Appellee denied having made this agreement, although he admitted having left his wife in possession of the property. His version of their agreement upon separating was that she might occupy and use the property while the children were being educated.

This brief statement presents the issues of fact in the case, and no useful purpose would be served by setting out the more or less conflicting testimony.

As has been said, the case as adjudged related only to the city property, and upon this issue the court gave the following instruction: "Gentlemen of the jury: Mr. Bristow sues Mrs. Bristow for joint possession of three certain pieces of property, claiming that he is the record title owner of said property and is entitled to have possession and income of said property jointly along with the defendant. Mrs. Bristow claims that he is not entitled to have possession and part of the income along with her of said property for the reason that he gave her the property and it is now all hers. It is admitted on the part of the defendant that the record title or deed is in Mr. Bristow; that he bought it and paid for and the deed made to him. Mrs. Bristow contends that when he left about 20 years ago he gave her the property.

"So, gentlemen of the jury, you will find for the plaintiff, Mr. Bristow, unless you find from a preponder-

ance of the testimony that Mr. Bristow gave the property to his wife. If you find that he gave the property to her then, he now has no interest in it, and she should win. If he didn't give the property to her then, he now has interest in it, and he should win."

Upon a verdict in favor of appellee the following judgment was rendered: "It is therefore the order and judgment of the court, upon the verdict of the jury, that the plaintiff, Geo. O. Bristow, do have and recover of and from defendant, Josie E. Bristow," the lands in controversy, which, as there described, were the town lots.

If this judgment is proper, the instruction was not, as its import is that the plaintiff was seeking to recover a joint interest, and not one which was several. The court, in giving the instruction, no doubt had in mind the allegations of the complaint alleging joint ownership. It is inferable, although not established, by the testimony that a portion of the property described in the complaint had been acquired by the parties as tenants by the entirety. However, no objection was made to this instruction, but we make this comment upon it in view of the fact that a new trial must be ordered.

The appellant asked, but the court refused to give, the following instruction: "You are instructed that if you find from the preponderance of testimony that the plaintiff did at the time of their separation or any other time give the defendant the property he owned in Ozark in question, and that she has been in possession of it and has held the same for a period of more than seven years, and that she had relied upon that gift, then you will find for the defendant."

We think this instruction should have been given. It is true appellant claimed title under a parol conveyance, which the witnesses referred to as a gift, but she also claimed title by adverse possession, and the testimony on her behalf was sufficient, if believed, to support a finding that she had adversely occupied the property as owner for many years. It is to be remembered that

the parties were divorced in 1914, and this suit was not commenced until 1930. *Wilkerson* v. *Powell,* 173 Ark. 33, 291 S. W. 799. There was no inconsistency in the defenses which appellant interposed, first, that she took title by a parol conveyance, and second, that she had acquired title by adverse possession. The instruction should therefore have been given.

Over appellant's objection, the court permitted appellee to offer in evidence the following letter:

"Ozark, Arkansas, Nov. 13, 1930.

"Dear Mr. Bristow: Why do you want to law out all we have? We owe to the children what we can leave them. I will give you a home a room as good as I have if you will withdraw that suit, on account of the children. You can have a room and make yourself at home, and it seems to me that would be better than lawing it all out. If you will withdraw the suit, you know how low down Jack is. Now please keep what we have for the babys. You can have a home, and we will neither have one when we finish. Please let me hear from you and come back home. The sheriff has sued for the taxes, so I don't know what to do, but will manage some way. Let me hear from you.

"Joe."

This letter was written after the institution of this suit, and was admitted on the theory that it tended to explain the character of appellant's possession.

We think, however, that the letter should not have been admitted in evidence. It was evidently an offer in good faith to compromise the litigation. Notwithstanding the divorce of the parties, their children were their heirs, and the reference to them as such is not inconsistent with appellant's claim of title by adverse possession.

For the error in refusing the instruction set out above, and for the error also in admitting the letter in evidence, the judgment of the court below must be reversed, and it is so ordered.

STATE NATIONAL BANK *v.* FISHER.

4-2634

Opinion delivered July 11, 1932.

Jas. D. Head, for appellant.

BUTLER, J. The appellant filed a complaint in the Miller Chancery Court alleging that W. A. Coleman died June 9, 1931, leaving surviving him no widow, and leaving W. A. Coleman, Jr., a minor who is now about eight or nine years of age, his sole surviving heir at law.

In October, 1927, the said W. A. Coleman made a will, by the terms of which the appellant was appointed as executor and also appointed as guardian of the estate of W. A. Coleman, Jr. The will was duly probated on June 23, 1931, letters issued to appellant both as the executor of the estate and as guardian of the minor.

It made bond both as executor and guardian and is now acting as such.

All of the property of the decedent was devised in trust to the bank, and directions given to reduce personal property, except United States bonds, to cash, and to invest same in revenue-bearing investment. It was also directed to take charge of, improve, lease, sell and dispose of all real estate, and re-invest so much of the proceeds as is not required for the administration of said estate.

The executor was also requested to hold the estate intact, if possible, until W. A. Coleman, Jr., arrives at the age of twenty-one years; to pay the expenses and legacies out of the income, if sufficient, and, if not, to use the principal for that purpose. Provision was also made for decedent's mother, but she died before the testator.

The will gave to testator's sisters and brothers $1 each. It directed the appellant to superintend the manner of W. A. Coleman, Jr's., living, and see to his education, and deliver the remainder of the property to W. A. Coleman, Jr., when he arrived at twenty-one years of age. The will also provided for the executors to receive such fees as are allowed administrators and executors and a reasonable compensation as guardian for W. A. Coleman, Jr.

The plaintiff in the court below requested instructions and directions in many particulars. Mrs. N. R. Fisher, a sister of testator, was made defendant.

After hearing the evidence and considering the case, the chancery court decreed as follows:

"(a) The administration should be closed at the end of one year, the debts being paid;

"(b) There was created by the will, at the end of the statutory period, a trust with the State National Bank acting as trustee;

"(c) Said bank as executor should file its final settlement at the end of the statutory period, there being

no debts and then transfer to itself as trustee the remaining assets;

"(d) That such assets were vested by the will in the bank as trustee, with full authority to handle, administer, sell, dispose of, invest and reinvest funds from the sale of any of the property of the estate;

"(e) That under the will the bank is entitled, during the statutory period of administration, to those fees allowed to executors and administrators;

"(f) At the expiration of the statutory period for administration, the bank should receive reasonable compensation as trustee;

"(g) Upon final settlement by the bank (at the end of the statutory period of administration) the trustee should take over the remaining property and continue the trust under the provisions of the will;

"(h) There being no present necessity for advice to the bank, or for interpretation of the will as to whether it was intended to vest a present estate in W. A. Coleman, Jr., a minor, in the residue of property, the court declines to interpret it in this respect."

Section 97 of Crawford & Moses' Digest provides among other things that: "All demands not exhibited to the executor or administrator as required by this act before the end of one year from the granting of letters shall be forever barred."

This section of the Digest was amended by act 211 of the Acts of 1931, but there is no change in the paragraph above quoted.

Section 1 of Crawford & Moses' Digest, under administration, also provides that in certain cases no letters of administration shall be granted, or, if granted, the same shall be revoked.

It was the intention of the Legislature to close the administration within one year if there were no debts or claims against the estate. The court was therefore correct in holding that the administration should be closed at the end of one year, the debts being paid, and

also in holding that the will, at the end of the statutory period, created a trust with the State National Bank as trustee.

Paragraph 2 of the will conveys all of the testator's property in trust for the purposes thereafter named.

Having held that the administration should be closed at the end of one year, it necessarily follows that the executor should file its final settlement at that time, and, since it was, by the terms of the will, made trustee, it would be its duty at the end of the administration to take charge of the property as trustee.

Paragraph 4 of the will expressly provides that the executor shall take charge of, improve, rent, lease, sell, convey and dispose of any and all real estate, and, if it sell the same, it is authorized to convey title thereto and reinvest the proceeds in some good revenue-bearing investment.

Paragraph 3 of the will directs the executor to reduce all personal property to cash, except United States bonds and to invest the proceeds, not required for the purposes mentioned elsewhere in the will, in good revenue-bearing investment.

The court therefore correctly held that the assets were vested in the trustee, with full authority to handle, administer, sell, dispose, invest and reinvest funds from the sale of any of the property of the estate.

The will itself provides that the executor shall be allowed such fees as are allowed by law to administrators and executors for its services, together with reasonable compensation for acting as guardian.

If the will had made no provision for compensation to the executor, it would have been entitled to the statutory fees. There is no provision in the will naming the amount of fees that the trustee shall receive. The will directs the trustee in the matter of the management of the estate, and names numbers of things that it is to perform, and it was evidently the intention of the testator not only that it should have the management of

the estate, but that it should have a reasonable compensation for its services as trustee. The will fixed the fees that the executor should receive as such, but did not fix any fees for the bank as trustee, but it was manifestly the intention of the testator that the trustee should perform the duties indicated in the will, and that it should be paid a reasonable compensation. This compensation should be presented to and allowed by the probate court.

In the case of *James* v. *Echols,* 183 Ark. 826, 39 S. W. (2d) 290, it was said: "In this connection it may be stated that when the trustee accepts the trust, and qualifies and enters upon the discharge of his duties as such trustee, he accepts the trust upon the conditions named in it, and is entitled to no other or greater compensation than the will allows."

Therefore if the testator had fixed the fees for the trustee, it could not accept the trust and receive any other or greater compensation than that named in the will; but, since the will pointed out the duties of the trustee, and did not undertake to fix the compensation, it would be entitled, as the lower court held, to reasonable compensation.

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

MISSOURI STATE LIFE INSURANCE COMPANY *v.* BARRON.

4-2592

Opinion delivered June 27, 1932.

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

Sam T. & Tom Poe, for appellee.

HUMPHREYS, J. This is an appeal from a judgment for $2,000, twelve per centum statutory penalty, and an attorney's fee of $500, rendered in a suit in the circuit court of Pulaski County, Second Division, in favor of appellees against appellant, on a certificate of accident insurance under group policy No. ADD-501 carried by the Missouri Pacific Railroad Company to protect John Barron, husband and father of appellees, as well as its other employees, from death resulting from accidental bodily injuries, effected through external, violent and accidental means independent from all other causes * * *.

It was alleged, and the proof introduced by appellees tended to show, that John H. Barron died from heat prostration induced by working in an engine in a roundhouse of said railroad company within a few hours after he was stricken. The certificate of insurance provided that notice of injury and death should be given to appellant within the time provided in the group policy, and the group policy provided for notice to appellant within 90 days after the loss for which claim is made. Appellees did not know of the existence of the certificate until they obtained pos-

session thereof in November, 1930. They employed attorneys on December 2, 1930, who proceeded to make an investigation of the facts and the law applicable thereto, and on May 7, 1931, notified appellant by letter that death had resulted to the insured through accidental means, and demanded payment of the face of the policy. Appellees introduced testimony tending to show that, after discovering the existence of the certificate of insurance, it was a difficult matter to ascertain the real facts surrounding the death of the insured, and to determine whether death resulted from natural or accidental causes, dependent to some extent upon expert testimony, and that their attorneys diligently pursued the inquiry during the five months intervening between discovering the certificate and the demand made for the payment of the face of the policy. Upon receipt of the letter from appellees' attorneys, appellant answered same, denying liability, in which letter it reserved the right to make any defenses it had or might later ascertain.

Appellant first contends for a reversal of the judgment upon the ground that it did not receive notice that the insured died from heat prostration within a reasonable time after appellees discovered the existence of the certificate of insurance. We are unable, as a matter of law, to say that five months was an unreasonable time to make the investigation and determine whether appellant was liable. There is testimony in the record tending to show that the attorneys prosecuted the investigation diligently, and that, in order to make a thorough investigation, the time consumed was actually required. The dispute in the evidence on this point made the issue one for the jury, and not a question of law for the court. The court therefore properly submitted this issue to the jury. Of course, further and more formal proofs of the cause of the insured's death were waived by appellant's denial of liability within the time appellees had a right to give the notice, which was a reasonable time after discovering the existence of the certificate of insurance. *Ætna Life Ins. Co.* v. *Duncan,* 165 Ark. 395, 264 S. W. 835. The reser-

vation in the letter, to make any defenses it then had or might later ascertain, did not qualify the denial of liability. The effect of the unqualified denial made within the period appellees had to make formal proof of the cause of the insured's death was to waive it, notwithstanding the reservation contained in the letter.

Appellant next contends for a reversal of the judgment because the court gave instruction No. 3, which is as follows:

"You are instructed that you are the judges of the cause of death of John H. Barron, and, if you find from a preponderance of all the facts and circumstances in evidence in this case that on the 24th day of June, 1929, John H. Barron, a short time after leaving the firebox of a locomotive engine, which was poorly ventilated and unusually hot, suffered from heat stroke, and at the time he suffered from heat stroke Barron was afflicted with a latent or dormant abscess, tumor or growth or formation in the brain, and which abscess, tumor, growth or formation was affected by the heat stroke and excited and aroused and caused the erosion of blood vessels within the brain of John H. Barron and consequently hemorrhages which resulted in his death on the same day and within a few hours thereafter, independently of all other causes; that is to say, that Barron would not have died as and when he did if the accident had not occurred; that, while death from the abscess, tumor, growth or formation in his brain might have resulted, it would have been deferred until a later period of his life, then heat stroke would be considered the cause of his death within the meaning of the policy and certificate of insurance."

This instruction told the jury in effect that, if the heat stroke was the proximate cause of the death of the insured, appellant would be liable under the policy, although death might have resulted at a later date on account of an abscess or tumor discovered in his brain by the autopsy, regardless of the heat stroke. This instruction was based upon the following clause found in both the certificate and group policy, to-wit:

"If death shall result from accidental bodily injuries, affected through external, violent and accidental means, independently of all other causes * * *."

Appellant admits that this instruction was a correct declaration of law applicable to the language quoted above under the construction placed thereon by this court upon a similar clause in an accident policy in the case of *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493. Appellant argues, however, that the group policy in the instant case contains an exception or exemption clause which brings the case within the rule that there can be no recovery if a disease of the insured cooperated with the accident to produce death. The exception or exemption clause relied upon to differentiate the instant case from the Meyer case, *supra,* is as follows:

"This insurance shall not cover accidental injuries, death or loss caused directly or indirectly, wholly or partly by bodily or mental infirmity or by any kind of disease."

The testimony is in conflict as to whether death resulted to the insured from heat prostration, from an abscess or tumor found in one cell of his brain when the autopsy was made, or from both causes co-operating together. Under instruction No. 3, requested by appellees and given by the court, before the jury could return a verdict for appellees they must find that heat prostration was the proximate cause of the insured's death. As stated above, this was a correct declaration of law as applied to the liability clause pleaded as a basis for the recovery. Liability under said clause was denied, and this was the only issue joined by the pleadings. The exemption or exception clause was not pleaded as a defense. It should have been pleaded specifically, and the failure to do so was a waiver by appellant. 1 C. J. 493; *Harrison* v. *Interstate Business Men's Acc. Assn. of Des Moines, Iowa,* 133 Ark. 163, 202 S. W. 34; *National Life & Acc. Ins. Co. of Nashville, Tenn.,* v. *Sherod,* 155 Ark. 381, 244 S. W. 436.

Appellant next contends for a reversal of the judgment because instructions Nos. 3 and 5, requested by appellant and given by the court, conflicted with instruction No. 3, requested by appellees and given by the court. The effect of instructions Nos. 3 and 5, given by the court at the request of appellants, was to tell the jury, if they found that the proximate cause of insured's death was a disease of the brain, then they should return a verdict for appellant. The instructions stated exactly the converse of the propositions contained in instruction No. 3, given by the court, and were not in conflict with it. Instruction No. 3, given by the court at the request of appellees, presented their theory of the case, and instructions Nos. 3 and 5, given by the court at the request of appellant, presented its theory of the case. Instructions presenting the respective theories of the parties are in no sense conflicting.

Lastly, it is contended that the attorney's fee of $500 allowed by the court is excessive. We think not, considering the time required to investigate the facts and try the cause, together with the services performed on the appeal of this case. The testimony of learned attorneys of the bar of Arkansas was to the effect that four or five hundred dollars was a reasonable fee for the preparation and trial of the cause.

No error appearing, the judgment is affirmed.

DAVIS *v.* LAWHON.

4-2616

Opinion delivered June 27, 1932.

George B. Pugh and *J. H. Carmichael,* for appellant.

Compere & Compere, for appellee.

MEHAFFY, J. The firm of Jackson-Hill Cotton Company became indebted to the American Southern Trust Company, and, to secure its debt, executed a deed to the American Southern Trust Company conveying about 8,000 acres of land in Ashley County, Arkansas. The conveyance, although a deed in form, in fact was a mortgage, and signed by the individual members of the firm of Jackson-Hill Cotton Company, and their wives, as follows: Ranson J. Jackson and Ann C. Jackson, his wife; B. O. Jackson and Della McM. Jackson, his wife; Harry E. Hill and Bracey Jackson Hill, his wife.

Bracey Jackson Hill was the sister of B. O. Jackson and Ranson J. Jackson, and was living in Pulaski County until the time of her death. Harry E. Hill was appointed administrator of her estate.

W. O. Davis was appointed receiver of the American Southern Trust Company, and presented the claim to the administrator of the estate of Bracey Jackson Hill, which claim was disallowed by the administrator.

Thereafter, on October 15, 1931, the claim was allowed by the probate court of Pulaski County. Before the

claim was filed in the probate court of Pulaski County, suit had been filed by W. O. Davis, receiver, in Ashley County, Arkansas, to foreclose the mortgage in that county. Said suit is now pending in the Ashley County Chancery Court.

Thereafter a petition on behalf of the children of Bracey Jackson Hill was filed in Pulaski Probate Court, asking that the allowance of said claim be set aside, and that the court remove Hill as administrator, and appoint R. J. Jackson administrator in succession of the estate of Bracey J. Hill, deceased.

The probate court made an order reciting the pendency of the suit in Ashley Chancery Court against the administrator and others to foreclose the mortgage, and to obtain a judgment against the administrator and others upon the notes sued on. The probate court, for that reason, set aside the allowance made on December 23, 1931, and refused to allow or disallow the claim. Appellant then filed in the Pulaski Circuit Court a petition for a writ of mandamus to compel the Pulaski Probate Court to act on the claim.

Ross Lawhon, the judge of the Pulaski Probate Court, did not appear, and an order was issued directing him to pass on the claim, and either allow or disallow it.

Thereafter Ross Lawhon, judge of the probate court, filed a petition and asked that the writ be set aside. The circuit court set aside the writ and refused to issue the writ of mandamus. The case is here on appeal.

The only issue involved is whether appellant can foreclose in one county a mortgage which he holds and at the same time, during the pendency of the foreclosure suit, probate his claim against the estate in another county.

The appellee's first contention is that § 1189 of Crawford & Moses' Digest prohibits the prosecution of the suit in Pulaski Probate Court, while the foreclosure suit is pending in another county. He relies on the third paragraph of the above section, which states, as a ground of

demurrer, that there is another action pending between the same parties for the same cause.

The suits are not between the same parties, and they are not for the same cause. The suit in the Pulaski Probate Court is against the estate of Bracey Jackson Hill for an allowance against the estate. The suit in Ashley Chancery Court is against several persons, including the administrator of the estate of Bracey Jackson Hill, and is for the foreclosure of a mortgage.

The Pulaski County Probate Court would have no jurisdiction to foreclose a mortgage, and the Ashley Chancery Court would have no jurisdiction to allow a claim against the estate of Bracey Jackson Hill.

It is only in cases where two courts have concurrent jurisdiction of the same cause of action that the pendency of the case in one court bars the right to pursue the same remedy by the same parties in another court. *Kastor* v. *Elliott,* 77 Ark. 148, 91 S. W. 8; *Simms* v. *Miller,* 151 Ark. 377, 236 S. W. 828; *Bd. Dir. St. Francis Levee Dist.* v. *Redditt,* 79 Ark. 154, 95 S. W. 482.

It is said that, if the Pulaski County Probate Court allows or disallows the claim, this will bring about a conflict of jurisdiction with the chancery court of Ashley County. It is true that one court might find one amount, and another court a different amount. One court might find there was liability and the other that there was no liability, but these questions are not before us, and, if such a thing should happen, and appeals be taken in both cases to this court, it would then become the duty of this court to decide this question.

But the question now before the court is whether another suit pending in Ashley County was a bar to the right of prosecuting the claim in the probate court of Pulaski County, and, as we have said, it is not between the same parties, and is not the same cause of action, and the pendency of the suit in Ashley County does not prevent the claimant from prosecuting his claim in the probate court of Pulaski County. It is only in cases where the causes of action are inconsistent that the prosecution

of one suit bars the other. Where the two remedies are cumulative and not inconsistent, both suits may be prosecuted at the same time. *Sturdivant* v. *Reese,* 86 Ark. 452, 111 S. W. 261; *Dilley* v. *Simmons National Bank,* 108 Ark. 342, 158 S. W. 144; *Craig* v. *Meriwether,* 84 Ark. 298, 105 S. W. 585.

"Where the law affords several distinct but not inconsistent remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver of the right to pursue the other remedies. In order to operate as a waiver or estoppel, the election must be between coexistent and inconsistent remedies. To determine whether coexistent remedies are inconsistent, the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings should be considered. If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies." *American Process Co.* v. *Florida Pressed Brick Co.,* 56 Fla. 116, 47 So. 942, 16 Ann. Cas. 1054.

"Another class of cases exists where there is but one cause of action but in which different or alternative remedies may be pursued. It is permissible to follow these remedies or reliefs independently, even in some cases to judgment, although but one satisfaction can be had. Thus a creditor whose claim is secured by two written obligations falling due simultaneously has a right to proceed at once thereafter upon either or both of them to enforce payment of the amount due." 9 R. C. L. 958-59.

"The doctrine of the election of remedies, that the pursuit of one remedy will exclude the pursuit of another applies only to those cases in which the party has two or more remedies which are inconsistent with each other, and has no application to a state of facts where the remedies available to him are concurrent and consistent.

Where the law furnishes a party with two or more concurrent and consistent remedies, he may prosecute one or all until satisfaction is had; but a satisfaction of one is a satisfaction of all. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final." 20 C. J. 6-7.

It is said in a note cited in support of the above text as follows: "If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies." Note 56, 20 C. J. 7.

If the remedies had been the same, and the parties the same in each court in this case, then the jurisdiction of the court which had been first invoked would retain jurisdiction, and no other court would exercise jurisdiction during the pendency of the first suit. In other words, where courts have concurrent jurisdiction, the one that first obtains jurisdiction will determine the case, and no other court with concurrent jurisdiction would be permitted to interfere. But where the remedies are wholly different, as they are in this case, and are consistent, as they are in this case, then they are cumulative, and the plaintiff may pursue as many remedies as he may have.

In a recent case we said: "We find nothing in the law requiring a plaintiff to exhaust his security in the mortgage before resorting to other proceedings. A plaintiff creditor may prosecute all remedies against a debtor with the right, of course, to only one satisfaction of the debt." *Vaughan* v. *Screeton,* 181 Ark. 511, 27 S. W. (2d) 789; *Rhodes* v. *Cannon,* 112 Ark. 6, 164 S. W. 752; *England* v. *Spillers,* 128 Ark. 33, 193 S. W. 86.

Our attention has been called to the case of *McLean* v. *McLean,* 184 Wis. 495, 199 N. W. 459. It may be said in the first place that the authorities on the question here involved are not entirely harmonious. Different States have different statutes governing the question, but in the

case of McLean, referred to, the court said that the owner of the mortgage had the right to pursue one of three remedies, and that statement indicates that that court might hold that they could not all be prosecuted at the same time.

But this question was not before the court in the McLean case. The court itself stated as follows: "The appellants in the court below pleaded the statute of limitations, and the only question involved on this appeal is whether or not the note and mortgage are barred by such statutes." The court was not considering the question before us; it was unimportant. No one connected with the case gave any thought to the proposition here involved, because the only question before the court was the question of the statute of limitations.

The weight of authority seems to be that, where one has cumulative and consistent remedies, he may pursue all or one.

Attention is called to the case of *Jamison* v. *Adler-Goldman Commission Co.*, 59 Ark. 548, 28 S. W. 35, and the case of *Merchants' Nat. Bank of Ft. Smith* v. *Taylor*, 181 Ark. 356, 25 S. W. (2d) 1048. Under these authorities, if any amounts were collected from the securities, it would, of course, have to be applied in reduction of the claim in probate court. So, also, if payments were made on the claim in the probate court, the claim pending in the Ashley Chancery Court would necessarily be reduced by the amount collected in the probate court.

In other words, although a person may pursue one or all his remedies, he can have but one satisfaction.

The judgment of the circuit court is reversed, and the cause remanded with directions to issue the writ.

SMITH, J., (dissenting). The majority say that, if any amount is realized from the mortgage, the sum realized would have to be applied in reduction of the claim in the probate court, and that, if payments were made on the claim in the probate court, the claim pending in the Ashley Chancery Court would necessarily be reduced by the amount collected in the probate court, and the

cases of *Jamison* v. *Adler-Goldman Commission Co.,* 59 Ark. 548, 28 S. W. 35, and *Merchants' Nat. Bank of Ft. Smith* v. *Taylor,* 181 Ark. 356, 25 S. W. (2d) 1048, are cited in support of this statement.

The majority have, however, ordered the probate court, notwithstanding this declaration of the law, to proceed to hear and class appellant's demand, notwithstanding another court having full jurisdiction has already assumed jurisdiction and is still asserting it.

Judge BATTLE defined the proper practice to follow in this and similar circumstances in the case of *Jamison* v. *Adler-Goldman Commission Co., supra,* where he said: "In regulating the rights of creditors, the statutes give ample time in which to present their claims, and provide that they shall be paid equally according to classes. They take from the administrator the right to prefer one to another. To this extent they cure defects in the common law, and provide for the greater security of creditors. The changes made are commensurate with the evils intended to be remedied. They make no change, however, as to any vested interest that each shall take in the estate. Creditors are required to present their claims for the amount due them when it is presented, and to swear 'that nothing has been paid or delivered towards the satisfaction of it, except what is credited thereon, and that the sum demanded naming it, is justly due.' They may present their claims within one year and 364 days after the grant of the first letters—upon the close of the administration—but they must make this oath before their demands can be allowed; the statute thereby showing clearly an intention that they shall not share in the assets of the estate, except upon the basis of what is actually due after all payments are deducted. This being the manifest intention of one, it is presumed that it pervades the other statutes upon the same subject, and that when they say, 'if there be not sufficient to pay the whole of one class, such demands shall be paid in proportion to their amounts,' according to an apportionment made by the court, they mean by 'amounts' the sum actually due

at the time of the apportionment. When money is received from collaterals or mortgages held as security, in part payment of claims, they are certainly diminished accordingly, and their amounts become the balances due on them. This construction was placed upon similar statutes of Missouri, in a similar case, in *Estate of McCune,* 76 Mo. 200. In *Haskill* v. *Sevier,* 25 Ark. 152, the same construction was partially placed upon the statutes of this State. In that case the court directed a foreclosure of a mortgage upon land which was executed by John A. Jordan, deceased, in his lifetime, to secure a debt, and directed that, if the proceeds of the sale were not sufficient to pay the debt, the balance thereafter remaining should be certified to the probate court, and there classed against the estate of Jordan."

In other words, where the mortgagee is unwilling to rely exclusively on his mortgage for the satisfaction of his demand, but wishes to share, as a general creditor, in the distribution of the general assets, he should first exhaust his security and apply the proceeds thereof to the partial satisfaction of his demand, and it is the balance then remaining—and this balance only—which he may probate as a general creditor.

This was the practice, conforming to our own, which was approved by the Supreme Court of Wisconsin in the case of *McLean* v. *McLean,* 184 Wis. 495, 199 N. W. 459. Speaking of the remedies of a mortgagee against the estate of a deceased mortgagor, the Supreme Court of Wisconsin there said: "Up to the time of the death of Mary E. McLean, as a joint maker of the note, she was liable for the principal and the interest, and her property remained as security by virtue of the mortgage. Upon her death, the owner of the mortgage had the right to pursue one of three remedies as against her: First, she could file her claim for the full amount of the note, with interest, against the estate of the deceased, and thereby recover the full amount of the personal obligation; second, she could file a contingent claim for a possible deficiency on the foreclosure, and then proceed with

a foreclosure suit in the circuit court for the foreclosure of the mortgage; or third, she could rely solely upon her security and the foreclosure of her mortgage." See also 2 Woerner's American Law of Administration (3d ed.) chapter XLIVa.

This was a practice which the probate court was attempting to follow, and would have followed but for the directions of the majority to proceed now, independently of the action of the chancery court, to pass upon and class the full demand, regardless of the credits which may arise from the sale of eight thousand acres of land under the decree of foreclosure in the Ashley Chancery Court.

In his excellent work on Arkansas Mortgages, at § 322 thereof, Judge HUGHES says: "So far as the mortgage itself is concerned, the probate court is without power. That court has no jurisdiction in respect of foreclosure or redemption, and even its judgment allowing the mortgage debt as a claim against the estate is not conclusive upon chancery courts as to the amount of the debt in foreclosure or redemption actions subsequently instituted therein." Here, however, the probate court is directed to proceed in a matter over which the chancery court first obtained jurisdiction and in which it is still asserting that jurisdiction.

The views here expressed are not in conflict with the statement of the remedies of a mortgagee against the estate of a deceased mortgagor appearing in *Rhodes* v. *Cannon,* 112 Ark. 13, 164 S. W. 752. It was there said that the mortgage creditor might go into the probate court and probate his claim against the estate generally, or might foreclose his lien in the chancery court, or that he might pursue both remedies, but there was not involved in that case, as there is here, any question as to the practice in the pursuit of these remedies.

Here the expressed purpose of the probate court was to treat the demand of appellants as properly filed for allowance, but to postpone the adjudication of the balance due thereon until it became known what credits

would arise from the sale of the lands under the foreclosure proceeding pending in the Ashley Chancery Court, and, as I think this was the proper course for that court to pursue, I dissent from the order of this court awarding a writ of mandamus directing the probate court to allow the demand before knowing what credits should be applied thereon.

I am authorized to say that Mr. Justice BUTLER concurs in the views here expressed.

PULASKI COUNTY *v.* BOARD OF TRUSTEES OF ARKANSAS TUBERCULOSIS SANATORIUM.

4-2695

Opinion delivered June 27, 1932.

Carl E. Bailey, for appellant.

John W. Newman, Joseph M. Hill and *J. F. Loughborough,* for appellee.

MEHAFFY, J. This action was begun in the county court of Pulaski County by the appellee, filing its claims for the Arkansas Tuberculosis Sanatorium against the county for the maintenance of tuberculosis patients, the claims aggregating $18,755.

The county court found that the claims were correct and unpaid, and that they should be paid by Pulaski County as soon as it has funds available for that purpose, but the county court was of the opinion that, under the provisions of amendment No. 10, it had no right to make an order allowing such claims, or to issue warrants thereon, and the court entered the following order:

"It is ordered that no order of allowance of said claim be made at this time, and that no warrants issue thereon now, and that the request of said board of trustees that allowance be made and warrants issued thereon at this time is denied, and that this order is a final judgment in that regard."

An appeal was granted to the circuit court, where it was tried on the following statement of facts:

"STATEMENT OF FACTS

"In each of the Pulaski County fiscal years of 1930 and 1931, on orders of the county court, duly made and entered for each patient, patients were sent and admitted to the Arkansas Tuberculosis Sanatorium for maintenance in the manner required by law, whereby the county was to pay five dollars a week toward the maintenance of each of said patients, and during each of those fiscal years patients from Pulaski County were maintained at said sanatorium under such orders of the county court, but in each of the quarterly periods ending on the date hereinafter described, and the monthly period ending October 31, 1931, hereinafter described, the county failed to pay to the sanatorium the respective amounts accruing in the preceding quarterly periods and in the one monthly period shown opposite the last day thereof, as follows:

June 30, 1930	$3,275
September 30, 1930	3,170
March 31, 1931	4,125
June 30, 1931	3,855
September 30, 1931	3,260
October 31, 1931	1,070

Nor did the county court enter any orders of allowance or issue any warrants on any of said claims.

"The amounts are correct, and represent the respective amounts unpaid for maintenance of Pulaski County patients at the sanatorium in the respective periods stated, at the rate of five dollars per week per patient.

"That claims in the usual form provided by law for claims against the county, describing the foregoing amounts as owing by the county to the sanatorium, were

sent to the county judge of Pulaski County within a few days after the end of each of the said periods, and were by him duly filed and kept in the records of the county court.

"In the fiscal year of 1930, the total amount appropriated by the quorum court for the maintenance of patients in the sanatorium was $13,000, and the amount paid in that fiscal year by the county on that account was $9,690, leaving $3,310 between the amount paid and the amount appropriated; and the total unpaid was $6,445.

"In the 1931 fiscal year, $10,000 was appropriated for the sanatorium, and $3,560 was paid on that account, leaving $6,440 of the appropriation that has not been paid, and a total unpaid of $12,310.

"No allowances were made or warrants issued in either of the years above the amount paid as described.

"In the fiscal year of 1930, the total county revenues, plus the valid floating indebtedness carried over from preceding years (including the amount of the indebtedness herein claimed in that year) did exceed the total valid contracts and allowances for that year; and the same is true of the 1931 fiscal year.

"The total county indebtedness incurred in the 1930 fiscal year did not exceed the revenues for that year; and the total county indebtedness incurred to October 1, 1931, was about $8,000 less than the total county revenues for the 1931 fiscal year. But an indebtedness was incurred after October 1st to November 1st of about $58,000 in excess of the revenues for that fiscal year; so that at the time all of the claims herein accruing in the fiscal year of 1930 were due, amounting to $6,445, the revenues for that year had not been exceeded. And the same is true of the claims herein that accrued in the 1931 fiscal year to September 30, 1931, amounting to $11,240, leaving the claim for the month of October, 1931, amounting to $1,070 in excess of the revenues for that year, except that the total county debts for that year, accrued to October 1, 1931, were $8,000 less than the total revenues for that year.

"Where the fiscal years of 1930 and 1931 are referred to herein, it is meant the fiscal year ending the first Monday in November in each of those years.

"Many of the patients, for whom the county's part of the maintenance is in the claim now made and unpaid, are still being maintained at the sanatorium and have not recovered from tuberculosis.

"There is attached to and made a part of this statement of facts, as Exhibit A, a statement showing the amount owing by the several counties in the State to the sanatorium for maintenance of patients sent from each, together with the number of patients from each county; the financial part of the statement being the condition on May 1, 1932, and the number of patients being those at the sanatorium on May 23, 1932. It is agreed that Dr. J. D. Riley, superintendent in charge of the sanatorium, would testify that the statement is correct, and it shall be received herein as his testimony, with the same effect as if shown in his deposition duly taken and filed herein.

"On December 7, 1924, there was outstanding general revenue fund indebtedness of Pulaski County in a substantial amount, not funded by bond issue, and the total amount of such outstanding indebtedness has not, at any time since that date, been reduced below the total amount of such valid non-bonded indebtedness of the county now outstanding, including the total amount of the claims involved herein.

"Signed this 28th day of May, 1932."

There was an exhibit which was made part of the agreed statement of facts, which showed the financial condition of the county, together with number of patients from each county. There is no necessity of copying this exhibit.

The circuit court allowed the claims in the aggregate sum of $18,755, and ordered the county court to allow it and issue warrants therefor, and judgment was entered accordingly.

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

This suit involves amendment No. 10 of the Constitution. This amendment has been before the court many times.

It will be seen from the agreed statement of facts that the only question for us to determine is whether or not the county court can allow this claim at a time when allowance of said claim would be in excess of the revenue from all sources for the current fiscal year.

The debt of the county was incurred and the claims were due at a time when they could have been paid without violating amendment No. 10. The claims were sent to the county judge, but were not acted on. Nothing was ever done by the appellees to get action on the claims at a time when they could be lawfully paid.

It is apparent that everybody connected with the case not only concedes that the claims are just, but that they should be paid if there is any way in which this can be done without violating amendment No. 10.

Appellee calls attention to a number of authorities, all of which we have carefully considered, but we think the decisions of this court construing amendment No. 10 settle this case beyond controversy.

The claims are not only just, but they are of such character that everybody would be glad to see them paid, and all regret that the situation is such that payment is impossible without a violation of the plain provisions of the Constitution. The failure to pay them will necessarily result in great hardship. That, however, does not justify the courts in violating the provisions of the Constitution.

Many instances might be named where decisions of the courts worked great hardships, and courts always regret to have to render decisions that will do this.

The law requires all demands against the estate of any deceased person to be made within one year, and all demands not exhibited, as required by law, before the end of the year are forever barred. It is wholly immaterial that the claim is just, that the estate may be very valuable, and the claimant very poor; no matter what the

equities are, if the claim is not exhibited, as required by law, within one year, it cannot be paid.

The owner of a promissory note must bring his action before the claim is barred by the statute of limitations. If the creditor fails to do this, his claim is barred and cannot be collected.

Under the provisions of amendment No. 10, the county court cannot make a contract, and cannot make any allowance for any purpose whatsoever in excess of the revenues from all sources for that year.

The court is not only prohibited by this amendment from making an allowance, but the county judge cannot sign or issue any script or warrant in excess of the revenue, and, if a warrant was issued on this claim, the officer or officers of the county who authorized, signed or issued such warrant would be guilty of a misdemeanor, and subject to fine and removal from office.

The holders of the claims involved in this suit might have compelled action by the Pulaski County Court and collected their money. It was their duty to do this.

It was said in the last case construing amendment No. 10:

"The holder of a valid warrant may, by an appropriate action, compel the redemption of his warrants, 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." *Stanfield* v. *Friddle,* 185 Ark. 873, 50 S. W. (2d) 237.

In *Nelson* v. *Walker,* 170 Ark. 170, 279 S. W. 11, we said:

"If we should hold otherwise, the obvious purpose of the amendment would be defeated. It would only be necessary to first make the allowances for the expenses covering those things with which a county might dispense to the extent of all the revenue, or so much thereof as was necessary to pay them, and then make allowances to cover the claims where the compensation is definitely fixed by law. It must be quite obvious that, if a county court can make allowances to cover claims which may be paid for by a county, but which are not essential to the operation of the county's affairs, and, after doing so, may then make other allowances on the theory that indispensable services have not been paid for, the provision of the amendment that the county's indebtedness shall not be increased would have no binding effect on the county judge who wished to evade it."

This amendment has been construed frequently by this court, and most of the cases are cited and the principles discussed in *Luter* v. *Pulaski County Hospital Asso.,* 182 Ark. 1099, 34 S. W. (2d) 770; *McGregor* v. *Miller,* 173 Ark. 459, 293 S. W. 30; *Dixie Culvert Mfg. Co.* v. *Perry County,* 174 Ark. 107, 294 S. W. 381; *Lybrand* v. *Wafford,* 174 Ark. 298, 296 S. W. 729; *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S. W. 1002; *Lake* v. *Tatum,* 175 Ark. 90, 1 S. W. (2d) 554; *Miller* v. *State use Woodruff County,* 176 Ark. 889, 1 S. W. (2d) 998; *Chestnutt* v. *Gates,* 177 Ark. 894, 9 S. W. (2d) 37; *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. (2d) 250.

There are other cases construing amendment No. 10, but we do not deem it necessary to review all these deci-

sions here. None of the cases in which amendment No. 10 has been construed are in conflict with the principles herein announced.

While it is to be regretted that the situation is such that the appellee cannot collect its just claims, yet the plain provisions of the Constitution compel the conclusions herein reached.

The judgment of the circuit court is reversed, and the cause remanded with directions to enter a judgment disallowing the claims.

McHaney, J., dissents.

Paving Districts Nos. 76 and 52 of Pine Bluff *v.* State Highway Commission.

4-2604 & 2605

Opinion delivered June 27, 1932.

Coleman & Gantt, for appellant.

Hal L. Norwood, Attorney General, and *Claude Duty,* Assistant, for appellee.

McHaney, J. Prior to the passage of act 85, p. 247, Acts 1931, Street Improvement Districts Nos. 76 and 52, in the city of Pine Bluff, had improved certain streets

therein, a portion of which was being used as continuation of State Highway No. 3. Prior to the passage of said act 85, in the year 1930, appellee contemplated changing the route of State Highway No. 3 so that it would not pass over any portion of the improvement in said districts. Pursuant to that purpose, appellee entered into a contract for the construction of approximately one-half mile of new highway to connect State Highway No. 3 with West Sixth Avenue, and participated with Improvement District No. 105 in said city in the paving of West Sixth Avenue and other streets in said district over which said highway would pass, under the provisions of act 8 of 1928, approved October 3, 1928. The one-half mile connection above mentioned was graded, but has never been paved nor opened for public use. Certain streets in district No. 105 have been designated as the continuation of highway No. 65, which is both a Federal and State highway, and appellee participated in the cost of said improvement to the extent of one-half of the entire cost of construction of the improvement made by said districts. Appellee has continued to route traffic passing over State Highway No. 3 over a few blocks of the improvement in appellant districts since the passing of act 85, but with the purpose and intent of changing the route as above stated, and has designated same as a temporary route by its markers thereon. Appellants brought these suits against appellee to compel it, by writ of mandamus, to participate in the retirement of the outstanding bonds and maturing interest under § 2 of said act 85. Demurrer was interposed and sustained to the complaint setting forth the above facts, and this appeal followed.

We think the court correctly sustained the demurrer. The complaint shows that appellee contemplated the change in the route of highway No. 3 through the city of Pine Bluff, and had actually entered upon the construction of one-half mile connection to route the traffic over the streets in Improvement District No. 105, and had participated with said district to the extent of one-half the cost of the improvement in said district No. 105. This

shows that, although appellee was using as a continuation of State Highway No. 3 a few blocks of the improvement in appellant districts, this use was temporary in character, and we are of the opinion that it was not the intention or purpose of the lawmakers in passing act 85 of 1931 to require appellee to participate by paying one-half the bonds then outstanding in municipal street improvement districts for a mere temporary use of said streets, and especially where a permanent route had been selected over other streets and its share of the cost thereof assumed. The fact that appellee was using a portion of the street improved by appellant districts at the time of the passage of act 85 gave it no vested right to a continuation of the use thereof. *Hempstead County* v. *Huddleston,* 182 Ark. 276, 31 S. W. (2d) 300.

The route to be selected as continuations of State Highways through cities and towns rests in the sound discretion of the Highway Commission, and no person would have the right to control such discretion by mandamus. The ultimate effect of this suit is virtually an attempt to compel appellee to continue the use of a portion of the streets in appellant districts as a continuation of State Highway No. 3, and, as we have already shown, this is a matter resting in the discretion of the Commission, and not subject to be controlled by mandamus.

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

UNITED FRIENDS OF AMERICA *v.* PHILLIPS.

4-2606

Opinion delivered June 27, 1932.

Troy W. Lewis, for appellant.

Brundidge & Neelly, for appellee.

BUTLER, J. Alice Booth became a member of the United Friends of America, a fraternal benefit association, which was operated by means of a lodge system. There is no question as to whether or not she paid her dues regularly until July, 1929. On the 28th of that month she died. Proof of death was made in the month of August, and the appellant insurance company denied liability, claiming that the dues of the deceased were not paid in the month of July, 1929, within the time prescribed by the by-laws.

A jury was waived, and the case submitted to the court sitting as a jury, which, after having heard the testimony in the case, found that at the time of the death of the deceased the certificate was in full force and effect, and rendered judgment in favor of the plaintiff, the beneficiary named in the policy, for the sum prayed. From that judgment is this appeal.

The testimony adduced for the appellee tended to show that the local council, domiciled at Searcy, had no regular place of meeting and no regular lodge room. The meetings were usually held at the home of Lulu Heard, the local secretary. It was the custom of the members of the local council to pay their monthly dues

to the said Lulu Heard. When the dues were paid to her, she kept an account of the same, made a report of the moneys received, and forwarded this report to the supreme council at Little Rock.

The testimony of the witnesses on behalf of the appellee tended further to show that on the 15th day of July, 1929, the dues of the assured for that month were sent to the home of Lulu Heard to be paid to her as was the custom. Lulu Heard had left home on or about the 13th of July, for a trip to Chicago, and was absent on the 15th when the money was brought to her house. She intended to remain away from home, and did so remain, until about the first of August, 1929, and had directed her daughter, Mary Heard, and her stepmother, Lucy Freeman, who lived with her, to receive the dues of the members of the council. The money for the payment of the dues of Alice Booth was received, and Lucy Freeman gave a receipt therefor, which read as follows: "Received of Lillian Phillips, July 15, 1929, $1 for Alice Booth endowment. [Signed] Lucy Freeman."

Mary Heard testified that the money received on the 15th of July was not sent off immediately because at that time the $1 paid for Alice Booth was all the money received, and they were waiting until the other members paid before sending it in to the general council. After the death of Alice Booth, on the 28th of July, and before the 5th of August the other members of the local council came in and paid their dues, and on the last mentioned date Lulu Heard, who had in the meantime returned to Searcy, made report of and remitted the collections, amounting in all to $10.30, to the supreme council at Little Rock. The supreme council retained the money until it received notice later in August of the death of Alice Booth, and thereupon the $1 paid by her was tendered by the supreme council to Lulu Heard, who refused to receive it.

Counsel for the appellant calls attention to certain discrepancies and contradictions in the testimony of the witnesses for the appellee which, he contends, cast doubt

upon the credibility of the witnesses if it does not indicate the falsity of all their testimony. But these were questions for the court, and, the court having accepted the testimony of these witnesses as true, we are bound by its decision.

The only question presented for our determination is whether or not the evidence is sufficient to support the finding and judgment of the court below, sitting as a jury, counsel recognizing the rule that the finding of the court is entitled to the same weight as the verdict of a jury, and will not be disturbed where there is legally sufficient evidence to sustain it, even though such finding might appear to this court to be contrary to the preponderance of the evidence. Counsel contends that Lulu Heard was powerless to delegate her authority to collect dues and issue receipts, and therefore the payment of dues to Lucy Freeman was unauthorized and not binding on the appellant. In the absence of Lulu Heard, the secretary, the payments of dues should have been made, it is claimed, to the assistant secretary, "who is clothed with the duty of collecting dues and giving official receipts in the absence of the secretary by the express provisions of the by-laws." Counsel introduced that part of the by-laws deemed pertinent to the issues involved in the case which was incorporated in the bill of exceptions and copied in his brief, but by an examination of the by-laws to which he referred (section 8, article 22) it seems that he was in error as to the authority of the assistant secretary. The by-laws do not prescribe any specific person or officer to whom dues shall be paid, but there is a provision that "all members will see to it that their dues are paid to their local council in time for the local council to remit same to the general office on or before and not later than the 20th of each and every month;" and there is the further provision that, if any member fails to pay the dues "to his council" in time to get it to the general office on or before the 20th of each month, he shall be delinquent and suspended from all benefits of the order.

Section 2 of article 2 provides for the organization of the local council. Section 4 names the officers, and the remaining sections of that article prescribe the duties of each. The duties of the secretary and assistant secretary are as follows:

"Section 7. The secretary shall keep a correct account of all moneys collected by the council and keep a correct account between the council and the members, forward to the supreme office, one report for each month's dues paid by members, make out and together with the commander sign all orders drawn on the treasurer.

"Section 8. The assistant secretary shall assist the secretary in keeping a correct account of the council's business and in the keeping of the correct minutes of every meeting held by the council; make record of all new members joining, and of everything transacted by the council, and perform such other duties as the law may require."

It will therefore be seen that the only authority for the secretary to collect the dues would arise from custom, and the assistant secretary is delegated no authority by the by-laws except to assist the secretary in keeping the records. In the absence of the secretary therefore the assistant secretary would have no more authority to collect the dues than any other member of the council. Furthermore there is no testimony to show who the assistant secretary was and whether or not he was available for the payment of dues on the 15th day of July, 1929.

Section 9 of the by-laws requires that the dues be paid in the lodge room or place appointed for meeting, and that they be marked on the official card furnished by the order and that this card is the "only official receipt authorized by the grand lodge and the lodge room the only authorized place for receiving and paying dues, the organization shall not be liable or responsible for any dues paid by any one to any officer or council unless said dues are paid in the lodge room as herein described and marked on the official card."

The evidence does not disclose whether or not the dues of the members as paid were noted on the official card except the testimony of one witness who, in referring to the payment of dues by the members, stated that "they didn't have any cards or books."

We infer from the testimony that the business of the local council was conducted in rather an informal way, and that Lulu Heard was the principal functionary, although there were other officers who might be said to rank her in authority and who possessed higher sounding titles. Another one of the by-laws provided for the forwarding by local council to the supreme office $1.25 each month for every member, and that this payment should be forwarded so as to reach the supreme office by the 20th of the month, and that, should any council fail to comply with this provision within the time named, "the entire council shall be delinquent and shall stand suspended from all the benefits of the order until said report is made by the council, received and accepted by the general office." It was further provided that where the dues were sent in after the due date the grand lodge might either accept or reject the report, and in case the report was rejected should not be liable to the council or any of its members.

The secretary of the grand lodge testified to the effect that in the report received of the payment of dues July 1st, twelve members were shown to have paid their dues, the sixth in order being Alice Booth. But so far as the evidence of this witness, or any other, discloses the report was not rejected except as to the item of the $1 for Alice Booth, although received long after the time limit named in the by-laws. The effect of this was to retain the premiums of the members who continued in life and to repudiate the payment by the one who had died.

The evidence as accepted by the trial court makes it clear that there was a *bona fide* attempt made by the assured to pay her dues in July within the time prescribed; that such payment was offered at the only place under the by-laws where it could be lawfully accepted,

and that it was not paid to the person accustomed to collect the dues for the order was no fault of the assured. Whether or not Lucy Freeman and Mary Heard, the stepmother and daughter of the secretary, who lived in the same home with her, could have been lawfully authorized by Lulu Heard to accept the payment of dues in her absence is beside the mark, for there can be no doubt that it was carried to and paid at the proper place as designated in the by-laws, and she actually received the money on her return and transmitted it to the supreme lodge, which accepted it without demur, although the time limit had expired, until it learned of the death of Alice Booth. It then elected not to reject the dues of any of the delinquent members who were living but only that of the member who had died. Such being the state of the record, we are of the opinion that the trial court correctly held that the policy or certificate involved a valid and binding obligation.

In *Crites* v. *Capital Fire Ins. Co.*, 91 Neb. 771, 137 N. W. 847, the premium on the policy was payable at the home office of the company, but the insurer sent the premium note to a bank in another State for collection. Being notified of this, the maker of the note, on the day of its maturity, went to the bank at the customary hour for opening to pay the same and waited for a time. No one appearing, he went to his work. That night the property covered by the insurance was destroyed. In that state of case it was held that it was a question for the trial court to determine whether the insured used reasonable diligence in endeavoring to pay the note and sustained a judgment in favor of the insured notwithstanding the premium note had not been paid.

In a New York case reported in 1 Hun at page 460, *O'Reilly* v. *Guardian Mutual Life Ins. Co.*, a policy of life insurance had been issued which prescribed no place for the payment of premiums. An agent for the company called at the home of the insured semiannually, and collected two of the half yearly premiums, but did not call on the 7th of January, 1872, the due date for the

third half-yearly premium. The agent's connection with the insurer had been discontinued in August of the preceding year, but the insured had no notice of this and died on the 15th of May, 1872. In that case it was held a question of fact for the jury as to whether or not under the facts above stated it was the duty of the insured to seek out some one to whom to pay the premium. The jury found for the plaintiff, the beneficiary under the policy, and the judgment of the trial court on appeal was affirmed.

It will be noted that the secretary in the instant case actually received the dues paid for Alice Booth. Therefore, the payment was sufficient, although first paid to one who might not have been authorized to receive it. *Weisman* v. *Commercial Fire Ins. Co.,* (Del.) 50 Atl. 92; *Mauck* v. *M. & M. Fire Ins. Co.,* 4 Pennewill (Del.) 54 Atl. 952.

It is our opinion that the principles announced in the cases above cited are applicable to the facts in the case at bar and support the view we have taken. Affirmed.

BLAKE *v.* STATE.

Crim. 3794

Opinion delivered July 4, 1932.

C. M. Martin and *Scipio A. Jones,* for appellant.

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

SMITH, J. Appellants, Louis and Elbert Blake, who are father and son, have prosecuted this appeal from the judgment of the Ouachita Circuit Court sentencing them to death for the murder of Brad Polk. The testimony on the part of the State was to the following effect. Louis Blake was a tenant on the farm of Polk, and they had disagreed about Blake's account and had been unable to effect a settlement. Blake had stated that he would not leave the farm where he lived until a settlement had been effected, and that he would kill Polk, if necessary, to secure a settlement. This threat was made in the presence of Walter Jones about 10:30 at the People's Bank in Stephens, Arkansas, on the morning of the day before the killing. Louis Blake owned a pistol, which he had been known to carry. Polk went to Blake's home at about noon on Christmas Day to effect a settlement. This conclusion was arrived at from the following facts. When deceased was found after he had been shot, it was discovered that he had been shot in his left eye. Deceased's glasses were found upon his breast with the left lens shot out. Polk used his glasses only when reading, and an envelope was found in his pocket covered with figures. The Blakes were in their home when the fatal shot was fired. The elder Blake fired four shots. His son fired only once, but this was the fatal shot, and it struck Polk while the latter was standing near the porch on the outside.

Louis Blake denied making the threat about which the witness Jones testified, and two other witnesses testified that at the time when the alleged threat was made Louis Blake was not at the bank but was at work on the house of a Mr. Guttry. This, however, was a question of fact for the jury.

Louis Blake admitted that he and Polk had disagreed about their settlement.

This testimony, standing alone, might, with the inferences reasonably deducible therefrom, support the finding that the Blakes had killed Polk after deliberation and premeditation, and were therefore guilty of murder in the first degree as found by the jury. But it does not stand alone. There are certain other facts which cannot be ignored, although we may say that the jury had the right to disbelieve the testimony of the defendants as to the circumstances under which the fatal shot was fired, according to which the killing occurred in their necessary self-defense and in defense of their home and the protection of its inmates from a murderous assault.

After the shooting, young Blake ran away, but he was later arrested. The older Blake went at once to the home of the deceased and informed deceased's daughter that Elbert Blake had shot her father, and he went with her for a doctor. The doctor—Dr. Sanders—went at once to the scene of the killing. Polk was dead when he arrived, having been killed instantly. Deceased's glasses were lying across his chest, they having apparently fallen off his face. Deceased had a pint of liquor in his left hip pocket, but none of it had been consumed. Other witnesses testified that Polk had not been drinking that day. Deceased's pistol was found lying near his feet.

R. L. Elliott, a deputy sheriff who investigated the killing and arrested Louis Blake, arrived at the scene of the killing a short time after it had occurred. He and others searched the house and found two pistols, one of .38 caliber, the other .45 caliber Colt's revolver. There were four empty shells in the .38 caliber pistol and one in the .45. In regard to bullet holes found in the Blakes' home, Elliott testified as follows: "Q. Did you examine the house to ascertain whether or not any bullet holes were in it? A. Yes, sir. Q. What did you find? A. There were three bullet holes through the wall and one bullet was taken about the door, it went in straight, and there was a bullet fired from the outside that went through the window sash and through a 2 x 4 and then stuck into the wall. There was a bullet hole up over the door,

kind o' at the corner of the door facing. Q. What was your statement with reference to the window? A. That was fired from the door, whoever fired it was on the outside of the door. Q. The bullet that went through the sash was fired from the outside? A. Yes, sir, and went to the corner of the building on the inside."

The sheriff, who also examined the house in which the Blakes lived, testified that he found where three shots had been fired from the inside of the house through the wall thereof and one through the window from the inside, but he also found one which had been fired from the outside, there being one or two shots over the door. Louis Blake, when first arrested, denied that he had fired any shot, but later admitted that he had shot three or four times through the wall of the house.

A witness who was hunting near the Blakes' home testified that he heard the report of the guns, and that all of the shots were fired within a short time of each other, and he and other hunters with him supposed that other hunters were shooting birds.

We have concluded that, while this testimony is sufficient to support a verdict of murder in the second degree, it is not sufficient to support a verdict of murder in the first degree. We think there is lacking that deliberation and premeditation required to constitute the higher degree of murder. The appellants were in their home at the time of the shooting, and, while the jury evidently did not believe their testimony that deceased began the shooting, it is certain that he participated in it. Guests present in appellants' home to partake of a Christmas dinner, then about ready to be served, testified that when they saw deceased coming to appellants' home they thought there would be trouble, and they left hurriedly, and that immediately after they had left the house through a rear door the shooting began, but they did not know who had commenced it.

In numerous cases this court has announced the power of the court to reduce a punishment imposed upon the verdict of a jury. One of the leading cases is that

of *Routt* v. *State,* 61 Ark. 594, 34 S. W. 262, in which a defendant had been convicted of robbing one Morgan of several hundred dollars. The court was of the opinion that, while the testimony established the fact that Routt had stolen Morgan's money, it did not suffice to establish the crime of robbery. In discussing the power of the court to reverse the judgment of the trial court convicting appellant of robbery and to reduce the punishment to that appropriate for grand larceny, the court pointed out that "the charge of robbery made against the defendant includes larceny," and the judgment of imprisonment for robbery was set aside, and the case remanded with directions to the circuit court to sentence the prisoner for grand larceny.

In discussing this power of the court, Justice RIDDICK there said: "Our statute provides that 'the Supreme Court may reverse, affirm or modify the judgment or order appealed from, in whole or in part, and as to any or all parties, and when the judgment or order has been reversed, the Supreme Court may remand or dismiss the cause, and enter such judgment upon the record as it may in its discretion deem just.' Sand. & H. Digest § 1064. We have twice held that this statute applies to judgments in criminal as well as civil cases. *Simpson* v. *State,* 56 Ark. 19, 19 S. W. 99; *Brown* v. *State,* 34 Ark. 232."

It was there also said: "We have said that the evidence does not sustain the charge of robbery, but that it does clearly make out a case of grand larceny. The fact that the defendant was found guilty of a greater crime than was warranted by the evidence does not compel us to set the entire conviction aside when it is in part clearly correct. It was to avoid such an unreasonable and costly procedure that the statute above referred to was enacted. The defendant in this case was sentenced to be imprisoned for ten years, when the maximum punishment for larceny of money is imprisonment for five years. Under the statute and the authorities cited above, we will relieve the defendant from the ex-

cessive judgment, of which he has a right to complain, but affirm the conviction to the extent that it seems clearly right. The judgment of imprisonment for robbery is set aside, and the cause remanded, with an order that the circuit court sentence the prisoner for grand larceny."

This power has frequently been exercised by this court in subsequent cases, and, while the practice usually followed is to reverse the judgment on account of the excessive punishment, unless the Attorney General will consent that the trial court impose a lower sentence, that practice has not always been followed. The court, when it is thought proper to do so, has itself fixed the reduced punishment.

One of the first cases in which this was done was that of *Howard* v. *State,* 82 Ark. 97, 100 S. W. 756. The headnote in that case reads as follows: "A conviction of murder in the first degree will be reduced to the second degree where the evidence shows that the killing was done with a deadly weapon but without deliberation or premeditation." The court there said: "We will set aside the judgment for murder in the first degree, and affirm it for murder in the second degree, and will assess the punishment at imprisonment in the penitentiary as provided by the statute." The final judgment of this court in that case shows that the punishment imposed by this court, after reversing the death sentence, was imprisonment for twenty-one years, the highest punishment provided by law for murder in the second degree.

Other cases in which this court has itself reduced the punishment are as follows: *Williams* v. *State,* 66 Ark. 264, 50 S. W. 517; *Noble* v. *State,* 75 Ark. 246, 87 S. W. 120; *Petty* v. *State,* 76 Ark. 515, 89 S. W. 465; *Walker* v. *State,* 91 Ark. 497, 121 S. W. 925; *Quinn* v. *State,* 114 Ark. 201, 169 S. W. 791; *Trotter* v. *State,* 148 Ark. 466, 231 S. W. 177; *Williams* v. *State,* 183 Ark. 870, 39 S. W. (2d) 295; *Stanley* v. *State,* 183 Ark. 1093, 43 S. W. (2d) 415.

The judgment of the court below sentencing the appellants to death will therefore be reversed, and the

judgment will be modified by reducing their conviction to that of murder in the second degree, and a sentence of twenty-one years upon each of them is hereby imposed.

MEANS *v.* AMERICAN EQUITABLE ASSURANCE COMPANY.

4-2636

Opinion delivered July 4, 1932.

Tom F. Digby, for appellant.

Verne McMillen and *Terrell Marshall,* for appellee.

SMITH, J. On October 28, 1930, a thief abandoned an automobile which he had stolen in one of the streets of the city of North Little Rock, a city of the first-class. When the presence of the car was discovered, the chief of police of that city directed appellant, who operates a public garage in that city, to remove the car from the streets and to place it in storage. This appellant did.

The city of North Little Rock has an ordinance relating to motor vehicles abandoned in the streets of that city, the relevant portions of which are to the following effect: Such cars are to be seized by any member of the police department. The owner may identify and recover the car without cost within twenty-four hours after being notified to appear and claim his car. If the owner is unknown, the chief of police shall publish notice that the

car has been seized, and the owner may, within two weeks, identify and recover his car "upon payment of all storage charges and cost of posting and publishing notice." If the abandoned vehicle remains unclaimed for a period of thirty days or more, the chief of police is required to sell it after notice published in a local newspaper, and to hold the proceeds of sale, less costs, for six months, during which time the owner may establish his title and claim the net proceeds of the sale. There was no sale of the car in question.

The owner of the stolen car carried theft insurance with appellee, American Equitable Assurance Company, hereinafter referred to as the company, and he collected from the company the insurance carried upon the car. Upon making this payment the company took a bill-of-sale for the car from the owner.

Later an agent of the company discovered the car in the possession of appellant, who offered to surrender it upon payment of his charges. This demand was refused, and the company brought replevin for the possession of the car.

It was evidently the opinion of the circuit judge, in the trial of this cause in the court below, that the ordinance, set out above, was invalid, as the jury was instructed that appellant had no right to hold the car for his charges and to allow nothing on that account. The cause was submitted under instructions which required the jury to find the value of the car and the damages arising from its detention, and this appeal is from a judgment rendered upon the verdict thus returned.

Inasmuch as we do not concur in the view that the ordinance was invalid and that no rights were acquired under it, we find it unnecessary to decide certain questions which have been discussed in the briefs on this appeal.

Counsel for the company correctly say that no authority has been expressly conferred by the General Assembly, even in the statute conferring certain en-

larged powers upon cities of the first and second class, to pass the ordinance in question; but we think this power is necessarily implied from those which were expressly granted by § 7494, Crawford & Moses' Digest to all municipalities, commonly known as the "general welfare" clause. This section provides, in part, that"* * * they (municipalities) shall have power to make and publish such by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of such corporations and the inhabitants thereof."

We think the power is implied under this grant to pass ordinances providing for the removal of abandoned motor vehicles in the streets of a town or city which, if not removed, would obstruct and menace traffic; and we think also that the ordinance in question was a reasonable exercise of this implied power, and that the action of the chief of police was authorized by the ordinance.

This being true, appellee should have paid a reasonable charge for storing the car. There was, however, no compliance with the ordinance in regard to advertising the recovery of the car, nor with its provisions in regard to its sale. On the contrary, it appears that appellant kept the car in his possession and made certain personal use of it. We are therefore of the opinion that the value of this use of the car to appellant should be offset against the storage charges.

We say the value of the use made of the car by appellant, and not the value of its use generally or the value thereof to the owner, should be assessed by the jury, for the reason that the true owner was not wrongfully deprived of its possession. Appellant had the right to retain possession, but, as he used the car without having the ordinance under which he held it complied with, he should

pay for the value of the use which he made of it, or any damages to the car resulting from such use.

The judgment of the court below will therefore be reversed, and the cause will be remanded with directions to try the issues stated in accordance with the principles herein announced.

MISSOURI PACIFIC RAILROAD COMPANY *v.* WATT.

4-2558

Opinion delivered July 4, 1932.

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

John L. McClellan, for appellee.

MEHAFFY, J. The appellee, Ed Watt, began this action in the Hot Spring Circuit Court against the Missouri Pacific Railroad Company for personal injuries alleged to have been caused by the operation of one of appellant's trains at Malvern, Arkansas.

W. E. Kelly, a minor, by Zoa Kelly, mother and next friend, and Tom Belote, brought suits against the appellant for injuries alleged to have been caused by the same accident alleged in Watt's case. These cases were consolidated for trial.

It was alleged in the complaints that William Kelly was driving a truck belonging to Tom Belote, and, while attempting to cross the railroad track on Main Street in the city of Malvern, and while in the exercise of due care, the agents in charge of and operating one of appellant's trains negligently and carelessly caused the motor truck to be turned over and wrecked, and the occupants of the truck injured.

Appellant's train had stopped near the crossing, and it is alleged that, as appellees undertook to cross the track in the truck, the train was negligently, carelessly, suddenly, and without warning, started onto said crossing, thereby placing the occupants of the truck in a posi-

tion of extreme peril, and, in order to avoid being struck and run over by said train, the driver of said truck was compelled to swerve it suddenly and abruptly into the curb, turning the truck over, wrecking it, and injuring appellees.

It was alleged that the employees operating the train negligently failed to keep a lookout, and, if they had kept a lookout, they would have discovered the approach of the parties in the truck in time to have avoided the injury.

It was further alleged that the appellant maintained a flagman at the crossing whose duty it is to give signals and warning of the approach of trains to persons in vehicles and pedestrians; that said flagman was present at the time of the accident and negligently failed to give any signal or warning, and, by reason of such negligence, the parties in the truck, in the exercise of ordinary care, believed it safe to cross at the time.

The complaint then alleged the manner in which the parties were injured and a prayer for damages in each complaint. Kelly and Watt sought to recover damages for personal injuries, and Belote for damages to his car.

The appellant filed an answer to each complaint, denying all the material allegations of the complaints. It denied that it was guilty of any negligence, but that, if the parties were injured, the injuries were due to their own fault and carelessness in not stopping, looking, and listening for the approach of trains, and in disobeying the signal lights, and alleged that the accident was caused by the negligence of William C. Kelly, and that appellee Belote was negligent in permitting the truck to be driven by a young and inexperienced driver.

When the cases were called for trial, appellant filed motion to quash the jury panel, and for cause stated that Tom Belote, one of the appellees, was a member of the regular panel of the jury, and had been sitting on said petit jury and served as juror in many cases determined by the jury at that term, and had been with the jury, associated with the jurors, and had deliberated

with them, and for that reason, the appellant moved the court to quash the jury panel.

Evidence was taken on this motion. The clerk of the Hot Spring Circuit Court was called as a witness, and testified that he had a list of the petit jurors who served at the present term of court, and that Tom Belote had been serving as a special petit juror; had served for three days; that he had only served as juror at the present term of court in one case; that Belote was summoned as a special juror, and is not on the regular panel. He was summoned late Wednesday afternoon. The court overruled appellant's motion to quash the panel, and exceptions were saved.

The evidence introduced by appellees tended to show that the parties were hauling dirt from the Malvern Brick & Tile Company, and it was necessary to cross the railroad tracks of appellant at the main street crossing. They were in a Chevrolet truck and were going north at about 4:30 P. M., and were running between 10 and 15 miles per hour; that they shut off for the crossing, and put on the brakes, and brought the truck to almost a complete stop, and saw the southbound passenger train taking water, and the engine was 12 or 15 feet from the crossing. They saw the engine standing and saw the fireman on the back of the tender; noticed him reaching over to get the water nozzle. The bell was not ringing, but the flagman was standing about in line with the right sidewalk; was on the opposite side of the track from the truck, and was hacking on the telephone post with his flagstick and not looking in the direction of the truck. No signals were given by the operators of the train before starting up, and when the truck was about 30 feet from the track the occupants noticed the train beginning to move. The driver of the truck put on his brakes, and swerved to the right to keep from striking the train. The truck hit the curb and turned over.

Witness testified that no signal had been given from the train, the flagman was not out there, and nothing was done to warn the parties that the train was starting.

If the driver had not swerved, the truck would either have struck the signal sign or run in front of the engine. There was nothing the driver could have done to prevent the accident.

Witnesses then described the injuries received, and physicians were introduced who testified as to the injuries. The truck was going down a pretty steep grade, and the driver was using his brakes coming down the street. The driver was looking ahead and saw the signal lights at the crossing, and knew there was danger. He knew that the crossing was dangerous, but he saw the engine standing and saw the flagman there, and he did not give them any signal. The truck was stopped some distance from the track, but they saw the engine was not moving, saw the fireman on top of the tender, and, as no warning was given, either by the trainmen or flagman, they thought it was safe to cross the track.

The evidence on the part of the appellant tended to show that the engineer stopped the engine even with the water spout, and that the front of the engine was about the edge of the sidewalk; that there was an automatic bell ringing when they came into the station. The employees in charge of the train saw the truck coming down the street, and thought nothing of it until it got within about 20 feet of the train; that the engine was at that time moving, the engineer having received a signal from the fireman. The bell was ringing, and the flagman was in the middle of the crossing, and when the train came in, the flagman was in the middle of the street with his stop sign up. There was nothing to prevent the driver of the truck from seeing the train.

The evidence of appellees' witnesses was in conflict with the evidence introduced by appellants as to negligence. Attention will be called to such parts as necessary in discussing the issues.

The jury returned a verdict in favor of William C. Kelly for $100, for Ed Watt for $1,000, and in favor of Tom Belote for $150. Motion for a new trial was filed and overruled, and the case is here on appeal.

Appellant's first contention is that the court erred in overruling its motion to quash the panel of petit jurors, and it says that Belote had served and sat as a juror in other cases with the jury that tried his case; that he had associated daily with the jurors, and that this influenced other jurors may be seen because in the Belote case the verdict was unanimous, and in the Kelly and Watt cases it was not unanimous. The Belote case, however, was for damages to his car, and the other cases were for personal injuries. The jury might very well agree unanimously as to the value of the car, and they might not all agree as to the amount appellees were entitled to recover for personal injuries.

Appellant quotes from 35 C. J. 333 as follows: "Where a litigant serves on a jury at a term at which he has a case to be tried by a jury, all of the other jurors with whom he has been serving are incompetent to sit in the trial of his case."

Appellant's attorney doubtless thought, when he filed his motion to quash, that Belote was a member of the regular panel. The evidence, however, shows that he was summoned as a special juror and served in one case. The record is silent as to whether he was summoned for the purpose of serving in that case alone. It does show however that he was not on the regular panel, and that he served in but one case, and it fails to show any association at all with the other members of the panel, and there is no evidence in the record tending to show that any juror who tried this case had associated with Belote at all, or even knew that he had been subpoenaed as a special juror and served in one case.

Appellant also calls attention to note one in volume 35 of C. J. 333, but there is nothing in the evidence in this case tending to show any association or unfair advantage or that any of the jurors who served in this case had at any time served with Belote. It would certainly not disqualify the panel because Belote served in one case, when there is not any evidence tending to show that he served with any of the jurors in his case.

Appellant next contends that the court erred in sending the instructions into the jury room after the jury had deliberated some time, with the word "pltf." in pencil at the left hand top corner of plaintiff's instruction No. 2, and the word "This" on plaintiff's instructions Nos. 4, 6, 8 and 12.

It appears that the penciled notations on the margin of the instructions were put there during the argument of counsel with no intention or expectation that the jury would see them. The notations were put there for the convenience of the attorney in making his argument, and no one seemed to think about it, and the attention of the court was not called to it. If the court's attention had been called to it, or there had been any request to do so, he would doubtless have erased the marks.

Whether appellant's attorney knew about the marks being there before the instructions were given to the jury is not shown by the evidence. He probably did not know of it, but there is no evidence in the record tending to show that they were noticed by the jury or influenced the jurors in any way.

It is next contended that there is no liability under the law and evidence in this case, and that the trial court should have directed a verdict in favor of appellant.

It is true that the train did not strike the truck, but an injury may be done or caused by the running of a train without the train actually striking the person or property. If the appellant was guilty of negligence in the operation of the train at the time, and that negligence injured the appellees, while they were in the exercise of ordinary care, this would be damage done and caused by the running of trains. Section 8562 of Crawford & Moses' Digest.

It was the duty of the appellees to exercise ordinary care for their own safety, and to look out for the trains, but the evidence on behalf of appellees shows that the engine was not moving, that the fireman was on the tender, and that the flagman, whose duty it was to warn

travelers, was there and gave no warning, and there was no warning given by the engine crew before starting the engine.

Persons crossing a railroad track where a flagman is kept, whose duty it is to warn travelers, and when he is standing at his usual place but does not give any warning, have the right to assume that they may cross the track with safety. Travelers must exercise ordinary care, and that means such care and precaution as a person of ordinary prudence would use under the circumstances.

It is true that they saw the signal lights flicker, and they would have known the train was there whether they had seen the lights or not, because they saw the engine. They knew the engine was not moving, and, according to their testimony, no signal was given before the engine moved.

The question of the negligence of the appellant and the question of the contributory negligence of the appellees was submitted to the jury under proper instructions. Whether one is guilty of negligence or contributory negligence is a question of fact to be determined from the evidence introduced, and, if there is any substantial evidence to support the verdict, this court is not authorized to disturb such verdict.

The crossing at which the injury occurred was where the main street of the city of Malvern crosses appellant's railroad track, and the travel is considerable, and for that reason, doubtless, a flagman is kept, and any one undertaking to cross when the flagman has indicated that it was dangerous to do so would be guilty of negligence, but to travelers knowing that a flagman was kept at this place, seeing him at his place at the time, the failure by him to give any warning to the travelers would be an invitation to cross.

There was no error in permitting defendant's witness to be asked on cross-examination questions, the answers to which tended to show that he had failed to

perform his duty. The answers to these questions would tend to show the credibility of the witness, and no prejudice could possibly have resulted from admitting this testimony.

Appellant had placed the flagman on the stand and asked him about his performance of duty at the time.

Appellant calls attention to the case of *Pugsley* v. *Tyler,* 130 Ark. 491, 197 S. W. 1177, and *Railway Co.* v. *Harrell,* 58 Ark. 454, 25 S. W. 117. It is true that you can not establish negligence in any given case by showing that the party was negligent in some other case. The evidence on the part of the appellees must show negligence on the part of the appellant, and, while you can not prove negligence by showing that one was guilty of negligence on a former occasion, one whose constant duty is to warn and protect the public at a place where there is constant travel may be asked on cross-examination, for the purpose of testing his truthfulness or credibility, what his habits have formerly been, with reference to the same matter.

Defendant offered to prove by Mr. Halbert, former city attorney of Malvern, that there was an ordinance requiring people using vehicles or automobiles to stop before going across the Main Street crossing. Court and counsel withdrew from the presence of the jury, and Halbert testified that, when he was city attorney, there was an ordinance which required drivers of vehicles to stop at intersections of streets where there were stop signs, and that during his term as city attorney people had been fined in the mayor's court for not stopping at the railroad crossing in disregard of the stop sign. Witness also testified that he did not know where the ordinance was, but knew that it was passed and published.

The court refused to admit this evidence. This was not error. Appellees admitted that there was a flagman at this crossing with a stop sign, but that he was not displaying it at the time of the accident. There was no controversy about the duty of the travelers to stop if

the sign was displayed, and the ordinance which appellant desired to introduce, according to the evidence, was with reference to stop signs at intersections, and whether there was or was not such an ordinance would in no way tend to prove negligence on the part of the appellees because, according to their evidence, there was no stop sign displayed, and it was conceded that, if the stop sign was displayed, it would be negligence to cross.

The appellant urges a reversal because of the giving of certain instructions by the trial court, and its refusal to give others. There were numerous instructions offered, some given and some refused. It would serve no useful purpose to set them out at length. After a careful examination of the instructions given, as well as those refused, we have reached the conclusion that the instructions as a whole constituted a correct guide, and the court therefore did not err in either giving or refusing instructions.

The judgment of the circuit court is affirmed.

POOLE *v.* THOMPSON.

4-2630

Opinion delivered July 4, 1932.

E. L. Carter, for appellant.

Steel & Edwards, for appellee.

BUTLER, J. James Thompson, a negro, executed the mortgage sued on covering 100 acres of land in sections

14, 16 and 23 in township 9 south, range 29 west, on October 20, 1921. The mortgage was made to the Conservative Loan Company, and regularly assigned to the appellants.

There was no dispute about the mortgage or about the right of appellants to a judgment against the mortgagor, James Thompson.

The Bank of Lockesburg held a third mortgage also executed by James Thompson against the same lands, and 120 acres in section 8, to secure the payment of a note for $2,160. This note and mortgage were executed June 7, 1922, and were due October 2, 1922. Thompson made payments on the indebtedness to the Conservative Loan Company, and also on the indebtedness to the Bank of Lockesburg. In 1928 his indebtedness to the bank had been reduced to $1,000, and he executed a note for this amount.

In February, 1929, Thompson paid to the bank $400, leaving an indebtedness of $600, and on that date executed a note for $600 secured by chattel mortgage, and this mortgage was to secure all indebtedness due the Bank of Lockesburg.

All the lands in the mortgages became delinquent for nonpayment of road taxes due for the years 1921 and 1922, and in 1924 the road improvement district filed suit and a decree was entered in the chancery court and a commissioner's deed executed in October, 1926. The land was thereafter conveyed to Dell Dritt, who conveyed the same to the Bank of Lockesburg on March 1, 1927.

The appellants, assignees of the Conservative Loan Company, brought suit to foreclose the mortgage executed on October 20, 1921. The appellee, Bank of Lockesburg, filed answer and cross-complaint denying all the material allegations in the complaint and alleging that it was the owner of the lands described, free from any lien of plaintiffs, and alleged that plaintiff's mortgages

constituted a cloud upon its title and asked that they be set aside.

It was further alleged that the lands described in the complaint are embraced in Road Improvement District No. 3, and were sold for the assessments levied against the lands for the years 1921 and 1922; that suit was brought and a decree entered in April, 1924; the lands were sold to the district, and deed was made to the road improvement district in October, 1926; that in December, 1926, the road improvement district sold and conveyed said lands to Dell Dritt, and on the first day of March, 1927, Dell Dritt conveyed the lands to the Bank of Lockesburg.

The appellants filed answer to the cross-complaint alleging the mortgage made to the bank and certain payments thereon, and that said mortgage had never been satisfied; that the purchase of said land by Dell Dritt and the Bank of Lockesburg was for the purpose of redeeming the lands from the improvement district taxes. They further alleged that James Thompson, the defendant, had repaid the Bank of Lockesburg, and that it continued to permit Thompson to remain in possession; that the Bank of Lockesburg was estopped from asserting and claiming the title thereto.

James Thompson and Henrietta Thompson, appellees, filed an answer and cross-complaint denying the allegations of the Bank of Lockesburg that it had any deed from the improvement district. Thompson further alleged that he was an ignorant negro farmer, and had been a customer of the Bank of Lockesburg, and had sought its assistance in paying taxes and buying and selling land. It was further alleged in Thompson's answer that the debt to the bank had been reduced to $600, which was secured by chattel mortgage and that that represented all of Thompson's indebtedness to the bank. They alleged that in the fall of 1929 they paid the Bank of Lockesburg the proceeds from the sale of their crop, the amount of which was unknown. They further alleged

that they paid the taxes due for 1930 and all former years, and that the bank had never demanded possession; that Thompson was advised by the cashier of the bank not to pay the improvement district taxes.

The bank filed a reply to the answer of Thompsons, denying all the allegations made by them.

There is practically no dispute about the facts as between the appellants and the Bank of Lockesburg, and Thompson did not appeal.

The court entered judgment in favor of appellant, Poole, for $989.79 and E. L. Carter, trustee for $59.81. These judgments were against James Thompson. The court also found that the indebtedness from Thompson to the Bank of Lockesburg was $600, and that, as to Thompson, the purchase of the land amounted to a redemption, and that the bank had paid $100 in redeeming the land from the road improvement district, and that Thompson could redeem by the payment of the $100 and the $600 secured by the mortgage, and gave Thompson six months in which to pay said sums.

It was further decreed that, if Thompson failed to pay within six months, the rights of the Bank of Lockesburg in and to said lands be quieted and confirmed against all the parties. The decree further provided that, if Thompson redeemed the land, Poole and Carter should have the right to have the lands sold for the payment of their respective judgments.

The appellants contend for a reversal of the decree because: (1) The court allowed the Bank of Lockesburg a prior lien of $100; (2) the decree provided that only Thompson had the right to redeem; (3) for the reason that the decree required not only the payment of $100, but the $600 that Thompson owed the bank; (4) for failure to require the bank to exhaust its security against the chattels embraced in the mortgage, and against the 80 acres of land upon which the bank had a first lien; 5, the court erred in permitting the introduction of the deed from the improvement district.

It will be seen from the statement that there is no controversy about the amount of indebtedness, and there is, as we have already said, practically no dispute as to the facts.

Since Thompson has not appealed, the only question for our consideration is whether the appellants have any rights as against the Bank of Lockesburg.

The mortgages owned by appellant, and which they sought to foreclose, were executed October 20, 1921. The road improvement district taxes were delinquent for the years 1921 and 1922, and suit was brought in 1924 by the road improvement district to foreclose its lien. A decree was entered in its favor in April, 1924, and the lands were sold in May, 1924, and purchased by the road improvement district.

A commissioner's deed was made to the district in October, 1926, and in December, 1926, the Bank of Lockesburg purchased the lands. The appellant could have, at any time from 1921 up to the time the bank purchased the property, paid the taxes and redeemed the land. They could have protected themselves in this manner, or they could have paid the taxes before they became delinquent. They, however, did not do this. They made no effort to protect their lien, and began no proceedings until July, 1931.

As to the rights of the Bank of Lockesburg and the appellants, the authorities are not in harmony. But the questions here involved have already been settled by the decisions of this court, and it is therefore unnecessary to discuss other authorities.

In a recent case we said: "The holder of the second mortgage was under no obligation to the holder of the first mortgage to redeem the lands in possession of the mortgagor from their sale for delinquent taxes, notwithstanding the owner was bound to the payment of such taxes by the terms of the first mortgage. The appellant, under his mortgage, could have paid the taxes before the lands were sold as delinquent, and charged them against

the mortgagor, and it could have redeemed the lands in the manner provided by the act from the tax sale within the time allowed therefor after such sale. "Appellant makes no showing of having been prevented from either paying the taxes or redeeming the lands by any conduct of the holder of the second mortgage calculated to lull him into security in the belief that such taxes would be paid or redemption would be made for his benefit." *Security Mtg. Co.* v. *Herron,* 174 Ark. 698, 296 S. W. 363. The same principle was announced in the case of *Security Mtg. Co.* v. *Harrison,* 176 Ark. 423, 3 S. W. (2d) 59.

The decisions in the above cases settle this case. It is, however, contended by appellant that these cases are overruled by the case of *Bartel* v. *Ingram,* 178 Ark. 699, 11 S. W. (2d) 488. There is, however, nothing in that case in conflict with the principles announced in the two cases above mentioned. The facts in *Bartel* v. *Ingram* case were wholly different. The case is controlled by the principles announced in the above cases, and the decree of the chancery court is affirmed.

LEONARD *v.* TRICE.

4-2556

Opinion delivered July 11, 1932.

Hal L. Norwood, Walter L. Pope, John W. Moncrief and *A. G. Meehan,* for appellant.

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

SMITH, J. The Northern Road Improvement District of Arkansas County, which embraces about one-half the area of that county, was organized under special act 247 of the 1919 session of the General Assembly (vol. 1, Road Acts, 1919, page 1071). The district constructed and improved 111 miles of highway, of which 48 miles were taken into and became a part of the State highway system, under the provisions of the Martineau Road Law of 1927 (act 11, Acts 1927, page 17). The act creating the district authorized it to borrow money and issue bonds therefor to construct the proposed improvements, and this it did. These bonds are being paid by the State under the Martineau act, *supra,* but no provision was there contained for State maintenance of the 63 miles of road which were not taken into the State highway system.

The special act creating the district provides that "The district shall not cease to exist upon the completion of the roads, but shall continue to exist for the purpose of preserving them and keeping them in repair."

While the act contains express authority to issue bonds with which to raise money for construction purposes, this authority does not appear to have been conferred for maintenance purposes.

The 1927 session of the General Assembly, however, made provision for maintenance of roads constructed by improvement districts which were not taken into the State highway system. This authority is found in act 112, Acts 1927, page 312. Section 9 of this act reads as follows: "With the approval of the county court, the commissioners in each district whose roads are not wholly included in the State highway system may annually, as

necessary, levy a tax not to exceed one per cent. on the assessed benefits in the district, for the purpose of constructing, repairing and maintaining roads of the district which are not included in the State highway system, and for such purpose, in order not to delay such necessary work, such road improvement district may issue and sell certificates of indebtedness, bearing interest at a rate of not exceeding six per cent. per annum, and for an amount not exceeding one annual tax, which certificates shall be and are hereby made negotiable, and shall mature and be made payable within one year after their issuance, and shall constitute a lien and charge against the funds of such district. Provided this section shall not repeal section one (1) of act 180 of the Acts of the General Assembly of 1923."

The 1931 session of the General Assembly passed an act numbered 63 (page 171) creating a fund to be known as "County Highway Fund," paragraphs (g) and (h) of § 1 of this act containing the following provisions in regard to its disbursement:

"(g) From the allotment made to each county, as provided for in paragraph 'f', the State Treasurer shall deduct the amount required to pay seventy-five per cent. (75%) of the maturing bonds and interest of all bonds issued by road improvement districts issued since February 4, 1927, or hereafter issued by existing road districts or annexes to existing road districts, and fifty per cent. (50%) of the maturing bonds and interest of all bonds issued by road improvement districts created after the passage of this act. The amounts for retiring such road district bonds issued by districts of any county shall be deducted from that particular county's allotment and be placed in the State Treasury to the credit of the respective districts. It being distinctly understood that no part of the allotment from one county shall be used for retiring road district bonds of any other county.

"(h) The entire allotment of each county, where there are no such outstanding road bonds, and the residue due each county where there are such outstanding road

bonds, shall, after deducting the respective seventy-five per cent. (75%) and fifty per cent. (50%) of such maturing road bonds and interest, be remitted within ten days (10) after such allotment to the county treasurer of each county for credit to the county road fund, to be disbursed by the county judge of said county for any of the following purposes:" * * *

The third paragraph of § 6 of this act reads as follows: "Road district bonds under the terms of this act shall apply to all road district bonds issued since February 4, 1927, and all road maintenance district bonds in each of said counties, and to the payment of any bonds or coupons for improvement of public thoroughfares issued since February 4, 1927, where such district was organized under act 126 of the Acts of the General Assembly of 1923 and amendments thereto, and under act 183 of the Acts of the General Assembly of 1927 and amendments thereto, or organized under other existing laws."

Under the authority of § 9 of the act of 1927, *supra,* the road commissioners petitioned the county court for authority to levy a tax of one-half of one per cent. of the assessed benefits of the lands in the district for the purpose of repairing and maintaining the roads of the district not taken into the State highway system, and, pursuant to this authority, which the county court granted, the tax was levied. The tax thus levied amounted to $20,966.66, of which $15,176.15 was collected. The balance was not paid by the landowners, and is now delinquent. Upon levying this tax, the commissioners issued, in the name of the district, certificates of indebtedness amounting to $8,221.85, covering that amount of borrowed money.

Under act 63 of 1931, *supra,* there was allotted to Arkansas County, for the year 1931, the sum of $46,950.25, of which $40,641.50 was paid to the county treasurer to the credit of the "county highway fund" of that county. The balance of $6,308.75 was paid to the road

improvement district by the State Treasurer under the supposed authority of act 63 of the Acts of 1931, *supra.*

This suit was brought by the county judge of Arkansas County to restrain further payments of the county highway fund to the improvement district, and to recover from the district the payment made. The chancellor granted the relief prayed, and this appeal is from that decree.

The question for decision is therefore whether the certificates of indebtedness issued by the district pursuant to the act of 1927, *supra,* are maintenance bonds within the meaning of the act of 1931, *supra.*

We think the legislative scheme as to maintenance of improvement district roads not taken into the State highway system was to provide, when necessary and when authorized by the county court, an annual tax for that purpose not exceeding one per cent. of the betterments, but that this revenue might be anticipated by the issuance of certificates of indebtedness to be paid out of the revenues when collected. We are also of the opinion that these certificates of indebtedness are not bonds within the meaning of paragraph 3 of § 6 of act 63 of the Acts of 1931.

It is not contended that the improvement district has any bonds issued subsequent to February 4, 1927, unless the certificates of indebtedness referred to are such bonds, and it is our opinion that the word "bonds," as used in act 63 of 1931, was used in its technical sense, and that the certificates of indebtedness in question are not embraced within that meaning.

Certificates of indebtedness cannot be issued until the authorization of the county court has first been obtained, and their issuance is predicated upon a tax levied for their payment. Certainly these certificates of indebtedness are not to be twice paid, first with the proceeds of the tax levy and again from the county's part of the county highway fund. Nor is to be supposed that this tax money should first be collected from the land-

owners and later returned to them when the county had been allotted its proportionate part of the county highway fund.

This one per cent. maintenance tax is levied annually, if at all, and the authorization of the county court must first be obtained in each instance, and certificates of indebtedness may or may not be issued when this authorization has been obtained, but, if and when issued, they are payable out of this annual levy.

The word "bond" is not ordinarily applied to short-time obligations. Bonds are ordinarily issued to cover a loan payable over a period of years, while the payment of the certificates of indebtedness in question was contemplated out of the revenue derived from the tax of a single year, and within one year after their issuance. In other words, the issuance of the certificates of indebtedness was authorized as a temporary expedient whereby the collection of the tax for a single and particular year was anticipated and used in advance of its collection.

Cases such as *Arkansas State Highway Commission* v. *Kerby,* 175 Ark. 652, 300 S. W. 377, are cited as authority to support the contention that the terms "bonds and certificates of indebtedness" are used interchangeably, and as being synonymous in the road legislation relating to their issuance and payment.

It was held in the Kerby case, *supra,* that the Martineau Road Law, authorized payments on the construction cost of the roads built by the various road improvement districts, whether evidenced by bonds or by certificates of indebtedness. But, as was there pointed out, this was true because the purpose of that legislation was to assume and pay the construction costs of the roads constructed by the various road improvement districts in the State, however evidenced.

That holding was reviewed in the case of *Gaster* v. *Dermott School District,* 184 Ark. 536, 42 S. W. (2d) 990, and the distinction was pointed out between bonds and other evidences of indebtedness, and the subject need not be again reviewed.

The court below was therefore correct in holding that the improvement district had no right to have its maintenance certificates of indebtedness paid out of the "county highway fund," and the decree must therefore be affirmed, and it is so ordered.

STATE *v.* BROOKS.

Crim. 3810

Opinion delivered July 11, 1932.

Robert F. Smith and *Guy Amsler,* for appellant.

H. K. Toney and *E. P. Toney,* for appellee.

SMITH, J. The issues presented on this appeal sufficiently appear from the recitals of the judgment from which this appeal comes. This judgment reads as follows:

"On this day these two causes, being consolidated, coming on to be heard, the State being present by Hon. George H. Holmes, prosecuting attorney, and the defendants being present by their attorney, E. P. Toney, and both sides agreeing to submit the cases to the court upon an agreed statement of facts, which was done, and, after argument of counsel, the court finds:

"That Will Craig is a resident of Chicot County, Arkansas, and hunted deer in said county without having paid a State license so to do, but had paid for a Chicot County license.

"That Claud Brooks is a resident of Ashley County, Arkansas, and hunted deer in Chicot County, Arkansas, with dogs, and had not paid State license on dogs but had paid Chicot County license on dogs.

"That both cases arise under the 1923 special act numbered 678, approved March 26, 1923.

"That so much of § 4773 of Crawford & Moses' Digest, and so much of § 4778 of Crawford & Moses' Digest as requires a State license on dogs, as well as a State license to an individual, to hunt in Chicot County, Arkansas, was superseded by said special act numbered 678 of the Acts of the General Assembly, approved March 26, 1923, and said special act repealed that part of said sections of Crawford & Moses' Digest (in so far as it applied to Chicot County).

"It is therefore by the court ordered and adjudged that the said 1923 special act, numbered 678, supersedes that part of §§ 4773 and 4778 so far as a State license for dogs or for men to hunt in Chicot County, and that part of said Crawford & Moses' Digest is repealed."

The controlling question is the one of law, whether special act 678 of the Acts of 1923 (Special Acts 1923, page 1771) supersedes §§ 4773 and 4778, Crawford & Moses' Digest, in so far as they apply to Chicot County. The court below held that they did, and we concur in this view.

Another statement of the question is, whether, having taken out a license required by the special act, the defendants were required also to take out a State license to hunt in Chicot County.

Sections 4773 and 4778, Crawford & Moses' Digest, are parts of act 276 of the General Acts of 1919 (General Acts 1919, page 204) creating the Fish and Game Commission. This is a comprehensive act for the protection of the wild life of the State. Section 4 of this act, which appears as § 4773, Crawford & Moses' Digest, fixes the State license fees for hunting and fishing. Section 9 of this act, which appears as § 4778, Crawford & Moses' Digest, makes it unlawful to hunt any deer, etc., with a dog without first procuring a license for each dog so used, for which license the sum of $1.50 shall be paid.

At the 1923 session of the General Assembly, special act 678 was passed (Special Acts 1923, page 1771), which

was an act entitled, "An act to increase, propagate, preserve and protect the game and fish of Chicot, Desha and Phillips counties, Arkansas, and for other purposes." This act provides a comprehensive system for the protection of game and fish in the three counties named, and leaves no doubt that it was intended to supersede the general game and fish law in those counties. The special act embraces many subjects comprehended in the general fish and game law, and many of its provisions are similar, if not identical. This special act was passed prior to the adoption of the constitutional amendment prohibiting the passage of local or special bills, and was upheld as valid legislation in the case of *Merritt* v. *Gravenmier,* 169 Ark. 779, 277 S. W. 526, where it was said: "The General Assembly of 1923 enacted still another local statute (Acts 1923, p. 1771) covering Chicot, Desha and Phillips counties, and providing a complete game and fish law for these three counties, with six game commissioners, two from each county, to enforce its provisions. This statute contains a complete scheme for the protection of game and fish and the regulation of taking the same, similar to the general statutes of the State creating the Fish and Game Commission. This statute provides for license fees similar to the general law for taking game and fish, prescribes open seasons and closed seasons, a daily bag limit and catch, and requires all persons fishing or hunting to pay a license except persons under sixteen years of age."

Section 5 of special act 678 provides, in separate paragraphs, the fees to be paid in each of the three counties there included. The portion of this section relating to Chicot County reads as follows:

"For Chicot County.

"1. Every person fishing with artificial bait shall pay the sum of one ($1) dollar and ten cents ($0.10).

"2. Every person a resident of Arkansas and over the age of sixteen years who desires a license to kill any kind of game in accord with the provisions of this act,

shall pay an annual license of five ($5) dollars and twenty-five cents ($0.25). Provided, that should such person desire to secure license without the privilege of hunting or killing bear, deer and turkeys, such license shall be the sum of two dollars and twenty-five cents ($2.25). Every person keeping a dog for the purpose of hunting deer or quail shall, before using such dog, secure a license for such dog and pay therefor the sum of one dollar and ten cents ($1.10), as other licenses herein provided for are paid."

We think the effect of this special act is to prescribe the license fees to be paid in the counties of Chicot, Desha and Phillips, and that these license fees are not in addition to the fees charged and collected by the State Fish and Game Commission under the general statute, but are to their exclusion. In other words, to hunt and fish in Chicot County one is required to pay only the fees for hunting and fishing in that county, and is not required to pay the State license fee in addition. The defendants paid the fees required in Chicot County, and are not required to pay any other.

At the 1927 session of the General Assembly an act was passed numbered 160 (Acts 1927, page 556), entitled, "An act to protect and propagate game birds and animals and other wild life, to regulate the taking thereof, and for other purposes."

This act of 1927 contains various regulations in regard to hunting and fishing which we need not consider, as that act expressly provides that it shall not repeal special act 678 of the General Assembly of 1923 except in so far as it affects the open and closed seasons and bag limits for game and the provisions of the special act in regard to fishing with artificial bait.

As the provisions of the special act have not been repealed in so far as they relate to the charge against the defendants in this case, who have complied with this special act, the judgment of the court below must be affirmed, and it is so ordered.

MEHAFFY, J., dissents.

TERBIETEN *v.* COLUMBIA SCALE COMPANY.

4-2641

Opinion delivered July 11, 1932.

[redacted]

Roy Gean and *G. L. Grant,* for appellant.

Clinton R. Barry, for appellee.

HUMPHREYS, J. Appellee obtained a judgment for $165 against appellant in the circuit court of Sebastian County, Fort Smith District, for an alleged balance due on the purchase price of a weighing scale purchased by appellee from appellant on order. The scale was sold on the installment plan under written contract, the unpaid purchase money being evidenced by a note. The contract and note were introduced in evidence. The contract contained the following paragraph:

"You may ship me one Columbia weighing scale, freight prepaid. It is sold to me with the understanding that I may return it to you with or without reason at any time within thirty days from date of arrival of the scale, freight collect, instead of paying the purchase price. Should I not ship it back to you by freight only, within thirty days from date of arrival, I will pay you the purchase price, one hundred and ninety-five dollars. Fifteen dollars per month in equal consecutive monthly installments, the first payable thirty days after date of arrival; the remaining installments on the same date of each month thereafter."

Appellant failed to return the scale, and, when this suit was brought for the balance of the purchase money, he interposed the defense that the scale was mechanically

defective and wholly worthless, relying upon an implied warranty in the sale and purchase of the scale that it was reasonably fit for the purpose for which it was intended.

Appellant offered to introduce testimony showing that the scale was worthless, and of no value, on account of mechanical defects therein, which was excluded by the court over his objection and exception. The objection and exception, however, was not preserved in his motion for a new trial, and therefore its admissibility cannot be determined by this court on appeal. *Trumbull* v. *Martin,* 137 Ark. 495, 208 S. W. 803; *Blair Milling Company* v. *Jones,* 181 Ark. 1145, 24 S. W. (2d) 319.

Only one ground was assigned by appellant in his motion for a new trial, which is as follows:

"The court erred in peremptorily instructing the jury to return a verdict in favor of the plaintiff."

The note and contract, with evidence to the effect that appellant did not return the scale, constitutes the record in the case, and, upon the record as made, it was the duty of the trial court to peremptorily instruct a verdict against appellant.

No error appearing, the judgment is affirmed.

RAILWAY EXPRESS AGENCY, INC., *v.* H. ROUW COMPANY.

4-2639

Opinion delivered July 11, 1932.

A. M. Hartung and *Warner & Warner,* for appellant.
D. H. Howell, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Washington County to recover damages growing out of the shipment of a car of strawberries from Mansfield, Arkansas, to Denver, Colorado.

In addition to alleging specific acts of negligence on the part of appellant as grounds for a recovery, appellee alleged appellant's negligent failure to deliver the berries in as good condition as they were when it received them for shipment.

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

Before the introduction of any testimony, appellee elected to rely upon its allegation of appellant's common-law liability, and the case was tried and submitted upon that theory, resulting in a verdict and consequent judgment against appellant for $434.60, from which is this appeal.

The testimony introduced by appellee was to the effect that, when the berries were delivered to and accepted by appellant for shipment, they were firm and otherwise in good condition. According to expert inspection, they were U. S. No. 1, but, when delivered to the consignee, they had deteriorated in quality from ten per cent. in some crates to forty-five per cent. in others. This proof raised the presumption under the allegation of

common-law liability that appellant had negligently failed in its duty in properly caring for the berries in transit and cast the burden of proof upon appellant to show that the deterioration was not due to any negligence on its part.

Appellant first contends for a reversal of the judgment on the ground that the undisputed evidence reflects that it properly iced the refrigerator car containing the berries to maintain the temperature therein to preserve the berries, and that the deterioration in quality was the result of rhizopus and leather rot. The United States expert inspector, as well as other witnesses who made an inspection of the berries when they reached their destination, testified that the tape of the recording thermometer in the car showed a final reading of 44 degrees. This thermometer was placed in the car after it was sealed at Mansfield for shipment one foot above the load and eighteen inches back of the door and registered the temperature on the tape attached during the period of transportation. The tape itself was introduced in evidence and inspected by the jury. According to the registration on the tape, the temperature in the car was reduced to 65 degrees by twelve o'clock on the night of the 10th of May to 60 degrees at noon on May 11, to 52 degrees by midnight, and to 44 degrees at noon May 13, when the car was delivered to the consignee. After leaving Monett, the car was not re-iced until it arrived in Kansas City, at which time the ice in the bunkers was four inches below the top. It was not again re-iced until the car arrived in Pueblo, twenty-four hours later, at which time the ice was twenty-six inches below the top of the bunkers. D. C. Buel testified, as an expert, that, if the berries had been properly cared for in transit, they would have stood up in good marketable condition for six or eight days.

In view of the testimony detailed above, we cannot agree with appellant that the undisputed evidence reflects that it maintained the proper temperature in the car by sufficient icing to preserve the berries. According

to the testimony, for the first thirty hours in transit, the temperature remained above fifty degrees and never did get down to 44 degrees until the car reached its destination. The high temperature maintained in the car, together with the fact that the ice in the bunkers was permitted to sink down four inches at one time and twenty-six inches at another before being re-iced, and together with the further fact that the berries would have remained in good marketable condition for six or eight days if properly cared for in transit, are strong circumstances in contradiction of the testimony introduced by appellant to the effect that it sufficiently iced the car to have preserved the berries in transit. The verdict and judgment are supported by substantial evidence.

The testimony set out above differentiates the instant case from the case of *Railway Express Agency, Inc.*, v. *S. L. Robinson & Company,* 184 Ark. 660, 43 S. W. (2d) 543, cited and relied upon by appellant as ruling this case.

Appellant also contends for a reversal of the judgment because the trial court erred in refusing to give its requested instructions Nos. 2 and 7. These instructions relate to negligent delay in delivery of the berries, and were properly refused because appellee elected not to rely upon that specific allegation of negligence and introduced no evidence upon that issue.

Appellant also contends for a reversal of the judgment because the court refused to give its requested instructions Nos. 3 and 4. These instructions relate to negligence in failing to furnish proper equipment. These specific allegations of negligence were likewise abandoned by appellee before any evidence was introduced, so the instructions were properly refused. They were not responsive to either the pleadings or testimony introduced in the case.

Appellant also contends for a reversal of the judgment because the court gave appellee's requested instruction No. 3 relating to measure of damages. The instruction conforms to the law relative to the measure of dam-

ages announced in the following cases: *C. R. I. & P. Ry. Co.* v. *Walker,* 147 Ark. 109, 227 S. W. 12; *M. P. Rd. Co.* v. *Alma Cash Store,* 168 Ark. 823, 271 S. W. 453.

Appellant also contends for a reversal of the judgment because written notice of its claim was not filed within the time specified in the uniform express receipt issued and delivered to appellee by appellant when it received the berries for shipment. The provision provided in the express receipt is as follows:

"Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence, as condition precedent to recovery claims must be made in writing to the originating or delivering carriers within six months after the delivery of the property, or, in case of failure to make delivery, then within six months and fifteen days after date of shipment."

The notice given was in the form of a letter and is as follows:

"H. Rouw & Company, Van Buren, Arkansas.

"Shippers of Fruits & Vegetables, Distributors of Bushel Baskets, Fruit & Vegetable Packages

"Van Buren, Ark., Nov. 9, 1929.

"R. E. Turner,
"Claim Agent Ry. Ex. Agcy.,
"Little Rock, Arkansas.

"This is to notify you that car strawberries IC 4843 from Mansfield, Ark. May 10, 1929, to Denver, Colo., was damaged account of improper refrigeration and handling in transit.

The exact amount of loss will be determined as soon as possible, and we request you make thorough investigation, as we will file claim against you for loss sustained.

"Yours truly,
"H. Rouw Company,
"By D. C. Buel.

"Mailed Nov. 9, 1929."

The letter was written and mailed within six months after the delivery of the berries to the consignee, and within time for appellant to have received it before the time expired. D. C. Buel testified that later he notified appellant of the amount claimed for damages. We think the letter complies substantially with the clause in the receipt requiring notice to be given.

No error appearing, the judgment is affirmed.

PERRY COUNTY *v.* GATLIN.

4-2623

Opinion delivered July 11, 1932.

Dean, Moore & Brazil, for appellant.

Evans & Evans, Wilson & Wilson and *Bullock & Priddy,* for appellee.

MEHAFFY, J. The appellant, Perry County, on June 26, 1931, filed in the chancery court of Perry County the following complaint:

"MOTION FOR SUMMARY JUDGMENT AGAINST SHERIFF OF YELL COUNTY, ARKANSAS

"Plaintiff states that:

"Plaintiff is the owner of a valid and subsisting judgment against Morgan Utilities, Inc., in the sum of

$10,276.94 obtained in this cause on the first day of September, 1930, which now remains wholly unpaid.

"On or about the.....day of November, 1930, the plaintiff caused to be issued by the clerk of this court an execution upon said judgment, which said execution was directed to the sheriff of Yell County, Arkansas. Said sheriff was by said execution commanded to make of the estate of said Morgan Utilities, Inc., the sum of $10,-276.94, with interest at the rate of 4 per cent. per annum from April 22, 1930, together with $27.70 costs.

"Said execution was promptly delivered to Baxter Gatlin, who was then sheriff of Yell County, but the said Baxter Gatlin has wholly failed and refused to return said execution to the clerk of this court, and plaintiff is therefore entitled to summary judgment against said Baxter Gatlin, and his bondsmen, J. W. Lewis, J. W. Wilson, Lynn Wilson, and C. C. Sharpe, in the sum of $11,577.77, which is the amount called for in said execution plus 10 per cent. penalties.

"A certified copy of the bond of the said Baxter Gatlin, as the former sheriff of Yell County, and signed by said J. W. Wilson, Lynn Wilson, J. W. Lewis and C. C. Sharpe, is filed herein, marked Exhibit A and made part hereof.

"Wherefore plaintiff prays that it be given summary judgment against Baxter Gatlin, J. W. Wilson, Lynn Wilson, J. W. Lewis and C. C. Sharpe in the sum of $11,577.77, together with any and all other legal and equitable relief to which plaintiff may be made to appear entitled, whether specifically herein prayed for or not."

A copy of the official bond of Baxter Gatlin as the former sheriff of Yell County, principal, and J. W. Wilson, Lynn Wilson, J. W. Lewis and C. C. Sharpe as sureties is attached.

The motion for summary judgment against the sheriff of Yell County, Arkansas, and his bondsmen, above set forth, was filed in the chancery case of Perry County, plaintiff, against S. R. Morgan *et al.*, defendants, in the Perry Chancery Court, on the 26th day of June, 1931.

On that day the plaintiff in that case, the appellant here, caused the clerk of the Perry Chancery Court to issue the following summons requiring Baxter Gatlin, J. W. Wilson, Lynn Wilson, J. W. Lewis and C. C. Sharpe to answer the summary motion above set forth:

"IN THE CHANCERY COURT OF PERRY COUNTY, ARKANSAS

"Perry County .....Plaintiff,
v. No. 1006
"S. R. Morgan *et al*.....Defendants.

"The State of Arkansas to the sheriff of Yell County:

"You are hereby commanded to summon Baxter Gatlin, J. W. Wilson, Lynn Wilson, J. W. Lewis, C. C. Sharpe to answer in twenty days after the service of this summons upon them a complaint filed against them by Perry County in the chancery court of Perry County, Arkansas, and warn them that same will be taken for confessed; and you will make due return of this summons on the first day that said court is in session after ten days after the issuance hereof.

"Witness my hand and the seal of this court this 26th day of June, 1931.

"J. R. McBath, Clerk."

This summons was directed to the sheriff of Yell County and was sent to him or delivered to him. It was served by the sheriff of Yell County in Yell County upon each of the appellees on the 6th day of July, 1931, as shown by the following return which was filed in the office of the clerk of the Perry Chancery Court on the 17th day of July, 1931.

"State of Arkansas, County of Yell.

"On the sixth day of July, 1931, I have duly served the within by delivering a copy, and stating the substance thereof, to the within named Baxter Gatlin, J. W. Wilson, J. W. Lewis, Lynn Wilson and C. C. Sharpe, as I am herein commanded.

"Buford Compton, Sheriff,
"By J. C. Caviness, D. S."

On July 17th, appellees filed a petition for permission to appear for a special purpose. The petition was granted, and appellees filed the following motion to dismiss petition for summary judgment:

"MOTION TO DISMISS MOTION FOR SUMMARY JUDGMENT

"Comes now Baxter Gatlin, J. W. Wilson, J. W. Lewis, C. C. Sharpe and Lynn Wilson, by permission of this court, for the special purpose of this motion only, and move the court to dismiss the motion for summary judgment filed in this cause, and to quash the writ issued thereon, and for grounds state:

"That the cause of action, if any, of plaintiff in said summary proceeding, arose in Yell County, and that the venue is wrongfully laid in Perry County, Arkansas.

"That plaintiff obtained the issuance of summons for your petitioners from the clerk of the court, directed to the sheriff of Yell County, where service was had.

"Your petitioners pray this court to dismiss plaintiff's motion and quash the writ issued thereon for want of jurisdiction.

"Wilson & Wilson,
"Solicitors for Petitioners."

The court sustained appellee's motion to dismiss, to which ruling of the court the appellant objected and saved its exceptions, and the case is here on appeal.

Appellee first contends that the case should be affirmed because appellant did not comply with rule IX. Appellant made a general statement of the issues, but, even if insufficient, the abstract by the appellees supplies this deficiency.

It is contended by the appellee that the Perry County Chancery Court had no jurisdiction because the defendants lived in Yell County, and were all served in Yell County, and they cite *Milor* v. *Farrelly,* 25 Ark. 353. That was a case brought in the Pulaski Circuit Court, and Milor was sheriff of Sebastian County, and the court said:

"The law under which these proceedings were had is silent as to where the motion should be made, and as nothing can be taken by intendment, and as the general law of the State provides that suits be commenced in the county where the defendant resides or may be found, and as the remedy created is against the securities as well as the sheriff, and as only three days' notice is required, we cannot place a construction upon the statute which would require parties living in one part of the State to appear before the circuit court of a distant county upon only three days' notice, especially when such a construction can only be made by supplying by intendment what the statute does not express."

In the case of *Smith* v. *Drake,* 174 Ark. 715, 297 S. W. 817, in discussing the jurisdiction of the court, where judgment was issued on an execution in one county, and served upon the sheriff and the sureties on his bond in another county, we said: "The circuit court of Jackson County had jurisdiction in this case. There was no suit pending in any other county, and, to hold that the Jackson Circuit Court, the court out of which the execution issued, did not have jurisdiction, would be to deprive the judgment plaintiff of the remedy given to him by statute."

The same may be said in this case. This judgment was in the court in Perry County, and, unless the judgment creditor can file his motion in Perry County, where the judgment is, he would be deprived of the remedy given him by statute. We therefore hold that the court in Perry County had jurisdiction, and that it is the only court where a motion for a summary judgment against these defendants could be filed. There is no judgment in any other court.

"In most of these States, proceedings for the enforcement of the officer's liability are of a summary character. No new or independent action need be commenced. A motion may be made in the suit in which the execution issued, and a judgment obtained therein against the officer and his sureties for the penalty prescribed by

statute." 3 Freeman on Executions, 368; *Smith* v. *Drake, supra.*

In a case referred to by the appellee, *Edwards* v. *Jackson,* 176 Ark. 107, 2 S. W. (2d) 44, the question we have before us now was not involved. That is a case where a suit was brought in Pulaski County against the sheriff of Montgomery County, his deputy, and members of his posse, and the sureties on his official bond for damages for the alleged wrongful act of the sheriff, and wilful, wanton and negligent killing of her husband, Carl Edwards, in Montgomery County, Arkansas.

It will be observed that this was an original independent suit against the sheriff and the sureties on his bond, and the statute expressly provides that suits of this character must be brought in the county where the cause of action, or some part of it, arose.

This case, as to procedure, is controlled by the case of *Smith* v. *Drake, supra.*

The court erred in sustaining the motion to quash service and in dismissing the motion.

The decree of the chancery court is reversed, and the cause remanded with directions to overrule motion of appellees, and permit them to plead, and to proceed with the trial of the case according to law, and not inconsistent with the principles herein announced.

LIFE & CASUALTY INSURANCE COMPANY *v.* DUNHAM.

4-2680

Opinion delivered July 11, 1932.

John A. McLeod, Jr., and *H. Jordan Monk,* for appellant.

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

MEHAFFY, J. The appellee, Alma Dunham, commenced this action in the Arkansas County Circuit Court against the appellant, Life & Casualty Insurance Company of Tennessee, for the recovery of $435 alleged to be due her from appellant, under a policy of insurance, written on the life of her son, Theodore Clemons. The policy was issued under the industrial plan, and did not require a medical examination prior to its issuance. The application was signed at Stuttgart, Arkansas.

The insured was an inmate of the State Hospital for Nervous Diseases, and it is contended by appellant that he was there as an inmate at the time the application purported to have been signed. The policy is dated in March, 1931. The insured was paroled from the asylum March 20, 1931, and was returned in April, 1931, and died there from general paralysis, caused by syphilis, in June, 1931.

The appellant, in its answer, denied the material allegations of the complaint, and alleged that there was fraud on the part of the insured in obtaining the policy sued on by reason of misrepresentations as to health. It alleges the insanity of the insured at the time the policy was issued, and, as a further defense, pleads a specific

provision of the policy that, should the insured die within two years of the date of the policy, and had, before its date, been treated for a serious disease by a physician, the company would only be liable for the amount of the premiums paid, which it alleged was $3.75, and it tendered that amount in court. The appellant also charged that the policy was issued and delivered through fraud of the said insured, and upon false and fraudulent misrepresentations, warranties and statements of the applicant.

After the evidence was introduced, attorney for appellant stated that they had pleaded fraud in the answer, but they now waive that, and state that no one perpetrated any fraud in obtaining the insurance on the deceased, Theodore Clemons.

The case was tried before a jury, resulting in a verdict in favor of appellee for the full amount stated in the policy. Motion for new trial was filed, which was overruled by the court, and the case is here on appeal.

It is contended first by the appellant that the court erred in its refusal to give instruction No. 1, requested by it. No. 1 reads as follows: "You are instructed to find for the plaintiff in the sum of $3.75."

The appellant contends that Theodore Clemons, the insured, had been treated by a physician for a serious disease and complaint before the date of the policy, and that he died from said disease at the State Hospital for Nervous Diseases within two years from the date of the policy.

The undisputed evidence shows that Gurling, the agent of appellant, solicited the insured.

Mrs. Alma Dunham, the appellee, and the mother of the insured, testified that she had been acquainted with Mr. Gurling some time before this insurance was taken out; he had been coming there collecting on other policies, and he asked witness every time he saw the boy to let him write some insurance on him; that she did not know that he could get insurance, because he had been hurt; that he fell from a building in Little Rock and injured himself, and she did not think she could get any

insurance on him. Mr. Gurling, the agent, said he believed he could, and that he would take it up with the insurance company right away. Gurling had been going to Mrs. Dunham's place for some time, he knew the insured, knew his mother, and knew that he had been in the insane asylum. He also knew that the insured had been seriously injured by falling from the third story of a building in Little Rock, and she told Gurling that he was very nervous and had been put in the hospital, and that he had better have him examined. She told him she would keep the premiums paid up, as she had two other boys with insurance in the same company, and, after she told him this, he wrote the insurance.

It therefore appears from the undisputed testimony that the insured had fallen from the third story of a building, and that the agent knew this, and knew that he had been an inmate in the hospital for nervous diseases, and therefore knew that he had been treated by a physician for a serious ailment. There is no positive evidence that the agent knew he had syphilis, and the probability is that the insured himself did not know what his ailment was. The mother of the insured appears not only to have told him all she knew about the physical and mental condition of the insured, but she told the agent, after telling about his injuries and ailments, that he had better have him examined.

It is true that one might know that a person was in the insane asylum without knowing that he had any serious physical ailment, but certainly one could not know that a person in the insane asylum had fallen from the third story of a building without knowing that he had been attended by a physician for a serious complaint. After the agent knew these things, he did not ask the insured any questions about his health or about doctors, and he did not ask the mother any questions about the insured's health. The agent himself wrote the application, and the insured signed it, but did not read it. The answers in the application were written by the agent, and not by the insured. The application was signed, and

Mr. Gurling delivered the policy later. The insured was working about the hotel, which belonged to Alma Dunham.

The manager of the company was with Gurling when the policy was delivered. When it was delivered, neither the insured nor witness read it.

The evidence of appellee concerning the writing and signing of the application and the delivery of the policy, and her evidence as to what the agent knew about insured's condition are not only undisputed, but they are corroborated by other witnesses.

It is true that the insured was treated before the date of the policy for a serious complaint by a physician, but it is also true that appellant's agent knew of his falling, and of his treatment in the insane asylum. Mrs. Dunham was asked if she knew whether or not a year before that time, or longer, he was afflicted with syphilis. She answered that she did not know, but she knew and told the insurance agent that he had been hurt.

It conclusively appears that, at the time the application was taken, and at the time the policy was delivered, appellant's agents knew that the insured had had a serious complaint, and that he had been treated at the Hospital for Nervous Diseases. If the insurance company knew before the date of the application that insured had been attended by a physician for any serious disease or complaint, whether it knew what the specific complaint was or not, would make no difference. The insurance company did know that he had been attended by a physician for a serious disease, and, if it wished to know what specific complaint, it should have made inquiry.

The record shows that the agent who wrote the application and delivered the policy knew the condition of the insured; knew that he had been in the hospital, and knew that he had had a fall from a third story of a building, but he did not ask the insured any questions, but wrote the application himself with a knowledge of all the facts detailed above.

We have held that knowledge affecting the rights of the insured which comes to the agent of the insurance company, while he is performing the duties of his agency, in receiving applications for insurance and delivering policies, becomes the knowledge of the company, and the insurance company is bound thereby in spite of a provision in the policy to the contrary, where the agent who solicited the business was charged with the duty of asking the applicant questions concerning his physical condition. *Southern Insurance Co.* v. *Floyd,* 174 Ark. 372, 295 S. W. 715.

There is no dispute about the fact that Mr. Gurling, the agent of the company, had knowledge of the physical condition of the insured, while he was performing the duties of his agency in receiving the application and delivering the policy, and the agent in this case was charged with the duty of asking applicant questions concerning his physical condition. The undisputed evidence also shows that the agent brought this policy to the insured and said, at the time, that it was for $435, and that it was all right, and they relied on what he said.

It is apparent that the insured and his mother were led to believe by the agent that they were getting a policy for $435. The undisputed evidence shows that, when the policy was delivered, appellee asked the agent, and the agent said the company had agreed to let him write the boy up, and they took the policy, and kept the premiums paid up. $435 is the amount agreed upon, and neither insured nor his mother read the policy. The agent brought it and said it was for $435.

In speaking of insurance contracts, this court said, speaking through Chief Justice HILL: "Insurance contracts are not, as a rule, made like other contracts. They are prepared by one party to the contract, and the other party thereto has no opportunity to deal with his contractor as to the terms, conditions, and limitations of the contract. The only option open to him is to contract or not to contract, and when he contracts it is upon terms

prepared in advance by the other party, and reduced to printed form, which is sought to be as unchangeable as the laws of the Medes and Persians.

"To procure these contracts of insurance, agents are sent forth whose duties are limited to procuring insurance, and various clauses are inserted in the policies, and in the application therefor, disabling the agent from binding the company in any manner not stipulated in the policy. Can one party to a contract thus prevent himself being bound by the ordinary principles governing principal and agent? If a man sends forth an agent and clothes him with authority to do certain acts, his acts within the scope of that authority are binding upon the principal; and moreover, if he clothes him with apparent authority to do certain acts, and privately instructs him to the contrary, and the agent proceeds to do those acts within the apparent scope of his authority, but contrary to his private instructions, still the principal is bound. When an agent does anything within the real or apparent scope of his authority, it is as much the act of the principal as if done by the principal himself." *People's Fire Ins. Co.* v. *Goyne,* 79 Ark. 315, 96 S. W. 365, 16 L. R. A. (N. S.) 1180, 9 Ann. Cas. 373.

In the instant case the company's agent was dealing with a person who, he not only knew, had been in the insane asylum, and had been seriously hurt and was very nervous, but the agent did not ask him a question. He wrote the application himself. He not only knew these facts, according to the evidence of appellee, and knew that the insured was insane, but he knew that the mother with whom he dealt did not read the policy, and probably would not have understood it if she had. And these parties were informed, and the agent of the insurance company was bound to know that they believed, that the insurance policy was for $435, and that this amount would be payable upon the death of the insured.

Appellee also offered in evidence the testimony of F. W. Dunham, the husband of Alma Dunham, but this

was excluded from the jury. He was acting as agent in paying the insurance premiums, and, since he was paying the premiums as agent of the insured, the statement of the agent was competent. Dunham stated that he asked the insurance agent if the insurance was any good, and he said, if the boy should die that night, his mother would get every dollar of it, and witness then paid him the premium.

Appellant states that, since the defense of fraud was waived, the sole defense was the limitation in the policy. If the insurance agent, knowing the facts detailed above, procured the application and delivered the policy, after having led the insured to believe that he was getting a policy for $435, this would constitute a waiver of the limitation in this policy. This, however, is a question of fact for the jury under proper instructions, and it is for the jury to determine whether there was a waiver or an estoppel. If there was, plaintiff is entitled to recover. If there was not, then she is entitled to recover $3.75 only.

Objection was also made to the evidence as to the application. We think, under the circumstances in this case, this evidence was competent because it tended to show that the insurance company's agent did not rely on anything said by either the insured or his mother, and, if appellee's testimony is true, led them to believe that they were getting a policy for $435.

Appellant next contends that the instructions are erroneous and conflicting. The instructions are in conflict, but we think it is unnecessary to set them out here. The only question, so far as this record is concerned, is whether the insurance company waived the provision in the policy, or is estopped from setting it up, and, as we have already said, these are questions of fact for the jury. There will be no difficulty in the trial court's properly instructing the jury when the case is tried again.

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

Mr. Justice SMITH concurs.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, *v.* CONDRY.

4-2631

Opinion delivered July 11, 1932.

H. M. Jacoway and *Lee Miles,* for appellant.

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

McHaney, J. Appellees are the beneficiaries in a policy of life insurance or beneficiary certificate issued by appellant on the life of George C. Condry, January 20, 1928, in the sum of $1,000. Appellant is a fraternal beneficiary association with a sovereign camp and local camps. Members are initiated into the local camps by a ritualistic form. On or about said date George C. Condry made application to and became a member of England local camp No. 37, and a beneficiary certificate was issued to him by appellant. He paid his monthly dues and assessments to the Sovereign Camp for about three months, when he was stricken with influenza, which later developed into tuberculosis, and from which he died on July 15, 1931. After he was taken ill the local lodge at England paid all his dues and assessments to appellant with its knowledge, consent and approval up to and including October, 1930. Monthly assessments became due the first of each month, and, if not paid before the last of the month, the policy, under the constitution and by-laws, was suspended and could be reinstated only by payment of delinquent assessments and furnishing a certificate of the applicant's then good health. The monthly assessment for November, 1930, was not paid either by the local camp or by said Condry, and in making his report about December 1, 1930, to appellant, the clerk of the local camp returned Condry as delinquent and his policy stood suspended.

On February 20, 1929, the clerk of the local camp wrote Condry the following letter: "At a meeting of the camp Monday night, a collection was taken for your benefit and the sum of $5 was collected, which I inclose. It was also motioned and carried that the camp pay your dues for you until you get able to work and take care of them yourself."

According to appellees' testimony the clerk promised to notify Condry in ample time, if the camp decided to discontinue payments for his account, to permit him to continue them and keep his insurance in force; also that

the above letter was sent to appellant at its home office and its receipt was acknowledged.

On December 11, 1930, the clerk of the camp wrote Condry that the charity fund was exhausted, and that they would not be able to keep up his insurance longer. In this letter he said: "I would suggest that you do not let this lapse. It is $0.85 per month." This letter was misdirected to Condry at Vallier, Arkansas, whereas his known address was Humphrey, and as a result he did not get it until the latter part of January. Thereupon, his wife caused to be sent appellant at its home office money order for $1.70 covering two months dues. Appellant returned same on the ground that it required a certificate of good health from a physician. Later she sent another money order for $0.85, but this was also refused. When Mr. Condry died July 15, appellees thereafter in apt time made proof of death, demanded payment, which was refused, and this suit followed, resulting in a verdict and judgment for appellees.

For a reversal of the judgment against it, appellant first insists that the court should have directed a verdict in its favor at its request. We do not agree with appellant in this regard. Of course, the application, the constitution, the by-laws and the certificate constitute the contract. And it is provided that failure of the member to comply with the laws of the society makes his beneficiary certificate void. He is required to pay his assessments at a certain time, that is, before the end of the month, and, as we understand it, appellant defended on this ground alone that he failed to pay his dues for November, 1930, and failed to furnish a certificate of good health when he did send in his dues, so that the policy remained lapsed and so continued to his death. These are valid requirements, and no officer is permitted to waive them. Even so, it does not prevent appellant from pursuing such a course of conduct as to mislead the insured to his detriment and thereby estop itself from insisting on a forfeiture. At least from January, 1929,

(and perhaps sooner) the local camp at England paid all of Condry's assessments to keep his policy in force up to November 30, 1930, under a written promise to continue to do so "until you get able to work and take care of them yourself." And under the further verbal agreement that, if the camp should at any time discontinue such payments, he would be notified in time to continue them himself before the certificate or policy had lapsed or been forfeited. This latter promise or agreement is corroborated by the letter of the clerk of December 11, 1930, to him in which he said: "I would suggest that you do not let this lapse. It is $0.85 per month." Why would the clerk suggest that he not let it lapse, if it had already lapsed? Evidently the clerk was under the impression at that time that the November assessment had been paid, and that he was notifying him in time to pay the December assessment in accordance with his promise to do so. Of course, the local camp was under no binding obligation to perform a gratuitous service such as payment of the member's dues for any definite time. It could have discontinued to do so at any time, but it could not do so without giving the insured reasonable notice so that he might prevent a forfeiture of his policy. For a period of nearly two years the local camp paid the dues from its charity or home camp funds with the knowledge of appellant and with full knowledge of the fact that the insured was afflicted with tuberculosis. Having adopted and consented to this manner of paying Condry's assessments, and for such a length of time, it would be unconscionable to permit it suddenly to change such conduct without reasonable notice to him in an effort to avoid liability. No notice of any kind was given him until after the policy had been declared forfeited or lapsed, and that upon the report of its own agent. In *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 158, 219 S. W. 759, we held that the local camps or councils in associations such as appellant, and its officers to whom it committed the duty of making col-

lections and remittances, are to be considered as the agents of the governing body, and that such agency is subject to the ordinary rules applicable to agencies of the same general character in the ordinary life insurance business. And to the same effect see *Sovereign Camp, W. O. W.*, v. *Pearson,* 155 Ark. 328, 244 S. W. 344. In the latter case we said: "There was established a course of conduct on the part of the local clerk which was acquiesced in and approved by the Sovereign Camp, which was calculated to mislead Pearson and cause him to believe that the Sovereign Camp was not insisting on the certificate of good health; and to cause him to make his payments believing that he was in good standing with the society. This conduct was such as to estop the appellant from insisting, under the doctrine of the Newsom case, *supra,* on the forfeiture of the policy because of the non-compliance with the by-laws as to reinstatement. See also *Sov. Camp* v. *Richardson,* 151 Ark. 231, 236 S. W. 278; *A. O. U. W.* v. *Davidson,* 127 Ark. 133, 191 S. W. 961. Cases from other jurisdictions are cited to the same effect and relied on in appellee's brief, but it is unnecessary to cite these, as the case is controlled by the doctrine of estoppel announced in *Sov. Camp W. O. W.* v. *Newsom, supra.*"

So here appellant's agent adopted a course of conduct which was acquiesced in and approved by it, which was not only calculated to deceive and mislead Condry, but which did actually do so, by causing him to believe that they would pay his dues, but, if not, would notify him in ample time to pay them himself and prevent a forfeiture. Such conduct was sufficient to estop appellant from insisting on a forfeiture for his failure to pay his November assessment. Nor was it incumbent on Condry to continue from month to month to make tender, as the law does not require the doing of a vain or useless thing. Refusal of appellant to accept on two different offers to pay was sufficient to show that further tenders would be useless.

Complaint is also made of action of the court in giving appellee's instruction No. 2 over its objections, and of the court's refusal to give its requested instruction No. 2. Appellant does not set out in its abstract all the instructions given and refused. We cannot know what they are without going to the record. It may be that its requested instruction No. 2 was covered by other instructions given, and we will so presume in their absence from the abstract. The instruction objected to is a correct declaration of the law as applied to the facts in this case, and is in accordance with what we have heretofore stated.

We find no error. Judgment affirmed.

BUZBEE *v.* HUTTON.

4-2723

Opinion delivered July 11, 1932.

John E. Coates, Jr., and *Chas. W. Mehaffy,* for appellant.

Rose, Hemingway, Cantrell & Loughborough and *Donham & Fulk,* for appellee.

LAMAR WILLIAMSON, Special Judge. This action is to test the constitutionality of act No. 21 of the General Assembly approved February 16, 1931, entitled, "An Act to Make the Office of Separate Chancery Clerk Appointive Instead of Elective, and for Other Purposes." This issue is presented to the court by appellant having undertaken to qualify under the rules of the Democratic party as a candidate for nomination at the primary election to be held August 9, 1932, for the office of clerk of the Pulaski Chancery Court in the manner and within the time prescribed by the rules of the party. The Democratic County Committee declined to permit the appellant to comply with the party rules for the purpose of becoming such candidate on the ground that no such office would be in existence to be filled at the general election because of the provisions of said act No. 21, § 1 of which provides:

"Clerks of chancery courts in counties in which the circuit clerk is not *ex-officio* chancery clerk shall be appointed by the chancellor of the district in which the county is located, and shall hold office for the term of the chancellor making such appointment. Said clerk shall receive an annual salary of forty-two hundred ($4,200) dollars, payable in equal monthly installments and such clerk may appoint or select his own deputies. No appointment shall be made under this act until the term of office of the present incumbents shall expire or the office become vacant."

Appellant then, in apt time, filed in the Pulaski Circuit Court his petition for mandamus making the chair-

man and secretary of the Pulaski County Democratic Central Committee defendants. These defendants plead act No. 21 in justification of their refusal to permit the appellant to qualify as a candidate. To this pleading appellant demurred by alleging that said act No. 21 was void because of the provisions of Amendment No. 14 to the Constitution providing that the General Assembly shall not pass any local or special act. The lower court overruled appellant's demurrer, and, appellant declining to plead further, dismissed his complaint resulting in the present appeal.

The court is of the opinion that the judgment of the lower court should be affirmed.

It is the well known rule of this court that statutes are presumed to be framed in accordance with the Constitution, and should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. *Dobson* v. *State,* 69 Ark. 376, 378, 63 S. W. 796. All doubts as to the constitutionality of a statute are therefore to be resolved in favor of the statute. In *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, this court approved the decision of the Supreme Court of Missouri in *State ex rel.* v. *Yancy,* 123 Mo. 391, 27 S. W. 380, where the court used the following language which expresses well the principle controlling numerous decisions of this court: "The presumption is in favor of the constitutionality of the act, and, before this court would be justified in holding it invalid because in conflict with the Constitution, it should be satisfied of its invalidity beyond a reasonable doubt."

The majority of the court is of the opinion that the question is determined by the decision of this court in *Waterman* v. *Hawkins, supra,* which announces as the controlling principle: "Statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or special in their operation. Though such an act relates to a court exercising jurisdiction over limited territory, it is general in its

operation, and affects all citizens coming within the jurisdiction of the court.

" 'Whether an act of the Legislature be a local or general law must be determined by the generality with which it affects the people as a whole, rather than the extent of the territory over which it operates; and if it affects equally all persons who come within its range, it can be neither special nor local within the meaning of the Constitution.' *State* v. *Yancy, supra.* In the case last cited, the Supreme Court of Missouri held that, under a provision of the Constitution identical with the provision of the Constitution of this State now under consideration, neither an act of the Legislature establishing a separate court, nor one detaching the clerical duties of that court and creating a separate clerk of the court, were local or special acts within the meaning of the Constitution." See also *State ex rel.* v. *Woodruff,* 120 Ark. 406, 179 S. W. 813; *State* v. *Hughes,* 104 Mo. 459, 16 S. W. 489; *State* v. *Shields,* 4 Mo. App. 259; *State* v. *Etchman,* 189 Mo. 648, 88 S. W. 643; *Greene County* v. *Lydy,* 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, p. 274.

The full force of this principle has been recognized in even the more recent decisions of this court. For instance, in the opinion in *Cannon* v. *May,* 183 Ark. 107, 35 S. W. (2d) 70, the court is careful to remark: "In this opinion in the case of *Webb* v. *Adams, supra,* (180 Ark. 713, 23 S. W. (2d) 617) on rehearing, we further said: 'In this connection we do not wish to be understood as impairing in the least the force of the decisions in *State* v. *Crawford,* 35 Ark. 236, which holds that a statute settling accounts between the State and certain parties is a general and not a special act; and in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, holding that statutes establishing or abolishing separate courts relate to the administration of justice, and are not either local or special in their operation. This is in recognition of that principle of State sovereignty under which the State, through its Legislature, may protect its own

interest, and by virtue of it the Legislature may treat every subject of sovereignty as within a class by itself, and bills of that kind are usually held to be general and not local or special laws. There are cases where the State, by its Legislature, commits the discharge of its sovereign political functions to agencies selected by it for that purpose, and such acts have usually been held to be general acts'."

The court again approved the Missouri decisions hereinbefore referred to by stating: "The Supreme Court of Missouri based its holding on the principle that the judicial system of the State was a whole, and that acts dealing with the courts have been usually held general, although not applicable to every court of like nature in the State. The ruling proceeds upon the doctrine that the judicial department of the State is a 'composite unit'."

The clerk of the Pulaski County Chancery Court, under the statutes of this State, is a very vital part of the court organization. Without him there is no court. He is required to perform numerous duties pertaining to judicial functions as well as many administrative matters of the court. Act No. 21 therefore deals directly with the necessary functions of a court for the entire State of Arkansas, and is a general act.

Furthermore, a study of the decisions hereinbefore cited establishes the well-recognized principle that, where there is a specific grant of power conferred by the Constitution upon the Legislature upon any certain or particular subject, an act passed in pursuance of such grant will not be held unconstitutional upon the ground that it is local or special legislation. See also *Kenefick* v. *City of St. Louis,* 127 Mo. 10, 29 S. W. 241; *Spaulding* v. *Brady,* 128 Mo. 658, 31 S. W. 104.

Section 15, article 7 of the Constitution is a specific grant of power conferred by the Constitution upon the General Assembly of Arkansas to establish chancery courts. As will be hereinafter mentioned, the Pu-

laski County Chancery Court has always been treated as unique since its original creation. The Legislature, not being expressly prohibited by the Constitution, is fully authorized to create separate courts of chancery. This necessarily infers the power to provide its complete organization, and there is no constitutional inhibition against providing separate clerks for chancery courts. The clerks of chancery courts are at present the result of legislation and are not constitutional officers. See § 2196, Crawford & Moses' Digest. If the Legislature has the power to create the office of chancery clerk under the provisions of the Constitution, it is not unreasonable to conclude that it also has the power to provide the manner of filling that office, its tenure, and all other necessary provisions to make the organization of the court complete and effective. We therefore conclude that act No. 21 is a general act, not only because it deals exclusively with the functions of a court of Statewide jurisdiction and importance, but because the Legislature in passing the act in question was exercising a specific grant of power conferred upon it by the Constitution of the State.

The majority of the court is also of the opinion that the act is not local or special because it is general in its terms, and is not based upon an unreasonable or arbitrary classification. The act affects every one alike coming within its general terms, and is not to be nullified merely because under present conditions only the county of the seat of the State government happens to fall within the general classification.

A review of the history of the Pulaski County Chancery Court discloses that both the Constitution makers of the State and her General Assemblies have always considered this court as being within a classification unique to Pulaski County. It was created by the act of January 15, 1855, as amended by act of January 13, 1857, under the provisions of the Constitution of 1836. The distinctive classification of this court was recognized

in the Constitution of 1874 by the provisions of § 44 of article 7. It was recognized by the General Assembly as a court of special distinction in act No. 106, approved April 1, 1885, which created the first chancery district of the State, § 18 of the act reciting: "That, inasmuch as the State will necessarily have business, and be interested in cases arising within the jurisdiction of the chancery court of Pulaski County, where the seat of government is situated, the said court shall be provided with a court room and clerk's office, for the accommodation of said chancery court, in the State House building."

Being the seat of the State government, this court exercised jurisdiction over the constitutional officers of the State, and the court may well take judicial knowledge of the fact that every citizen of the State is interested in a large body of the decisions of this court which are applicable to well nigh every department of the State government and organization. Inasmuch as the clerk of this court is exclusively a judicial officer, it cannot be said to be inappropriate that he shall be treated differently from the other clerks of the State who are not exclusively judicial officers. Many cogent reasons for the classification adopted by act No. 21 are suggested in able argument of counsel and come to mind, but suffice it to say that the majority of the court are of the opinion that the classification adopted by the Legislature cannot be said to be either unreasonable or arbitrary.

For either of the several reasons suggested, the judgment of the lower court is correct, and it is therefore affirmed.

Mr. Justice Mehaffy, having certified his disqualification, did not participate.

Hart, C. J., and Kirby, J., dissent.

FEDERAL LAND BANK OF ST. LOUIS *v.* BALLENTINE.

4-2635

Opinion delivered September 26, 1932.

J. R. Crocker and *Cazort & Cronkrite,* for appellant.

SMITH, J. Appellant filed a complaint in the Grant Chancery Court on September 26, 1931, to foreclose a deed of trust executed to it by Virgil Ballentine and wife on May 1, 1922, to secure the payment of a $600 loan. The deed of trust described three forty-acre tracts of land. A decree foreclosing the deed of trust was rendered for the want of an answer on October 26, 1931, and on January 16, 1932, exceptions to the commissioner's report of sale under this decree were heard by the court. The court found that notice of the sale had been given for the time and in the manner required by law, and that the sale had been conducted in accordance with the notice and the decree of foreclosure. The commissioner testified that only one bid was received, this being a bid for $300 for the three tracts of land, which bid was made by appellant. The debt, as adjudged in the decree of foreclosure, was $676.93.

J. R. Matthews, a real estate dealer, testified that he was familiar with the market value of the mortgaged lands and other lands in that vicinity, and that Mr. Ballentine had asked him to sell the entire 120-acre tract of land for $700, but he had been unable to get an offer for it, and that three to four hundred dollars was the fair value of the land, inasmuch as the only house on it—a

four-room house—had tumbled down and the cleared land presented the appearance of not having been worked for several years and had grown up in brush.

No other testimony was offered, and the court made the finding that the bid was "wholly inadequate," inasmuch as a $600 loan had been made on the property and the judgment was for $676.93. This appeal is from the decree refusing to confirm the commissioner's report of sale for the reason stated.

It is said in the briefs in explanation of the decree appealed from that the court did not confirm the report of sale for the reason that appellant's bid did not equal the amount of the loan secured. This, we think, was error.

There is no intimation of fraud or other inequitable conduct on appellant's part relating to the sale, except only that appellant did not bid the amount of the debt secured by the deed of trust.

The rule has long been established in this State that mere inadequacy of consideration, however gross, unaccompanied by fraud, unfairness or other inequitable conduct in connection with the sale, is, of itself, insufficient to justify the court in setting the sale aside and refusing confirmation. Of the numerous cases to this effect one of the latest is that of *Free* v. *Harris,* 181 Ark. 646, 27 S. W. (2d) 510, where we said: "In *Martin* v. *Jirkovsky, supra,* [174 Ark. 417, 295 S. W. 365], this court quoted from *George* v. *Norwood,* 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143, 7 Ann. Cas. 171, the following: 'When a sale is made in all respects according to the terms of the decree, and neither fraud, mistake nor misrepresentation can be alleged against it, the faith of the court is pledged to ratify and perfect it. * * * There is a uniform current of decisions settling that official sales will not be opened on mere representations that more may be obtained for the property. This well-known practice is in accord with the policy of our law respecting such sales, which are required to be made after advertisement sufficient to give publicity, by public outcry, to the highest

bidder. It is of the greatest importance to encourage bidding by giving to every bidder the benefit of bids made in good faith and without collusion or misconduct, and at least when the price offered is not unconscionably below the market value of the property. Nothing could more evidently tend to discourage and prevent bidding than a judicial determination that such a bidder may be deprived of the advantage of his accepted bid whenever any person is willing to give a larger price. The interest of owners in particular cases must give way to the maintenance of a practice which, in general, is in the highest degree beneficial.' "

No brief has been filed on behalf of appellee, but the suggestion has been advanced in our consultation that the chancellor knew—as we and all others know—that the present is a period of great depression and for that reason the chancellor had the discretion to refuse to confirm the sale and to order a resale, and the case of *Winfree* v. *Jones,* 183 Ark. 679, 38 S. W. (2d) 28, is cited to support that view.

That case, however, was not one in which the parties thereto were seeking to enforce contractual rights. It was a suit for partition of lands among the heirs who had inherited it, which land could not be partitioned in kind because of the large number of heirs, and a sale of the property had been ordered to effect the division. It appeared from the recitals of the decree ordering the sale that the chancellor had been induced to make this order by the statement of one of the heirs made in open court that he would see that the lands brought their fair market value. This the heir failed to do, and the lands were sold for a grossly inadequate price, the sale having been made on a day when twenty banks in the State had closed their doors.

The instant case is not one for partition, as was the case of *Winfree* v. *Jones, supra,* but is one to enforce the contractual right of having the mortgaged land sold in satisfaction of the mortgage debt. This relief had been

awarded by the court and a sale ordered, and a sale was had pursuant to the direction of this decree, and the question presented by this appeal is that of the right to have the report of the sale confirmed. We think that right exists and should be enforced. *McGown* v. *Sandford,* 9 Paige (N. Y.) 290; *Pewabic Mining Co.* v. *Mason,* 145 U. S. 349, 12 S. Ct. 887; Henderson's Chancery Practice p. 862. *Federal Land Bank* v. *Blackshare,* 183 Ark. 648, 38 S. W. (2d) 30.

Now, the law is equally as well settled that, while approval of sales will not be withheld because of inadequacy of consideration, yet, when the consideration is grossly inadequate, the court will seize upon slight circumstances of fraud or unfairness to afford relief. *Union & Planters' Bank & Trust Co.* v. *Pope,* 176 Ark. 1027, 5 S. W. (2d) 330. But that doctrine has no application to the facts of the instant case. There are no circumstances indicating fraud or oppression, nor is there a showing that the sale was for a price grossly less than the market value at the time of the sale. The undisputed testimony is to the contrary. The only evidence in the record on the subject is to the effect that the land sold for about its present market value. It is true, of course, that the sum bid by appellant was just half the original loan, but, so far as the record before us discloses to the contrary, the loan may have been made for a higher per cent. of the market value than is customary. However, it is undisputed that the only house on the land was in a "tumbled down" condition, and the cleared land did not appear to have been worked for the past several years and had been allowed to grow up in brush, and for these reasons the market value was placed at from three to four hundred dollars by the only witness who testified on the subject of value.

The report of sale should, therefore, have been approved, and the decree denying that right will be reversed, and the cause will be remanded with directions to that effect.

MEHAFFY, J., (dissenting). I do not agree with the majority in holding that the chancellor should have confirmed the sale. The mortgage and note were executed in May, 1922. Payments of $21 each were to be made semiannually. This $21 payment included interest and a payment on the principal. The last payment was not due until May, 1955. The appellees paid for seven and one-half years. All the payments were made up to and including the payments of November, 1929. After the November, 1929, payment no other payments were made. The Federal Land Bank in its complaint alleged that there were three payments due and unpaid, and that, under the terms of the mortgage, it had on July 1, 1931, declared the entire debt due, and soon thereafter filed suit to foreclose the mortgage, making the mortgagors and Bruce Vanlandingham and his wife parties defendants. It was alleged the Vanlandinghams were cultivating part of the land. The defendants did not answer or appear, and the court on the 26th day of October, 1931, entered a decree for $676.93 and for costs, and provided that the whole amount should bear interest at the rate of 8 per cent. per annum. The note and mortgage provide that the defaulted installment shall bear interest at the rate of 8 per cent. per annum, but they do not provide for 8 per cent. on the installment not due. In addition to the testimony of John R. Matthews, quoted in the majority opinion, he testified that the forty-acre tract he owned adjoining the Ballentine place was worth $5 per acre. If the Ballentine land was worth as much as the adjoining land, it would be worth $600 at a time when there was practically no market for land. This witness also testified that Mr. Ballentine was sick and confined to his bed with what he thought was tuberculosis six months ago when he was on the land. The majority opinion cites numerous authorities, but in my opinion none of them sustain the decision of the court in this case.

In the case of *George* v. *Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143, 7 Ann. Cas. 171, no such conditions existed as exist now, but the court in that

case said: "The evidence shows that the price bid was not inadequate." In that case the only ground alleged for setting aside the sale was inadequacy of price, and the court held that the price was adequate. This was the only question before the court. The court announced certain general rules about which there is no controversy. Another case cited is *Martin* v. *Jirkovsky,* 174 Ark. 417, 295 S. W. 365. In that case the court said: "If there had been any misfortune or any unseen thing that prevented him from being present, or if there had been any evidence of fraud on the part of the defendant or the purchaser, the chancellor would have been justified in setting aside the sale."

The next case relied on is *Free* v. *Harris,* 181 Ark. 644, 27 S. W. (2d) 510. In that case the court said: "It will be seen that the only ground alleged for setting aside the sale and refusing confirmation was the inadequacy of the price for which the sale was made." The court also said: "While it is alleged that the sale price was inadequate, the preponderance of the evidence is that such is not the case."

Henderson, Chancery Practice, page 862, is cited. That author says: "It is the duty of the officer directed to make a sale of property under a judgment or decree of court to put it up for sale at such a time and under such circumstances as to make it bring the best price, without injuring the party entitled to the proceeds of the sale by delaying the payment of his debt. This duty must be carefully observed by the master, because if, in violation of his duty, he is proceeding to sell property, under a decree in chancery, at an improper time or under improper circumstances, when such sale must necessarily result in a sacrifice of the property, as during the raging of a pestilence, or while there is a threatened invasion, which will destroy all chance of a fair competition by deterring bidders from attending the sale, it will unquestionably be the duty as well as the right of the chancellor to interfere." The case of *McGown* v. *Sanford,* 9 Paige (N. Y.), referred to in the majority opinion,

says in substance that the chancery court cannot arbitrarily suspend the ordinary operation of the laws. In that case the debt had been due more than two years, and the court said, of the mortgagee, she may be ruined by having her own property sacrificed by a forced sale upon execution, if she is deprived of the amount due to her for six months longer. In the case of *Pewabic Mining Co.* v. *Mason,* it appears that the sale was made after the defendants had prolonged the litigation for more than six years. The final decision in that case in favor of the sale was announced on Jan. 13, 1890, and the sale was not made until Jan. 24, 1891, more than a year after the decision. The defendants' answer in that case was filed in 1884. The last-named decision does not in my opinion support the decision in this case. In fact, I have been unable to find any case that supports the decision in this case. This debt was contracted in May, 1922. Payments were made for seven and a half years, the last payment being made October 31, 1929. It is a matter of common knowledge that farmers could not sell their crops in 1930 for as much as it cost to produce them. It is also a matter of common knowledge that the Federal Land Bank would not lend more than 50 per cent. of its value; therefore appellees' land in 1922, when the loan was made, must have been worth $1,200 or more. At the time the sale was made, December 12, 1931, there was no market for land. It could not be sold for one-fourth its value. These things did not require any evidence. They are all matters of which the court will take judicial notice. "The court will bring to its aid and consider, without proof of facts, its knowledge of those matters of public concern which are known by all well-informed persons. * * * Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence. Other common statements of the rule are that the court will take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction; and that they ought not to assume ignorance of,

or exclude from their knowledge, matters which are known to all persons of intelligence." 23 C. J., p. 58 *et seq.*

"A court cannot blind its eyes to the knowledge of a fact which is notorious throughout its jurisdiction." *Brass* v. *Texarkana & Ft. Smith Ry. Co.,* 110 Tex. 281, 218 S. W. 1040. There is no one of ordinary intelligence who does not know that since 1922 land values have gone down until in 1931 it was practically impossible to sell lands in this State for one-fourth of their value in normal times. Every person of ordinary intelligence knows that the price of cotton in 1930 was not sufficient to pay for the cost of production. If every person of ordinary intelligence knows these things, a court should know them and should take notice of them. The chancellor did know them, and he knew the conditions in Grant County, and knew land values in that county. He knew from the evidence that appellees paid promptly all payments due until 1930, and he knew, and this court knows, that in that year it was impossible for one to pay if he had to depend on raising money with which to pay by the sale of the crops he raised. In addition to the facts of which the court should take judicial notice, the evidence shows that, six months before the appellant made application for a confirmation of the sale, appellee was in bed sick with tuberculosis. If the facts in this case did not justify the chancellor in setting aside the sale and ordering another sale, the talk about the discretion of the chancellor is meaningless. There was no bid except that made by appellant. The appellant could not have been injured by a resale and to confirm the sale without giving the sick debtor another chance takes his property which is evidently worth in normal times $1,200 or more, and gives it to the money lender for a fourth of its value and at a time when the debtor was in bed sick. All the authorities agree that the sale should be made so as to protect the interest of both parties. The debtor is as much entitled to the protection of a court of equity as the money lender. The interests of both should be considered. The opinion

of the majority is to the effect that the case of *Winfree* v. *Jones* does not apply because that was a case of partition, and this is where a money lender is seeking to collect its debt. The equities in this case are stronger than in the case of *Winfree* v. *Jones, supra.* The principles announced in that case apply here. We there said: "In the instant case there was not only inadequacy of price, but it would be manifestly inequitable and unfair to confirm a sale for a grossly inadequate price when the sale was made at such a time that there was no market, and when the condition of the country was such, because of bank failures and drouth, that no one could obtain the money with which to buy. This court has always held that the trial court has and may exercise discretion in either confirming or rejecting judicial sales. This discretion, however, must be exercised according to fixed rules and not arbitrarily." We further said in that case: "Under the conditions that existed at that time the sale was made, it is impossible to suppose that the property would bring anything like its fair value and inadequacy of price, together with fraud, unfairness, or any other unforeseen circumstances, which make it impossible to sell the lands at anything like a fair value, justifies the chancery court in refusing to confirm the sale. No one could foresee the bank failures and the financial distress following the same." I suggest that the fall in the price of cotton from fifteen cents in 1929 to six cents in 1930 might be said to be an unforeseen circumstance, as also might the sickness of appellee. At any rate, under all authorities, these were facts of which the chancellor might take notice in exercising his discretion. I think the order of the chancery court in setting aside the sale is correct and should be affirmed.

KNIGHT *v.* EQUITABLE LIFE ASSURANCE SOCIETY.

4-2640

Opinion delivered September 26, 1932.

C. T. Carpenter, for appellant.

E. P. Mathes, for appellee.

SMITH, J. Property belonging to appellants was sold under a consent decree of foreclosure pursuant to the following notice of sale:

"COMMISSIONER'S SALE.

"NO. 4145.

"Pursuant to a decretal order, dated March 23, 1931, and entered at page 385 of the chancery record No. 10, for the Western District of Craighead County, Arkansas, wherein the Equitable Life Assurance Society of the United States was plaintiff and John C. Knight, Wrennie Knight, his wife, *et al.*, were defendants, the said decree being for the sum of $3,300.01, with interest from January 7, 1929, at six per centum per annum, and which decree had been credited with various sums paid thereon, as shown at page No. 385 of said chancery record No. 10, the undersigned will offer for sale at the east door of the courthouse in the city of Jonesboro, Arkansas, on the 29th day of August, 1931, the following described real estate, to-wit:

"All of lots 3 and 16 and the west half of lot 2 and the west half of lot 17 in Markle's Addition to the city of Jonesboro, Arkansas.

"Terms of Sale: Upon a credit of three months, purchaser to give bond, with approved security, and a lien to be retained on the property sold.

"Witness my hand, and the seal of said court, this 3d day of August, 1931.

"Spurgeon Clark,
(Seal) " Commissioner."

Exceptions were filed to the commissioner's report of sale, and from the order of the court overruling these exceptions and approving the report is this appeal.

The exceptions to this report raised the following questions:

First: The notice failed to state the amount due under the decree at the time of the sale. It is stated in 2 Freeman on Executions (3d ed.), p. 1641, in discussing "General Requisites of Notice of Sale," that: "while it is usual to state the amount of a judgment or decree to satisfy which the sale is to be made, this statement in the notice of sale is entirely unnecessary." Cer-

tainly, no prejudice resulted here to the appellants from the failure to state the balance due under the decree, as the notice did state the debt as adjudged, and that various sums had been paid thereon as shown by marginal indorsements on the record of the decree. Any interested person could have ascertained the amount of these credits by examining the record to which reference was made.

Second: It was objected that the description of the property was fatally defective for the reason that it did not give the county nor subdivision thereof in which the property was located. The property was described, however, as being in the city of Jonesboro, and this description definitely located the property as being in Craighead County, and it cannot be material that a prospective purchaser should have known in which district of Craighead County, Jonesboro was located. It was said in the case of *Woods* v. *Hayes,* 85 Ark. 166, 107 S. W. 387, that: "the object of giving notice of sales under execution is to inform the debtor that his property is about to be sold and also to inform the public so that attendance of purchasers may be attracted and competitive bidding be induced. It necessarily follows from this that the desired object is accomplished if the description of the property be sufficient in the notice to identify it with reasonable certainty, so that no one may be misled thereby. Tiedeman on Sales, § 260; 2 Freeman on Execution, § 285b."

Third: Objection is made that the property is described as lots and parts of lots in Markle's Addition to the city of Jonesboro, Arkansas, but that the block number of such lots is not given. This objection is answered when it is observed that no showing was made that this addition was laid off into blocks, and appellee asserts that it was not. We are unable, therefore, to say that the description employed does not correctly describe the property sold according to the survey of the addition of which it was a part.

Fourth: It is also objected that the notice "fails to state the hour when or within which the property would be sold." In 2 Freeman on Executions (3d ed.), § 285C, page 1646, it is said: "It would seem that the notice ought to name the very hour at which the sale will commence, so that persons having any inclination to attend will not be deterred from doing so by the fact that they might be kept waiting during all the business hours of the day. The authorities, however, sustain notices which declare that the sale will be made between certain designated hours, provided that both hours are in the business part of the day. It has also been held that if the statute designates the hours between which a sale may be made, they need not be mentioned in the notice of sale."

In his excellent work on Arkansas Mortgages—at § 412 thereof—Judge HUGHES says: "The statutes of Arkansas do not prescribe the time or place of foreclosure sale, nor the notice thereof that shall be given. The statute relating to notice of sale under order of court (Crawford & Moses' Digest, § 4323) refers only to sale by the sheriff under execution and not to foreclosure sales. In foreclosure in equity, the time and method of giving notice and the date and place of sale are in the discretion of the court."

Section 4317, Crawford & Moses' Digest, prescribes the time and mode of sale under executions, and directs such sales to be had between the hours of 9 A. M. and 3 P. M. While this section does not refer to sales by commissioners under orders of the chancery court, it is a matter of common knowledge that all judicial sales, unless otherwise ordered, occur between these hours; nor is it asserted here that the sale under review did not occur between those hours. On the contrary, it appears that, by an agreement made on the day of sale between the commissioner and the appellant, J. C. Knight, the sale was had at 10 A. M. on that day. We think, therefore, that the failure to designate the hour of sale in the notice

thereof was not prejudicial. Henderson's Chancery Practice, §§ 571-575.

Fifth: It is insisted that the notice was defective because it failed to describe the improvements on the lots. The character of these improvements does not appear, but it was stipulated that the rental value of the property was $27.50 per month. There is nothing in the record to indicate that any prospective bidder at all familiar with the property would not have known what those improvements were. There are States having statutes requiring notices of sale of real estate to describe the improvements thereon; but we have no such statute, and the general rule appears to be, in the absence of such a statute, that a description following the language of the instrument foreclosed is sufficient if the description identifies the real estate itself. 42 C. J., title "Mortgages," page 195; Jones on Mortgages, vol. 3, § 2459; *Austin* v. *Hatch,* 159 Mass. 198, 34 N. E. 95; *Guarantee Safe & Trust Co.* v. *Jenkins,* 40 N. J. Eq. 451, 2 Atl. 13; *Thompson* v. *King,* 2 Mann. (Del.) 358, 43 Atl. 168; Wiltsie on Mortgage Foreclosure (4th ed.), vol. 1, § 643, page 826.

Sixth: The final objection to the confirmation of the report of sale is that, because of the alleged defects in the notice of sale, the property sold for a grossly inadequate price. The property sold for $3,368.86, which was the balance then due under the decree of foreclosure, and the plaintiff in the case was under no obligation to bid anything in excess of its debt, nor to bid that. Moreover, there is no showing that the price for which the property sold was in fact grossly inadequate.

The report of sale was therefore properly confirmed, and the decree so ordering it is affirmed.

FURQUERON *v.* JONES.

4-2625

Opinion delivered September 26, 1932.

Pratt P. Bacon, for appellant.

Will Steel, for appellee.

HUMPHREYS, J. Appellants, owners under warranty deed of the east half, east half of section 28, township 18 south, range 26 west, brought suit in the circuit court of Miller County to recover twenty-four acres thereof alleged to be in the wrongful and unlawful possession of appellee.

Appellee filed an answer denying he was in the wrongful and unlawful possession thereof, but alleging; first, that the twenty-four-acre tract was a part of the west half of section 27, township 18 south, range 26 west, owned by him; and second, that if said twenty-four-acre tract was a part of the east half, east half of section 28, as alleged in appellant's complaint, appellee and his predecessors in title had acquired title thereto by adverse possession thereof for more than seven years; and, third, that appellee, owner of the west half of said section 27, and B. J. Mills, who was a predecessor of appellants in title to the east half, east half of said section 28, entered into an agreement, in order to settle a dispute between themselves as to the correct line between sections 27 and 28, by which the wire fence built by Winham and Batt in 1912 should be the correct line between said sections and the dividing line between their respective lands.

On motion the cause was transferred to the chancery court, and there tried upon the issues joined by the pleadings, as amended, and testimony adduced by the parties, resulting in a finding that the title to the twenty-four-acre tract in question was acquired by appellee and his predecessors in title by adverse possession for more than seven years claiming title thereto and also by oral agreement with J. B. Mills in 1929 establishing the wire fence as the division line between their respective lands. Based upon these findngs, the chancery court rendered a decree dismissing appellants' complaint for the want of equity, from which is this appeal.

It is next to impossible to determine from the testimony relative to the numerous surveys made in search for the government line between said sections 27 and 28 whether the twenty-four-acre tract in question lies in section 27 or in section 28 because the division lines fixed by the several surveys do not exactly coincide. This uncertainty as to the true division line and the dispute and controversy about it brought the case within the rule that owners of adjoining lands may orally agree upon a division line without the necessity of making conveyances the one to the other. *Randleman* v. *Taylor,* 94 Ark. 511, 127 S. W. 723, 140 Am. St. Rep. 141; *Schrader Mining & Mfg. Co.* v. *Packer,* 129 U. S. 688, 9 S. Ct. 385. In the instant case, testimony was introduced *pro* and *con* as to an oral agreement settling and acquiescing in the wire fence built by Winham and Batt in 1912 as the true division line between said sections 27 and 28 by the adjoining owners of the east half, east half of said section 28 and the west half of said section 27. The chancellor found that said agreement was made and acquiesced in, and, after a very careful reading of the testimony bearing upon this point, we have concluded that the finding is supported by the weight thereof. No useful purpose could be served by setting out herein the testimony of each witness responsive to this issue.

Likewise, we agree with the chancellor that the weight of the testimony is to the effect that appellee and

the predecessors in his chain of title acquired title to the twenty-four-acre tract of land by adverse possession for more than seven years claiming title thereto beginning in 1912 when Winham and Batt built the wire fence around said tract. After that date, appellee's predecessors claimed the rents thereon and asserted title thereto for more than seven years before any question was raised as to the boundary line. It would extend this opinion unnecessarily to incorporate herein the testimony of the several witnesses responsive to this issue. Suffice it to say that, after a careful reading of their testimony, we are of the opinion that it fully supports, by the weight thereof, the finding of the chancellor.

No error appearing, the decree is affirmed.

ROSE *v.* PINE BLUFF.

Cr. 3812

Opinion delivered September 26, 1932.

Reinberger & Reinberger, for appellant.

Evan W. Crawford, for appellee.

KIRBY, J. This appeal is prosecuted by appellant from a judgment of conviction for violation of an ordi-

nance of the city of Pine Bluff for peddling without having obtained a license therefor.

Paragraph 30 of § 1,300 of Lyle's Digest of the ordinances of the city of Pine Bluff, reads as follows:

"It shall be unlawful for any person to engage in, exercise or pursue any of the following vocations without having first obtained and paid for a license therefor from the proper city authorities, the amounts of which license are fixed as follows, to-wit:

"No. 30. For peddling any other article not otherwise provided for, three dollars per month.

"No. 32. For peddling apparel, dry goods, notions, household goods, and any other article not otherwise specifically provided for, five dollars per month, or fifty dollars per annum."

It appears from the testimony that appellant was selling cigars in the city of Pine Bluff for his firm, a wholesale house in Little Rock that had paid its regular occupation taxes there, his usual method being to carry a supply of cigars in a truck or car from Little Rock to call on his regular customers in Pine Bluff and sell them such merchandise as they needed to be delivered upon sending the orders back to Little Rock, except in cases where the merchant or dealer was out of some particular brand of cigars and requested that a box of that kind be left with him until the order could be shipped. In cases of a sale to new customers the salesman would solicit the business of the customer and upon receiving the order he usually left with him a box of the particular brand of cigars sold until the order could be shipped and delivered, no money being paid however for the partial delivery, the whole amount being collected for the shipment after delivery thereof, in the regular course of business. No sales were made except to retail dealers.

It is insisted that appellant in making the sales of cigars was only a traveling salesman or drummer, and not a peddler within the terms of the ordinance; and that ordinance was in effect but an attempt to levy an occupa-

tion tax upon the business of appellant's wholesale house contrary to law.

The Constitution gives the General Assembly the power to tax hawkers and peddlers, and in pursuance of such powers the Legislature has defined the term as follows: "Whoever shall engage in the business of selling goods, wares, or merchandise of any description, other than articles grown, produced or manufactured by the seller himself, or by those in his employ, by going from house to house, or place to place, either by land or water, to sell, the same is declared to be a peddler or hawker." Section 9793, Crawford & Moses' Digest.

No exception is made in this section of drummers or commercial travelers, but same applies to "whoever shall engage in the business of selling goods, wares or merchandise, etc.," in the manner prohibited, and the majority is of opinion, in which the writer does not concur, that the method employed by the salesman in disposing of the cigars, delivering part of the merchandise sold at the time of the sale from stock carried with him for immediate use by the purchaser and to new customers until the whole order could be delivered, is such an engaging in the business of selling goods, wares and merchandise within the meaning of the statute as comes within its prohibition. See *State* v. *O'Brien,* 188 N. C. 452, 124 S. E. 848. The act construed in the case of *State* v. *Fetter,* 65 Conn. 287, 32 Atl. 394, relied upon by appellant is different from our own statute defining peddlers, and is of little weight in its construction.

Neither is this ordinance an attempt to charge an occupation tax within the meaning of the law, nor did it constitute a violation of the statute, § 7618, Crawford & Moses' Digest, providing that no person, firm, individual or corporation shall pay a license fee in more than one city in the State, unless it maintains a place of business in more than one city, which was not the case here. We find no error in the record, and the judgment is affirmed.

McHaney, J., dissents.

WILLIAMS *v.* WILLIAMS.

4-2624

Opinion delivered September 26, 1932.

[redacted]

Saxon & Warren, for appellant.

MEHAFFY, J. Appellant filed suit in the Ouachita Chancery Court against appellee, alleging cruel treatment and adultery as grounds for divorce and asked for the custody of their eleven-year-old child. Appellee filed answer and cross-complaint in which the allegations in the complaint were denied and asked for divorce and alimony. The trial court granted appellant a divorce and the custody of the child, and held that appellee was not entitled to any alimony, but that she was entitled to one-half interest in the property described, subject to the burden of one-half the indebtedness against it.

Appellant prosecutes an appeal from that part of the judgment and decree of the court, finding that there was a partnership, and that appellee was entitled to one-half interest in the property.

There is some conflict in the evidence as to the ownership of the property, and it would serve no useful purpose to set it forth here. The chancellor found that the appellee was the owner of one-half of the property, and we cannot say that his finding is against the preponderance of the evidence.

The appellant testified that he bought the property where they lived, and borrowed $770 and paid for it; that the deed was made in his name; that he had added to the property from time to time and owed $700, and that he had bought one pressing machine for which he paid $400. Appellant testified in rebuttal that he owed $700 on the

place and $300 on other debts; that the $1,250 mentioned by appellee as having been paid on property was not that much but was a little over $1,000. When asked about the partnership that his wife spoke of, he said: "She never did want the property. When we built, she did not want to. I had to give her father a job to get her to sign the mortgage."

Appellee testified that they bought the property in 1923, and up to just before the suit was filed they both lived on it and operated a pressing and cleaning business. They separated in 1927. He begged her to come back and about March they paid $1,250 for the property, the same property that they bought in 1923. The interest ran it up to $1,250. That since 1923 she had actively taken part in the business at all times. When they talked about buying the property, appellant told her it would be for both of them. They were supposed to be partners in everything since they bought the property. Appellant does not dispute appellee's testimony that he told her they were buying the property for both of them. There is no contradiction of her testimony that they were partners. Appellant was asked about the partnership, and he did not say they were not partners. The evidence shows that the house was a two-story building, and they lived in the upper story and conducted the business in the lower story. It is clear from the evidence that both appellant and appellee worked and conducted the business which resulted in the accumulation of the property in controversy. It is immaterial whether there was a partnership. If appellee and appellant, by their joint work, labor and management, acquired the property, a court of equity would, even before the recent statutes, protect the wife's interest in the property. "A question arises as to the validity of the notes of Pillow to his wife. Are they valid? At common law, contracts between husband and wife are void. But in equity a promise by the husband to his wife to repay her a loan *bona fide* made by her to him out of her own separate estate, upon

his promise to repay, is obligatory and can be enforced." *Pillow* v. *Sentelle,* 49 Ark. 430, 5 S. W. 783; *Munday* v. *Collier,* 52 Ark. 126, 12 S. W. 240.

The statute provides: "Every married woman and every woman who may in the future become married shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a *feme sole;* provided, it is expressly declared to be the intention of this act to remove all statutory disabilities of married women as well as common law disabilities, such as the disability to act as executrix or administratrix as provided by § 6 of Kirby's Digest, and all other statutory disabilities." Section 5577, Crawford & Moses' Digest.

The above statute removes all disabilities, statutory as well as common law. However, if there were no statutes removing disabilities of married women, a court of equity would not take the property earned by the labor of a married woman from her and give it to some one else.

The decree of the chancery court is sustained by the evidence, and is therefore affirmed.

TAYLOR *v.* STATE.

Cr. 3814

Opinion delivered September 26, 1932.

Robert Bailey, for appellant.

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

MEHAFFY, J. The appellant was convicted of the crime of selling liquor, and his punishment was fixed at one year in the penitentiary. This appeal is prosecuted to reverse said judgment of conviction.

The first count in the indictment, the count on which appellant was tried, is as follows: "The Grand Jury of Pope County in the name and by the authority of the State of Arkansas accuses H. T. Taylor of the crime of selling liquor committed as follows, to-wit: The said H. T. Taylor in the county and State aforesaid, on the 15th day of October, 1931, did willfully, unlawfully, and feloniously sell and give away, and was willfully, unlawfully and feloniously interested directly and indirectly in the sale and giving away of ardent, vinous, malt, spirituous and fermented liquors and alcoholic spirits and a certain compound and preparation thereof commonly called tonics, bitters and medicated liquors, against the peace and dignity of the State of Arkansas."

It is contended by appellant, first, that the evidence is not sufficient to sustain the verdict. J. A. Worsham and Fred Martin each testified that he bought whiskey from appellant. This evidence was contradicted by appellant and his witnesses, but whether the evidence of the State's witnesses was true or not was a question for the jury and not for this court. It would serve no useful purpose to set forth the evidence. Where the evidence is conflicting, as it is in this case, the verdict of the jury is conclusive. It is the settled rule in this State that the credibility of the witnesses and weight to be given their testimony are questions for the jury,

and, if the verdict is supported by substantial evidence, it cannot be disturbed by this court.

"Under the settled rule in this State, the jury are the judges of the credibility of the witnesses, and where there is any evidence of a substantial character to support the verdict of a jury, we are not at liberty to disturb it upon appeal, notwithstanding we might believe it was against the weight of the evidence." *Fields* v. *State,* 154 Ark. 188, 241 S. W. 901; *Cox* v. *State,* 160 Ark. 283, 254 S. W. 542; *Rhea* v. *State,* 104 Ark. 163, 147 S. W. 463; *Nelson* v. *State,* 139 Ark. 13, 212 S. W. 93.

Appellant also contends that the testimony of Fred Martin was inadmissible, and that it should have been excluded. It is insisted that appellant was placed on trial in the case wherein J. A. Worsham was the prosecuting witness. There is nothing in the record tending to show this. Appellant was not charged with selling whiskey to Worsham. It will be observed from the indictment above set out that he was simply charged with selling whiskey without naming the party to whom it was sold. The evidence of Martin was therefore admissible.

Appellant says that the sale to Martin was not charged in the indictment. We have already shown that the indictment did not name the person to whom the whiskey was sold. It is true that Worsham's name was on the indictment, and Fred Martin's name was not indorsed on the indictment, but the question of Fred Martin's name not being indorsed on the indictment was not raised in the motion for new trial. The motion merely stated that his testimony was incompetent, and that the court should have excluded it. The statute requiring the names of witnesses to be indorsed on the indictment is directory. *Wood* v. *State,* 157 Ark. 503, 248 S. W. 568.

Appellant made no request to have the names of the witnesses indorsed on the indictment, and no request was made for a list of names of the witnesses. Appellant testified that he did not sell liquor to Fred Martin at the time Martin said he bought it or at any other time, but

he did not claim either at the time Martin testified or at any other time that he could have other witnesses to contradict Martin. He would not be entitled to a new trial on account of Martin's testimony without making some showing that, if a new trial was granted, he could produce witnesses to contradict Martin. This he did not offer to do. No other question is argued by appellant. The jury was properly instructed, there was substantial evidence to sustain the verdict, and the judgment is affirmed.

CORNING BANK & TRUST COMPANY *v.* FEDERAL LAND BANK OF ST. LOUIS.

4-2620

Opinion delivered September 26, 1932.

[redacted]

Oliver & Oliver, for appellant.

J. R. Crocker and *C. T. Bloodworth,* for appellee.

KIRBY, J., (after stating the facts). It is undisputed that the three notes sued on and for which the mortgages were sought to be foreclosed were made by the Mabrys to the appellee bank, and that its mortgages constituted a first lien upon the property. Nor is there any controversy about the Mabrys being indebted to the First National Bank, which released its prior lien and mortgage upon the lands involved, and voluntarily became a junior mortgagee subject to the lien of the appellee's mortgages.

Although it is denied that appellant bank paid the taxes, and that the First National Bank paid the taxes alleged to have been paid, it was shown that such taxes were paid by the First National Bank, which claimed to have paid them to protect its interest in the lands under the junior liens, which is admitted it held. While a junior mortgagee who in good faith pays the taxes due to protect its lien may be subrogated to the State's lien therefor and recover the amount paid, even as against the prior mortgagee, this principle of subrogation is administered, not as a matter of legal right, but to subserve the ends of justice and to do equity in the particular case; but, where such junior mortgagee pays the taxes over a three-year period, or furnishes the money to the mortgagor with which to pay them, the tax receipts being taken in the name of the mortgagor or in the name of the

bank furnishing the money and paying the taxes as his agent without the senior mortgagee's knowledge, meanwhile furnishing yearly supplies to the mortgagors for the production of crops and the payment of money to it on the junior mortgages, it has been held that such junior mortgagee is not entitled to subrogation to the State's lien for such taxes as against the prior mortgagee, there being no disclosure of the true situation as would give notice to the senior mortgagee of the nonpayment of the taxes, giving it an opportunity to pay the delinquent taxes for its own protection. *Federal Land Bank* v. *Richland Farming Co.*, 180 Ark. 442, 21 S. W. (2d) 954. Appellant knew the taxes were not being paid by the mortgagors, loaned them the money with which to pay same, and paid such taxes, taking the receipt therefor in its own name as agent for the mortgagors without notifying the senior mortgagee of the delinquencies and giving it an opportunity to pay the taxes, as appellant regarded it was bound to do. It knew that it had advanced the money to the mortgagors with which to pay the taxes and also, from the receipts of the money paid by it for the taxes, that it was paying the taxes for the mortgagors as their agent as disclosed by such tax receipts. Of course, if the taxes had been paid by the mortgagors as it was their duty to do, there could have been no right of appellant, who claims to have paid the taxes, to subrogation to the State's lien thereto, since it was the duty of the mortgagors to pay the taxes. The court did not err therefore in its decree denying appellant the right of subrogation to the State's lien for the payment of taxes claimed to have been paid by it for the mortgagors to protect its junior lien.

Neither was error committed in refusing appellant a decree for money expended by it in replacing one of the houses on a tract of the mortgaged land which had been destroyed by fire. It was not the duty of the junior mortgagee to make any such replacements, nor could it hold the senior mortgagee responsible for the cost thereof.

The decree is accordingly affirmed.

STATE EX REL ATTORNEY GENERAL *v.* ANDERSON-TULLY COMPANY.

4-2599

Opinion delivered September 26, 1932.

Hal L. Norwood, Attorney General, and *John M. Rose,* for appellant.

Williamson & Williamson, for appellee.

McHANEY, J. This is a suit for back taxes brought by the State on the relation of the Attorney General against appellee. The complaint alleged that tax was due the State, county and school districts by appellee by reason of the gross underassessments for the years 1925 to 1929, inclusive, of approximately 24,000 acres of timber lands belonging to appellee in Desha County. It is alleged that said lands possessed a value of $50 an acre or more during said period, and that same should have been assessed at the average per cent. of value at which other real estate in said county was assessed for the same period, which is alleged to have been 30 per cent. It is

further charged that the average assessment of appellee's lands during said period was $4.17 per acre, which is only eight and one-third per cent. of the alleged value of $50 per acre, and is far below the basis on which other real estate in Desha County was assessed. It is further alleged that this assessment, same being between one-third and one-fourth as much as the average assessment of 30 per cent. applied to other property in the county, constitutes a fraud on the State, the county and the school districts in which the land is located.

To this complaint a demurrer was interposed on several grounds, the principal and only one necessary to be considered here being that the complaint does not state facts sufficient to constitute a cause of action within the provisions of act 281 of 1931. The court sustained the demurrer. Appellant declined to plead further. The complaint was thereupon dismissed for want of equity, and this appeal followed.

We think the trial court was correct in so holding. The provisions of act 281 of the Acts of 1931, page 951, are too plain to admit of construction. It is entitled "An act to Regulate the Collection of Overdue Taxes and for Other Purposes." The first section of the act, and the only one of any importance in connection with this lawsuit, provides: "That, after the assessment and full payment of any general property, privilege or excise tax, no proceedings shall hereafter be brought or maintained for the reassessment of the value on which such tax is based, except for actual fraud of the taxpayer, provided that failure to assess taxes as required by law shall be *prima facie* evidence of fraud." The act was approved April 1, 1931. It did not have any emergency clause, but the effective date of the act becomes unimportant, in view of the express language of the act as to cases which had not been finally determined prior to the effective date. By its own terms it provides that "no proceedings shall hereafter be brought or maintained," etc. We think there can be no doubt that the word

"maintained" as here used refers to the further prosecution of suits pending on the effective date of the act, except they be based on actual fraud of the taxpayer as provided in the act. In other words, all suits pending at the effective date of the act are abated unless amended to charge actual fraud according to the terms of the act. Otherwise the word "maintained" would have no meaning. We think the Legislature intended and very definitely expressed its intention to accomplish two things: (1) to prevent the bringing of any new proceedings, and (2) to prevent the further prosecution of any proceedings which may have been pending at the effective date of the act, except under the terms of the act. The Legislature will be presumed to have used the words "brought or maintained" with some purpose in view, and the courts will ascribe such meaning to the language used as the words ordinarily convey. Appellant says that the word "hereafter" indicates that the Legislature did not intend to give any retroactive effect to the act, and that statutes are to be construed as having a prospective operation only unless the intention of the Legislature to make them operate retrospectively is especially declared or necessarily implied. Such is the correct rule many times announced by this court. But this is a statute relating to procedure, and it is admitted that statutes involving matters of procedure are applicable to pending litigation. *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653. Using the words "brought or maintained" in their ordinary signification, we have no doubt that the Legislature meant to prevent the bringing of back-tax suits, or maintaining such as were already brought, except under the terms of the act.

This brings us to a consideration of the question as to whether the complaint charged actual fraud of the taxpayer, and whether the proviso in § 1 of the act "that failure to assess taxes as required by law shall be *prima facie* evidence of fraud" is sufficient to put appellee on its proof and therefore to answer the complaint. We

answer both questions in the negative, as did the learned trial court. The complaint charged no actual fraud of the taxpayer. It did charge that its land was greatly underassessed. It did not charge that appellee assessed its own land, nor could it well have done so, as the law places no duty upon the taxpayer in connection with the assessment of real estate except to list his property with the proper assessing officials. The complaint does not charge that this duty was neglected. A careful review of the revenue laws of this State fails to reveal any duty imposed upon the taxpayer in connection with the assessment of his real property for taxation except as stated above. The whole duty in this regard rests upon officials of the tax collecting agency, officials of the county and State. The Constitution, art. 16, § 5, provides: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct." The General Assembly has provided the manner in which the value of property is to be ascertained. Section 9874 *et seq.*, Crawford & Moses' Digest. See also act 129, Acts of 1927 and 172, Acts 1929. Section 5 of the latter act provides that for the year 1929, one of the years involved in this litigation, "the county clerk shall extend taxes against such property based on the assessed valuation thereof for the year 1928, plus the value of any new improvements located thereon and valued or assessed by the assessor as by law required, provided, however, that the provisions of this section shall not be construed to prohibit or restrict the county equalization board of any county in equalizing the assessed value of such property for the year 1929." Not only does this constitute a legislative assessment of appellee's lands for the year 1929, but it is a legislative finding of the correctness of the assessment for 1928 because the assessment for 1929 is made the same as that of 1928. The complaint in this case simply fails to allege any "actual fraud of the taxpayer." The mere acquiescence of the taxpayer in an

underassessment made by the assessing officials, no matter how grossly undervalued, would not constitute actual fraud of the taxpayer. To constitute fraud on his part would require something more than mere acquiescence. It would require some active participation in the fraud of the assessor, as, for instance, a conspiracy between them to undervalue the property. But it is said by appellant that a gross underassessment comes within the proviso and constitutes *prima facie* evidence of fraud, sufficient to put appellee on its proof and therefore to require an answer. We do not think so. There was no failure upon appellee's part or that of the assessing officials of Desha County to assess appellee's lands for taxes at the time and in the manner provided by law, even conceding an underassessment. The language of the act is that the fraud for which a reassessment will be permitted is the actual fraud of the taxpayer. If the law imposed the duty upon the taxpayer to assess his real estate, and he fraudulently or grossly underassessed it, the proviso in the act might have some application. In the case of real estate the law imposes no duty upon the taxpayer as to any valuation to be placed upon it, the only duty being to list his property with the assessing officials, and, if such officials make a gross underassessment without any fraudulent procurement on the part of the taxpayer, it could not be said to be the act of the taxpayer in any respect.

It is suggested by counsel for appellant that act 281 is unconstitutional and therefore void. We do not agree with appellant in this regard, nor shall we undertake an extended discussion of the grounds upon which the unconstitutionality of the act is suggested. It is admitted by counsel for the appellant that the whole proceedings for the reassessment of property and for the recovery of back taxes are purely statutory, and without such authority no such action would be available. It is also conceded that the Legislature has the power to amend or repeal such statute. We have many times so held. *State*

v. *Standard Oil Co. of La.,* 179 Ark. 280, 16 S. W. (2d) 581, and cases there cited. We there said: "The power of the State to maintain suits such as the one at bar being purely statutory, the method and procedure prescribed by the statute must be followed as a condition precedent to its right to maintain such action. * * *" The original back-tax statute of the State has many times been held to be constitutional, both by this court and by the Supreme Court of the United States. This being an act in the nature of an amendment must of course be held to be within the power of the Legislature to enact.

Other questions are discussed in the excellent briefs of counsel for both sides, but we find it unnecessary to discuss them. We have reached the conclusion that the trial court was correct in sustaining the demurrer to the complaint, and its judgment must be affirmed. It is so ordered.

MEHAFFY, J., (dissenting). I do not agree with the majority in holding that act 281 of the Acts of 1931 is retroactive. The majority opinion holds that it was the intention to accomplish two things: first, to prevent the bringing of any new proceedings; second, to prevent the further prosecution of any proceedings which may have been pending at the effective date of the act, except under the terms of the act.

I think if the Legislature had intended that the act should be retroactive, it would have said so in so many words, and I think that the expression of the Legislature, "no proceedings shall hereafter be brought or maintained," etc., has reference to future suits and not to suits already brought. Of course, the question is the intention of the Legislature, but that intention must be ascertained from the language used by the Legislature.

"It is said that a law will not be given a retrospective operation unless that intention has been manifested by the most clear and unequivocal expression. * * * The rule is that statutes are prospective, and will not be construed to have retroactive operation unless the language

employed in the enactment is so clear it will admit of no other construction." Lewis-Sutherland on Statutory Construction, Vol. 2, 1157 *et seq.*

"Even though the Legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed, or clearly and necessarily implied, that the statute is to have a retroactive effect. There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, or imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of the statute." 25 R. C. L. 787-788; 59 C. J. 1161; *People* v. *Foreman,* 296 Ill. 497, 129 N. E. 788; *Walton* v. *Woodward,* 73 Kan. 238, 84 Pac. 1028.

It is held by the majority, however, that the act is retroactive because it uses the expression "brought or maintained." I do not think "maintained" has any such meaning here, and it cannot be said that it was so clearly the intention of the Legislature to make the act retroactive that there can be no doubt about it. The Legislature could have said, and if it intended that it probably would have said that this act shall apply to pending suits. I think it was clearly the intention of the Legislature to provide that hereafter no suit should be brought and maintained except for acts of fraud, etc.

The act provides that it shall take effect, and be in force from and after its passage. That necessarily meant ninety days after the adjournment of the Legislature, and it was, in my judgment, not the intention of the Legislature that it should apply to pending suits.

A suit might have been pending at the time of the act, and might have been disposed of before ninety days elapsed. In that case, of course, it could not apply.

The word "maintained," if it had been used alone, would have meant, "to begin and prosecute the action to final judgment."

In a Connecticut statute, the Legislature used the word "maintained", and it was contended that this made the statute retroactive. The Supreme Court of Connecticut, however, said: "We have therefore no question as to the constitutionality of a law which in direct and positive terms is made to act retrospectively; our duty is simply that of construction.

"One of the firmly established canons for the interpretation of statutes declares that all laws are to commence in the future and operate prospectively, and are to be considered as furnishing a rule for future cases only, unless they contain language unequivocally and certainly embracing past transactions. The rule is one of such obvious convenience and justice as to call for jealous care on the part of the court to preserve and protect it. Retroaction should never be allowed to a statute unless it is required by express command of the Legislature or by an unavoidable implication arising from the necessity of adopting such a construction in order to give full effect to all of its provisions." *Smith* v. *Lyon,* 44 Conn. 175; *Burbank* v. *Inhabitants of Auburn,* 31 Maine 590; *Gunpper* v. *Waterbury Traction Co.,* 68 Conn. 424, 36 Atl. 806.

The act of 1931 provides that no proceedings shall hereafter be brought or maintained for the reassessment of the value of property after the assessment and full payment of any general property privilege or excise tax.

Section 2 of the act provides that all suits which may be brought under the provisions of the act shall be conducted by the Attorney General as other suits brought in the name of the State.

When the whole act is read, it seems to me to be perfectly clear that the Legislature did not intend the act to be retroactive. If it had, it would have used words that made it clear beyond doubt. It did not do this. On

the contrary, section 2, which has reference to the suits provided for by this act, does not use the word "maintained" at all.

I think that the complaint stated a cause of action under act 281 of the Acts of 1931.

The second amendment to the plaintiff's complaint not only alleged that the lands were worth $50 or more an acre, and that they were assessed for $4.17 an acre, but it also alleged that the assessment was far below other similar property, and was slightly more than one-fourth as much as other real estate generally in the county was assessed; that the assessments were so grossly inadequate as to shock the conscience and constitute an actual fraud by defendant.

It further charged that the lands were timber lands, and located in the overflow area of the Mississippi River, and covering so vast an area that it made it difficult or impossible for the taxing officials to make any estimate of the value thereof, but that said officials were compelled to rely wholly on the representations of defendant as to said value, and all former assessments have been made on the faith of such representations. It might be that the complaint was such that the court should have sustained a motion to make more definite and certain, but certainly it charged fraud committed by the defendant, because it said that the taxing officials were compelled to rely and did rely on the defendant, and that defendant made the representation as to the value of the property, and fraudulently stated that it was worth less than one-fourth of its actual value, and that the taxing officials relied on these representations, believing them to be true. This is certainly the meaning of the allegation, and I think is sufficient to charge actual fraud. Of course, whether these are true would depend upon the evidence.

This court has frequently held that in testing the sufficiency of a pleading by general demurrer, every reasonable intendment should be indulged to support it. *Ellis v. First Natl. Bank,* 163 Ark. 471, 260 S. W. 714.

"Contrary to the common-law rule, under our Code every possible intendment and presumption is to be made in favor of a pleading, and a complaint will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say that they furnish no cause of action whatever." *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826.

Taking the facts to be admitted in this case, it is admitted that the defendant itself made false representations, and that it was impossible for the taxing officers to ascertain the value of the land otherwise, and that they relied on the representations made by the defendant.

Can it be said that these facts, if admitted, furnish no cause of action whatever? I do not think so.

The complaint also alleged that appellant failed to assess its taxes as required by law. The act expressly provides that such failure shall be *prima facie* evidence of fraud. The act as construed by the majority does not mean anything. There could not be a suit maintained under it. I think if the Legislature had intended to repeal the law, it would have said so.

I think the complaint charges fraud on the part of the defendant, and that the case should be reversed and remanded for trial.

Mr. JUSTICE HUMPHREYS agrees with me in the views herein expressed.

HERVEY *v.* HERVEY.

4-2589

Opinion delivered September 26, 1932.

C. T. Carpenter and *A. B. Caplinger,* for appellant.

Mardis & Mardis and *F. E. Denson,* for appellee.

BUTLER, J. In May, 1929, the appellee and the appellant were husband and wife, and in a suit instituted by the former for divorce a decree was entered in her favor, and she was awarded the custody of their minor daughter with an allowance of $25 per month for the maintenance of the child. Subsequent to that date the appellee filed a number of petitions in the court praying for judgment against the appellant for a part of his personal and real property. These petitions have not been acted upon, and are not involved in this appeal. In these petitions the appellee complained that the appellant was in arrears in the payment of the allowance of $25 a month, and as early as September 9, 1929, the court found that the appellant was in default in the payment of the sums adjudged. From that date various supplemental petitions were filed by the appellee complaining of the failure of the appellant to pay the allowance due and various orders relative thereto were made by the court.

Finally, in the month of November, 1931, the court found that the appellant was in arrears in the payment of monthly maintenance in the sum of $195.65, including the month of August, 1931. On August 4, 1930, in answer to one of the complaints of appellee, the appellant asked that the monthly maintenance be reduced. No order was made in this regard until the date of the order last above mentioned in which the monthly maintenance was reduced from and after September 1, 1931, to $15 per month. The court made an order requiring the appellant to pay the sums in arrears or to execute a bond within thirty days from the date of the order conditioned that

the sum would be paid on or before the first of May, 1932, and that, in default of payment or execution of the bond, the appellant be held in contempt. It appears that the appellant did not execute the bond or make payment of the sum in arrears, and later the court issued an order directing the sheriff to take him into custody and confine him in the county jail until further orders of the court. From the order made in November, 1931, this appeal is prosecuted.

The appellant contends that the evidence taken at the hearing before the order appealed from was made disclosed the fact that his disobedience to the orders of the court was not wilful but because of his inability to pay the sums adjudged against him. He insists that because of this the order of the court holding that he be imprisoned was an abuse of the court's discretion and should be reversed. It is true that the evidence discloses a state of facts calculated to excite sympathy for the appellant. He is a practicing attorney, and because of physical infirmities and a general falling off in business he had been able to earn but little for perhaps as long as two years before the date of the hearing. He has no other source of revenue except that derived from the practice of his profession. It is quite manifest that the condition of his health is very poor, and that this of itself would render him unable to successfully attend to his business.

If the above facts were all that the evidence disclosed, it would be quite evident that the order of the chancellor was not justified. This, however, is not all. It was shown that on various dates in the year 1930 and in the spring of 1931 the appellant had in the bank substantial cash balances, the smallest amount on hand in any one month from the first of August, 1930, until that date in 1931 being $488.21, and during the time of his default he had in the bank at one time as much as $1,165.21, and on the date of the hearing, when asked how much money he had in the bank at that time, he answered in effect that he did not know. In order to justify

his failure to pay the allowance, the appellant stated that most of the money in the bank at any one time belonged to his clients, and that his own personal account amounted to but a very small sum; that he had tried to borrow money to pay the appellee but was unable to do so. Whether or not the failure of the appellant to pay was in wilful disobedience of the order of the court or from inability to meet the payments was a question of fact, and the explanation given regarding the ownership of the cash deposited in appellant's name shown to have been in the bank was unsatisfactory to the court, and we cannot say that the preponderance of the evidence is against his finding. In cases of this kind imprisonment can only be justified on the ground of wilful disobedience of the orders of the court. Ex parte *Caple,* 81 Ark. 504, 99 S. W. 830. But that question is for the court to determine from the evidence adduced. It will be noted that the appellant contented himself with the bare statement that most of the money he had on deposit in the bank was that of his clients, and he gave no explanation as to who those clients were and how much each had in the bank in his name. This would not have been difficult for him to show, and his failure to do so, in our opinion, justified the court in the conclusion reached.

The claim made by the appellant in the instant case is similar to that made in the case of *East* v. *East,* 148 Ark. 143, 229 S. W. 5, where the appellant attempted to explain his failure to comply with the order of the court by testifying that he had lost the money he had on hand at the time the decree was rendered, amounting to between two and three thousand dollars. His explanation, however, was not convincing to the chancellor, and on appeal we held that the latter was not bound to accept as true the appellant's unsupported statement regarding the loss of his money.

The procedure in this case was substantially in conformity with that prescribed by our statutes governing contempt cases, and it is fundamental that courts of

chancery have the inherent power to enforce decrees awarding alimony, and that they may do so by punishing the recalcitrant party as for contempt. Ex parte *Coulter,* 160 Ark. 550, 255 S. W. 15. The decree of the chancellor holding that the appellant's failure to pay did not arise from his inability to do so, but was in wilful disregard of the order of the court, not being against the preponderance of the testimony, must be affirmed. It is so ordered.

ROGERS *v.* SNOW BROS. HARDWARE COMPANY.

4-2633

Opinion delivered September 26, 1932.

C. M. Martin, for appellant.
Thos. W. Hardy and *R. H. Little,* for appellee.

BUTLER, J. Snow Brothers Hardware Company obtained a judgment against W. L. Rogers in the Ouachita Circuit Court on the 11th day of April, 1927. On the 7th of May, 1931, they had an execution issued on this judgment with directions to the sheriff to levy the same on the interest W. L. Rogers had in a certain tract of land of which his father, John W. Rogers, died seized and possessed on the 6th day of May, 1931, and in which W. L. Rogers was assumed to own by inheritance an undivided one-fourth interest. After the issuance of the execution and on May 10, the appellants filed for record a warranty deed dated and acknowledged on December 7, 1926, by which W. L. Rogers undertook to convey all of the parcel of land to the appellants, A. M. Rogers, H. C. Rogers and W. H. Rogers, his brothers. When this deed was filed for record, this suit was instituted for the purpose of having said deed canceled and set aside and the interest of W. L. Rogers acquired by inheritance subjected to the satisfaction and payment of the judgment. Answer was duly filed, and the court, on consideration of the case as set forth by the pleadings and the testimony introduced by the parties, made the following finding of fact:

"That J. W. Rogers, deceased, indorsed his son's, W. L. Rogers', note as accommodation indorser and paid it. The son agreed to either repay the money or waive his right to share with his brothers in two hundred and fifty acres of land in Ouachita County, at his father's death. To carry this agreement into effect, he executed a warranty deed to his three brothers, A. M. Rogers, H. C. Rogers, and W. H. Rogers, for a recited consideration of $1,250, conveying a one-fourth undivided interest in the two hundred and fifty acres of land owned by his father and which he expected to inherit at his father's death. He delivered this deed to his father, J. W. Rogers, in 1926, with the express understanding that if he should repay this money at any time prior to his father's death the deed should be returned.

"That W. L. Rogers failed to repay the money. Soon after the father's death in May, 1931, the four defendants, being his sole surviving heirs, selected the elder brother, A. M. Rogers, and executed to him a power of attorney to administer and wind up the estate. A. M. Rogers, acting under his power of attorney, found the said deed among his deceased father's papers and filed it on record. That this does not constitute an unconditional delivery of said deed, and that said deed is ineffectual, and that A. M. Rogers, H. C. Rogers and W. H. Rogers acquired no interest in said lands under and by virtue of said deed.

"That said defendants are claiming title by reason of this deed and not by inheritance. Therefore, the indebtedness from W. L. Rogers to the estate of J. W. Rogers, deceased, is not material, since there was no delivery, and they acquired no rights by reason of the deed.

"Neither can it be construed to have been intended as a mortgage securing indebtedness to J. W. Rogers, because said Rogers had the fee simple title to said land and could not legally hold a mortgage thereon—it would have been merged. Therefore, the status of W. L. Rogers to the estate of J. W. Rogers, deceased, is that of a common debtor, so far as the rights of the parties are here concerned. The deed to the grantees (defendants) fails. None was executed or could have been executed to J. W. Rogers, the fee owner.

"By force of plaintiffs' execution they have a lien which should be foreclosed and sold by a commissioner of this court."

The court thereupon rendered a decree holding that the deed was null and void, and that the appellees' execution lien be foreclosed and the one-fourth interest of W. L. Rogers in the lands be sold by commissioner of the court to satisfy the judgment obtained by the appellants against him on the 11th day of April, 1927.

The facts as found by the chancellor cannot be said to be against the preponderance of the testimony, nor

do the appellants complain of this, for indeed these were the facts contended for by them. They insist, however, that W. L. Rogers, at the time of the execution of the deed and in the lifetime of his father, had such an interest in his father's lands that he could sell or mortgage and that the deed executed by W. L. Rogers to his brothers constituted an equitable mortgage on his prospective interest in the lands which constituted a superior lien to the judgment lien of the appellees. It is true that the effect of our statute is that a warranty deed will convey an after-acquired title, but the essential character of the mortgage is that there must exist an indebtedness or liability between the parties which the conveyance is intended to secure. *Farrow* v. *Farrow,* 136 Ark. 140, 206 S. W. 134; *Wells* v. *Moore,* 163 Ark. 542, 260 S. W. 411.

"No conveyance can be a mortgage unless made for the purpose of securing the payment of a debt or the performance of a duty, either existing at the time of execution or to be created, or to arise in the future. Hence, a deed which is absolute in its terms cannot be converted into a mortgage without proof of an obligation to be secured by it either in the form of an antecedent debt between the parties, or a loan, debt, assumption or liability, or contract for future advances contemporaneously made." 41 C. J., § 97, p. 333.

It was admitted by W. L. Rogers in his testimony that he did not owe anything to either of the grantees in the deed of December 7, 1926, and there is no testimony to the effect that they had assumed any liability for him. Therefore, the deed was not a mortgage. Neither was it effectual, although in form a warranty deed, to convey to them his after-acquired title. In order for a deed of that description to convey the after-acquired title, it must be executed so as to pass the grantor's estate if at the time he had title, and to be so executed it is essential that there be a delivery. In any given case whether or not the deed was delivered is essentially a question of fact to be determined by the intent of the grantor as manifested

by his acts or words or both. It is only where the acts or words unequivocally evince the purpose of the grantor that the question of delivery becomes one of law. *Battle* v. *Anders,* 100 Ark. 427, 140 S. W. 593. It is claimed that the delivery of the deed to John W. Rogers was in effect a delivery to the grantees, but this is not the case. Where the deposit of a deed is with a third person, it must be irrevocable, and, if it is subject to the control of the grantor, its delivery has no binding effect. *Moore* v. *Moye,* 122 Ark. 548, 184 S. W. 63; *American Central Fire Ins. Co.* v. *Arndt,* 129 Ark. 309, 195 S. W. 1075.

In the instant case the undisputed evidence is that there was no direction to John W. Rogers to deliver the deed to the grantees, nor was the delivery to the father an irrevocable act and the deed was subject at any time to revocation by the payment of the debt W. L. Rogers owed his father. We are of the opinion that the finding of the chancellor that there was no delivery is not against the preponderance of the testimony. It follows that the decree of the trial court is correct, and it is therefore affirmed.

KIRBY, J., dissents.

SLAYTON *v.* STATE.

Cr. 3798

Opinion delivered October 3, 1932.

E. G. Schoonover, J. C. Ashley and *Baker & Gautney,* for appellant.

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

SMITH, J. Appellant was convicted under an indictment charging him with having been an accessory before the fact to the murder of Manley Jackson. The indictment charged Lige Dame and Earl Decker with the commission of the murder, and that appellant had advised and induced its commission.

Decker was put upon trial as a principal, and upon his conviction was given a life sentence in the penitentiary. This judgment was affirmed on the appeal to this court, and the theory of the State's case was outlined in the opinion affirming that sentence. *Decker* v. *State,* 185 Ark. 1085, 51 S. W. (2d) 521.

It was the theory of the State that both appellant and Decker had urged Dame to kill Jackson, and Dame so testified, but the only testimony to the effect that appellant and Decker had conspired with each other to this end was that of Dame, to the effect that they had each urged him to kill Jackson shortly before he did so, but Dame did not testify that either of these men was present when the other made that suggestion.

Dame testified that he killed Jackson in response to the suggestions and urgings of both appellant and Decker, made by each in the absence of the other, and through the promise of appellant to pay him a thousand dollars to kill Jackson, and through fear on his part that he would be prosecuted for arson by appellant if he did not kill Jackson.

Dame testified that he agreed with Decker to kill Jackson on a particular Saturday night, and their plan

was as follows: Jackson was the night marshal of Pocahontas and would be on duty during the night. Decker was to take Jackson into custody at about 3 A. M. and detain him at or near the public square until the arrival of Dame in an automobile, and Jackson was then to be forced into the car and carried out in the country and killed. This plan was carried into effect, and, as Dame drove away from the place where Decker had held Jackson in custody, Decker gave Dame the pistol with which he had been armed. About two miles out of town the car was stopped, and Jackson was ordered to get out, and as he did so he stated to Dame, just before he was shot by Dame, that he knew Dame was killing him on account of Dame's wife. Jackson was shot four times, and all of the shooting was done by Dame.

After the shooting both Dame and Decker were arrested and confined in the jail at Marion, but in separate cells. Dame testified that while so confined Decker wrote a note on some cigarette paper, which was passed to Dame, reading: "I will still die before I will tell it," and Dame wrote on the reverse side of the paper: "So will I," and passed the paper back to Decker's cell. This testimony was offered at the trial of both Decker and appellant, but the paper was not produced at either trial. This testimony was competent as against Decker upon his trial, as he was an actor in the transaction. But it was not competent evidence at the trial from which this appeal comes, and its admission against appellant constituted prejudicial error. The alleged conspiracy to kill Jackson had then been carried out. Appellant was not present when these notes were written and passed. The law is definitely settled that, where a criminal deed is done and the criminal enterprise of the conspirators is ended, the acts or declarations of one conspirator are thereafter inadmissible against his co-conspirator. The case of *Counts* v. *State,* 120 Ark. 462, 179 S. W. 662, collects and cites a number of earlier cases to this effect. The

later case of *Hammond* v. *State,* 173 Ark. 685, 293 S. W. 714, cites later cases to the same effect.

After Dame's arrest he made several conflicting statements about the killing. Two of these were made after he had been taken to the penitentiary, one oral and the other written. In both the statements made in the penitentiary Dame charged appellant with having conspired with him to kill Jackson. These confessions made in the penitentiary were admitted in evidence over appellant's objection, and we think their admission was error for the same reason that the admission of the notes written on the cigarette paper was erroneous. Nor was it competent to support the testimony of Dame given at appellant's trial by proving that Dame had previously made similar statements.

We are also of the opinion that the testimony tending to corroborate that of Dame is not sufficient to meet the requirements of the law in this respect. The leading cases in this State on the sufficiency of the corroboration of the testimony of an accomplice were cited in the recent case, *Roath* v. *State,* 185 Ark. 1039, 50 S. W. (2d) 985.

The testimony, which is recited in the brief of the Attorney General as being corroborative of that of Dame connecting appellant with the commission of the murder, is to the following effect: Dame testified that appellant was the marshal of the town of Pocahontas, and that he protected him from arrest for selling liquor, and would advise him when raids were to be made on Dame's house, where liquor was kept to be sold unlawfully. This information was conveyed by certain signals which appellant would make with his hands. It appears, however, that Dame had been frequently fined, and that he was under a penitentiary sentence for selling liquor at the time of the killing.

A former sheriff of the county testified that appellant was with him on numerous raids upon Dame's home, and that they uniformly found no liquor. In this connection, the sheriff testified as follows: "Q. Do you remember at

least on two occasions that when you suggested that you go and wait for Dame so that you could catch him with liquor that John Slayton told you the weather was bad, and that there was no use to worry getting him as somebody else would sell it anyhow? Do you remember that? A. I don't think it was that way. I said that I had heard Mr. Slayton say on one occasion (interrupted). Q. I haven't asked you what you heard, but did you ask him about laying out, and he suggested that you would take cold, and that somebody else would sell it anyhow? A. Yes, sir, I will say he did. Q. He did that once? A. Yes, sir. Q. Did he do it twice? A. I wouldn't say so. Q. Still you didn't think there was enough in that to arouse your suspicion? A. No, sir."

The warden of the penitentiary was permitted to testify that both Dame and appellant related the same details concerning the burning of a house belonging to appellant. This house was burned some months before the killing, and Dame testified that he had burned the house to enable appellant to collect the insurance, and appellant promised him that, if he would kill Jackson, he would not only pay him a thousand dollars for doing so, but would also pay the promised reward for burning the house. Appellant admitted that he had burned a house to collect the insurance thereon, but denied that Dame had burned it.

The penitentiary warden testified that appellant said to him that he had never had any business or social relations with Dame, whereas appellant admitted at his trial that on one occasion he bought a shotgun from Dame for $5, and later bought another shotgun from Dame, the last purchase being made in a store where Dame was trying to sell or pawn the gun.

A Mrs. Meyers testified in behalf of the State that she had frequently seen appellant at Dame's home. All of these visits were not social, however, as the witness stated that on some of these occasions appellant had searched Dame's home.

A witness named Tiner testified that he had seen Dame's wife with appellant in the latter's car on more than one occasion.

The present sheriff testified that appellant had asked him to give Dame an extension of time to pay the balance due on a fine, and that he had done so. Appellant testified that he had merely communicated the request to the sheriff at Dame's instance.

An attempt was made to show that ill will existed between appellant and Jackson. This testimony was to the effect that Jackson was a prospective candidate for town marshal, the position held by appellant. Jackson had not, however, announced his candidacy.

Mrs. Maggie Taylor testified that she had frequently seen a large pistol in a holster at appellant's home, and had seen it there as late as November 4 or 5, 1931. Jackson was killed on the morning of November 8, 1931.

Deceased was killed with a .45 caliber pistol, and the father of deceased testified that on the afternoon of the day when his son had been killed appellant came to him wringing his hands and had stated that he was glad he had disposed of his .45 caliber pistol. This witness also testified that he later saw appellant, Dame and Decker talking together on a street of the town during the afternoon following the killing. Appellant expressed the opinion to deceased's father that the killing had not been committed by a resident of the community, but by some one who had stolen an automobile which was recovered on the morning of the killing about sixteen miles from the scene thereof.

The deputy prosecuting attorney testified that he was present and heard the conversation between appellant and the father of deceased, and that appellant stated the murder was an awful thing, and that he was glad he had got rid of that .45 of his, and that he had let a man named Davidson have the pistol sometime prior to that. Dame had testified that he obtained the pistol with which he killed Jackson from Decker.

There was also testimony to the effect that appellant and deceased had disagreed about the disposition of fines in certain cases in which they had been jointly interested in making the arrests, and that appellant had said to deceased that they could not work together in view of the deceased's contention, but the matter was submitted to the mayor, who took appellant's view of the matter.

There are certain other circumstances not mentioned in the brief of the Attorney General which we regard as too unimportant to mention.

There are explanations of the circumstances above detailed which we do not enlarge upon for the reason that the circumstances related do not supply that corroboration which the law requires to sustain a conviction upon the evidence of an accomplice.

We affirmed the Decker case, *supra,* upon the finding by us that the corroboration there recited was legally sufficient. That was a close case, but there were significant circumstances present there which are absent here, chief of which are these: The purchase by Decker shortly before the killing of cartridges similar to those found near Jackson's body. The fact that Decker had told of the killing before it was known in Pocahontas. Decker's remark to one Alphin that if he knew anything (about the killing) he had better keep his d—— mouth shut, and certain other statements of a similar nature.

For the lack of sufficient corroboration, and for the error in admitting the testimony as above set forth, the judgment must be reversed, and it is so ordered, and the cause will be remanded for a new trial.

SIBECK *v.* STATE.

Cr. 3805

Opinion delivered October 3, 1932.

Robert L. Rogers, John C. Sheffield and *Dillon & Robinson,* for appellant.

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

HUMPHREYS, J. Appellant was indicted, tried and convicted in the Pulaski County Circuit Court, First Division, for the crime of subornation of perjury for procuring Lee Weber to swear falsely on May 15, 1931, to an affidavit substantiating an account against said county in the sum of $4,034.33 for supplies sold to said county for its hospital, and, as a punishment therefor, was adjudged to serve a term of one year in the State Penitentiary, from which is this appeal.

Two alleged errors are urged by learned counsel for a reversal of the judgment.

First, it is argued that there is no legal evidence in the record to sustain the judgment of conviction, and, second, that the testimony introduced relative to other crimes was inadmissible and prejudicial to the rights of appellant.

(1) The record made by the State reflects that appellant, county judge, appointed Ralph Thomas county comptroller, Henry Hilliard, purchasing agent, and Mrs.

Harrell as receiving agent for supplies sold for use in the county hospital; that appellant directed Hilliard to buy the major portion of meats and groceries for the hospital from Lee Weber; that, pursuant to the direction, supplies for the hospital during the months of April, May and June, 1931, were ordered from Lee Weber, who ran a small grocery store and meat market, to the amount of $12,204.17, out of a total of $15,096.04 purchased therefor; that during the month of April, 1931, supplies were ordered from him in the sum of $4,034.33, out of a total of $5,149.68 purchased therefor; that the total ordered for the use of the patients and employees therein was much more than they could have consumed; that in the month of April, Lee Weber signed the name of the purchasing agent to the requisitions made upon him for the supplies, and likewise signed the name of Mrs. Harrell to many of the receiving slips for supplies; that items for milk were carried on Weber's account as beans to cover up the source from which the milk was obtained; that Weber was a contributor of $4,000 or more to appellant's campaign fund and a fund to influence legislation; that in July, 1931, the State auditorial department, pursuant to law, audited the accounts of Pulaski County, which disclosed the fact that appellant had allowed claims filed against the county by 555, Inc., and Kern-Limerick Company for large amounts of merchandise which had never been delivered to the county, and that, out of the amount received for the goods which had not been delivered 555, Inc., had contributed four or five thousand dollars to appellant's campaign fund and legislative fund, and that Kern-Limerick Company had contributed either to said funds or to appellant as secretary of a county court fund, $2,500; that, after this discovery was made, 555, Inc., refunded to the county $15,400 and Kern-Limerick Company refunded $2,500; that the campaign and legislative funds derived by appellant in this manner amounted to more than $20,000.

We think, from the facts detailed above, the jury might have reasonably concluded that appellant adopted this plan or scheme to raise campaign or legislative funds by padding orders or requisitions issued on behalf of the county for merchandise; and to reasonably infer that Lee Weber falsified his April, 1931, account by including groceries and meats therein which he never delivered, by and with the approval and consent of appellant.

There is ample testimony in the record to sustain the verdict and judgment.

(2) The insistence that the testimony relative to the transactions with 555, Inc., and Kern-Limerick Company was erroneously admitted in evidence because separate and distinct offenses is not sound. The testimony relative to these offenses tended to show a system adopted by appellant and his friends to defraud the county and to prove the scienter laid in the indictment. The offenses were similar in nature, all involving appellant and covering a reasonably short period of time, and were admissible under the rule announced in the case of *Howard* v. *State,* 72 Ark. 586, 82 S. W. 196, and reiterated in the case of *Wilson* v. *State,* 184 Ark. 119, 41 S. W. (2d) 764.

No error appearing, the judgment is affirmed.

WARD *v.* WARD.

4-2650

Opinion delivered October 3, 1932.

Harney M. McGehee, for appellant.

Pryor & Pryor, for appellee.

KIRBY, J., (after stating the facts). The right of survivorship where the real property is held by the entirety has not been destroyed by our statute (Crawford & Moses' Digest, § 6232), and it has also been held that the character of such estate by the entirety is not changed by a divorce of the parties. *Raulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690; 74 Am. St. Rep. 97; *Davies* v. *Johnson,* 124 Ark. 390, 187 S. W. 323; *Woodall* v. *Woodall,* 144 Ark. 159, 221 S. W. 463; and *Heinrich* v. *Heinrich,* 177 Ark. 250, 6 S. W. (2d) 21.

It is doubtless true, as appellant insists, that this holding is the minority rule, a great majority of the cases holding that the effect of a divorce of the parties is to sever an estate by the entirety and render the parties tenants in common, but our holding has been consistently that a divorce has no such effect, our last case being *Heinrich* v. *Heinrich, supra.* As the court could have granted no greater relief, we do not consider it necessary to change our ruling here.

This being true, we do not find it necessary, in view of this holding, there being no cross-appeal, to determine what effect should have been given to the alleged agreement of a division of the property claimed to have been made by appellant and denied by appellee, since both admit that there was no separation of the parties in contemplation at the time of its being made, if it was made.

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

MEHAFFY, J., concurs.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* WHITFIELD.

4-2642

Opinion delivered October 3, 1932.

[redacted]

[redacted]

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[redacted]

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

Sam T. & Tom Poe, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not sustaining its demurrer to the complaint, since it alleges the policy limited the indemnity in any event to payment of $7 per week for 20 weeks of any one year, but, as the opinion herein shows, we have concluded that no error was committed in overruling the demurrer, this being a suit for damages for breach of the contract, rather than for indemnity under the terms of the policy.

It is undisputed that appellant company refused to comply with the provisions of the policy and denied liability thereon, alleging that such disability was occasioned by, and the result of, a venereal disease not covered by the policy; or that it had been breached by the company's refusal to pay disability benefits in accordance with the terms thereof.

A fair construction of the terms of the policy binds appellant to pay to the insured during his lifetime and the continuation of a total disability weekly benefits of $7 per week, not exceeding, however, 20 weeks during any one period of 12 consecutive months, said policy providing:

"* * * The total number of days for which benefits will be paid under this policy is limited to one hundred and forty (140) during any twelve consecutive months."

A reasonable construction of this provision necessarily limits the number of days for which disability benefits may be paid to insured during any period of 12 consecutive months, but certainly not to the payment only of that amount for a continuing disability, otherwise this clause would have been omitted from the policy. It does not exclude the inference that the parties contemplated that future benefits would be paid for a disability which

continued during the lifetime of the insured, such clause limiting only the liability of the insurer to the payment of the amount prescribed to 20 weeks during any consecutive 12 months. If this clause had been omitted from the policy, it would have been like the policies involved in the cases of *Commercial Casualty Ins. Co.* v. *McCulley,* 185 Ark. 468, 48 S. W. (2d) 225, and *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364.

Other provisions in the policy show it was intended to remain in full force and effect during the lifetime of the insured, if he paid the premiums as required therein. Policies of insurance are construed liberally in furtherance of the general scheme proposed, such policy being construed most liberally in favor of the insured and most strongly against the insurer. *Mosaic Templars of America* v. *Crook,* 170 Ark. 474, 280 S. W. 3, 32 C. J. 1152. This rule of contracts applies with equal force where the provisions of the policy involved are ones of limitation of liability. 1 C. J. 414-15.

It may be true that in case of a lapse of the policy or death of the insured no further claim could be made for a future period of disability as claimed by appellant company, but the limitation of the policy only is to the amount or liability of appellant to the payment of no more benefits in any one year than the 20 weeks as expressly provided. This suit, however, is for damages for breach of a contract, and the jury has found that the contract was wrongfully breached by appellant company, and that the disability here was from an illness or sickness covered by the terms of the policy. The policy provides that the insured must be disabled from performing work of any nature, confined to his bed, etc., and certainly such terms do not indicate that it was limited on this point or a policy providing indemnity for partial disability only.

The breach of the contract, the appellant company's refusal to pay under its terms and denial of any liability thereunder, gave the insured the right to sue for gross

damages for such breach of contract, and the court has held that the measure of such damages is the present cash value of the past and future installments of the weekly indemnity based on the life expectancy of the insured. *Ætna Life Ins. Co.* v. *Pfeifer,* 160 Ark. 98, 254 S. W. 335. The rule as to the measure of damages is not modified by the fact that the insured died long before the end of the period of his life expectancy, the rights of the parties to a contract which has been breached being fixed at the time of the breach thereof. *Van Winkle* v. *Satterfield,* 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853; 6 Paige on Contracts, p. 5623; *Roberts* v. *Benjamin,* 124 U. S. 64, 8 Sup. Ct. Rep. 393, 31 L. ed. 334. The breach of the contract occurred in October, 1930, the suit was brought in August, 1931, and judgment rendered against the company on January 8, 1932, the death of the insured being subsequent to all of these dates, and damages being recoverable for the breach of the contract rather than acceleration of the payment of unmatured installments due under the contract. *Manufacturers' Furniture Co.* v. *Read,* 172 Ark. 642, 290 S. W. 353; *Ætna Life Ins. Co.* v. *Pfeifer, supra.*

The testimony is ample to sustain the jury's finding that the insured was permanently and totally disabled at the time his cause of action arose. *Industrial Mutual Ins. Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029.

No error was committed by the trial court in its refusal to give instruction No. A as requested by appellant, since its effect was to limit the amount of weekly disability benefits which insured might recover in the suit to those maturing before the bringing of the suit on August 3, 1931. This, as already said, is a suit for damages for breach of the contract by denial of liability thereunder, and appellee was entitled to recover all damages resulting from such breach in the one suit, it being the breach of the contract, and not the time of its discharge or the time of the bringing of the suit, that inflicts

the damages, the breach and denial of liability going to the entire contract being a repudiation of any liability thereunder. *Van Winkle* v. *Satterfield, supra; Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364.

Instruction No. 5 complained of was not erroneous on the measure of damages for the breach of the contract, and was approved in the case of *Ætna Life Ins. Co.* v. *Pfeifer, supra.*

Neither was error committed in the court's refusal to take judicial knowledge of the Hunter Tables of Mortality of Disabled Lives. The policy was not an insurance of a disabled man, but provided indemnity for disability to the insured, and certainly there was no necessity for giving any notice of any further disability under the policy of insurance, if any had occurred thereafter, or payment of a premium therefor, since the policy was breached and liability repudiated by the refusal to pay for the disability that resulted and for which indemnity was claimed as arising from a disease excepted from the provisions of the policy, a risk not covered thereby.

No error was committed in not instructing the jury otherwise, as appellant claims, by the giving of plaintiff's requested instruction No. 4.

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

ROSE *v.* W. B. WORTHEN COMPANY.

4-2652

Opinion delivered October 3, 1932.

Carmichael & Hendricks, for appellant.

E. G. Shoffner, for appellee.

MEHAFFY, J. This is the second appeal in this case. When the case was here before, we held that act 195 of the Acts of 1927 authorized administrators, executors and guardians to borrow money for certain purposes and secure the same by mortgage upon the real estate belonging to the estate represented by them. We held, however, that there was no authority granted by the act to borrow money and secure the same by mortgage or deed of trust except for the purposes specified in the act, and that, if money was borrowed and a mortgage executed for any other purpose than that expressed in the act, the order authorizing it and the mortgage executed in pursuance thereof were void. The decree of the chancery court was reversed, and the cause remanded with directions to enter a decree in accordance with the opinion of this court. *Rose* v. *W. B. Worthen Co.,* 184 Ark. 550, 42 S. W. (2d) 1002.

After the case was remanded, it was again tried in the Pulaski Chancery Court, and that court held that the mortgage was valid as to the following items: Recording fees, $5.25; continuation of abstract, $22.50; State and county taxes, $228.40; street improvement taxes, $160; sewer improvement taxes, $21.95; fire insurance premiums, $53; brokerage on loan, $5.77. Interest was allowed on these items at 7 per cent., amounting to $85.02. There was another item of $85 allowed for money paid to minors under the order of court, but there was no appeal from the allowance of $85, and it is not involved here.

This appeal is prosecuted to reverse the decree of the chancery court holding that the above items are secured by the mortgage, and that they are authorized under act 195 of the Acts of 1927.

Appellants insist, first, that the word "obligation" used in the statute means an obligation created by a contract which is a lien on the land, but that the word "obligation" does not include taxes. It is said by appellant that taxes are liens but not obligations secured by liens. Numerous authorities are referred to defining "obligation." Originally, the term was limited to instruments under seal of a certain kind, such as a bond, and the obligation could at that time be created only by a written instrument. The word "obligation" now, however, is not so limited, but in the act of 1927 it is used in the sense of liability either created by contract or by operation of law. 46 C. J. 447-448; *Elasser* v. *Haines,* 52 N. J. L. 10, 18 Atl. 1095. In order to arrive at the meaning as used in the statute, we must consider the connection in which it is used and the evident purpose of the Legislature in permitting mortgages and deeds of trust to be executed as prescribed by the statute. When we consider the whole act, there seems to be no doubt that the Legislature intended to authorize administrators, executors and guardians to borrow money to protect the interest of the minors, and the words used by the Legislature are broad

enough to include all obligations or liabilities which are liens on land.

Appellants contend that taxes are liens, but that they are not obligations secured by liens. Our statute providing for lien for taxes is as follows: "Taxes assessed on real and personal property shall bind the same and be entitled to preference over all judgments, executions, incumbrances or liens whensoever created, and all taxes assessed shall be a lien upon and bind the property assessed from the first Monday in June of the year in which the assessment shall be made, and shall continue until such taxes, with any penalty that may accrue thereon, shall be paid; provided, as between grantor and grantee said lien shall not attach until the first Monday in January in each year after the tax lien attaches." Section 10,023, Crawford & Moses' Digest.

There can be no doubt that the taxes create an obligation or duty, and that they are a lien on the land. But it is claimed that, while the taxes are obligations, they are not obligations secured by lien. We do not agree with appellant in this contention. They are not only secured by the very terms of the statute, but they are entitled to preference over all judgments, executions, incumbrances or liens whensoever created. If the act did not include taxes and assessments, then it would be impossible for minors in the circumstances of these minors to prevent a sale of the land for taxes and assessments. If taxes are not included in the act, and the guardian or executor or administrator had no money in his hands with which to pay the taxes, the lands would be sold, and we think that the intention of the Legislature was to permit borrowing money and executing mortgages for liens of this character as well as liens created by contract.

It is next contended that a mortgage cannot be given on a part of an infant's estate to take care of liens not covering the particular property. The intention of the Legislature seems to be plain, and that the act authorizes borrowing money and executing a mortgage for the

purpose of paying obligations secured by liens on any property except the homestead. There is a proviso, reading as follows: "Provided, that the homestead shall not be incumbered by mortgage or trust deed except for the purpose of satisfying existing liens against the homestead." Therefore the homestead cannot be mortgaged to raise money to pay obligations that are liens on any other lands except the homestead. The other items were expenses necessarily incurred in order to enable the guardian to borrow money. It is a matter of common knowledge that persons would not lend money on a house or building unless the property was insured, and it is also true that the other expenses are necessary, and, if not allowed, would prevent the borrowing of money to discharge liens. No person would lend money on a house without its being insured, and no one would lend money on property without an abstract showing title, and the recording fees are, of course, a necessary part of the expense. To hold that these items could not be paid would defeat the very purpose of the act. There is nothing in the record tending to show that any of the items of expense were created after the mortgage was made. We find no error, and the decree is affirmed.

SOUTHERN LUMBER COMPANY *v.* GREEN.

4-2644

Opinion delivered October 3, 1932.

D. A. Bradham, Aubert Martin and *Fred L. Purcell,* for appellant.

D. L. Purkins and *Leffel Gentry,* for appellee.

McHaney, J. Appellee brought this action against appellant to recover damages for personal injuries sustained by him while an employee in appellant's sawmill. On November 19, 1930, while working in the plant of appellant as oiler and while engaged in greasing bevel gears which drive the "live rollers" on one of the edger tables in the sawmill, appellee's right hand was caught in the cog wheel, brought in contact with the hood or covering over the top part of the gear and was injured—four fingers of his right hand being broken and crushed to such an extent that it became necessary to amputate three of them. A trial resulted in a verdict and judgment in favor of appellee in the sum of $1,000.

Several errors are assigned for a reversal of the judgment, the most serious assignment being the alleged

error of the court in refusing to direct a verdict for appellant. This challenges the sufficiency of the evidence to support the verdict, and this necessitates a brief review of the evidence in the light most favorable to appellee. It is the settled rule of this court that a judgment will not be reversed on account of the insufficiency of the evidence where there is any substantial evidence to support it, viewing the evidence in the light most favorable to the party in whose favor the judgment is rendered. Viewed in this light, the evidence establishes that appellee, a colored man, at the time of the injury was just past twenty-one years old; that he had been working for appellant in different capacities for about three and one-half or four years; that he had been performing the duties of oiler a very short time, substituting for the regular oiler, who had received an injury in the same manner a little less than thirty days prior to appellee's injury; that he had never greased the gears on the edger table prior to the time he was injured, except perhaps once a year or so previous; that he was instructed by the mill foreman on the morning of the accident to grease said gears by applying the grease to the outer cog wheel with a paddle while the machinery was in operation, but no other instructions were given him as to how the work was to be done; that he was injured on the first gear that he attempted to grease, there being a number of similar gears on the edger table; and that he had previously worked around and about the edger table at different times, but paid no particular attention to the gears or how they were greased. It is further shown that the gears were covered by a guard over the top part which came down half way to the bottom, leaving the under side exposed, which was standard equipment; that the cog wheels had become worn on the gear at which he was injured, having sharp edges, and that this caused the cogs to catch the stick or paddle, pulling his hand into the machinery. Appellee did not know of this condition. Under this state of facts we are unwilling

to say as a matter of law that appellee assumed the risk, and that the court should have directed a verdict against him. On the contrary, we think the facts make a question for the jury, especially when his youth and inexperience are taken into consideration. The general rule is that the question whether an employ assumes the risk is one for the jury and not for the court unless the danger is so open and obvious that a person of reasonable prudence would not perform the particular service. This is always true where the servant is acting under the immediate direction of his superior unless he knows and appreciates the danger of obeying the orders or the danger is so open and obvious that a person of reasonable prudence would refuse to do so. *Owosso Mfg. Co.* v. *Drennen,* 182 Ark. 389, 31 S. W. (2d) 762. Here the servant was not only acting by direction of his superior, but there was some evidence of negligence on the master's part of a defective condition of the cog wheel which was or could have been known to the master by an inspection and was unknown to the servant. Furthermore the servant, although twenty-one years of age, was young and inexperienced, and it is well settled that the law imposes the duty of instructing and warning such a one regarding the duties to be performed and the dangers incident thereto. *Ward Furniture Mfg. Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002.

Error is assigned on many grounds to the giving of instruction number one for appellee. This is a lengthy instruction and no useful purpose could be served by setting it out and commenting on the alleged errors separately. Exceptions were saved to it, both general and specific, all of which we have carefully examined and find them without merit. Complaint is also made of the refusal of the court to give appellee's requested instruction number seven. We have carefully read all of the instructions given by the court as well as those refused, and are of the opinion that the court fully and

fairly instructed the jury on every phase of the case. We therefore overrule these assignments.

Another assignment is that the court erred in allowing Fred Elliott, a witness for appellee, to testify over its objections that appellant had other cog gears on a casing table which were larger than those on the edger table, but serving a similar purpose, which were entirely covered or protected by a guard and were greased in a different way, and that appellee would not have been hurt if the gears on the edger table had been encased and greased like those on the casing table. Appellee responds to this statement by saying that no such testimony was given by the witness, and quotes the transcript of his testimony which shows that he did not. Whether he did or not we think unimportant, as the testimony in no way could have prejudiced appellant. The gears on the casing table were entirely enclosed with a guard or hood, both above and below, and the grease was poured in at the top in a receptacle provided for that purpose. Of course, had the gears on the edger table been so encased and greased, appellee could not have been hurt, and the witness' statement to that effect was a simple statement of fact which the jury and everybody else would know as well as the witness.

Complaint is also made of the action of the court in permitting the witness, Quimby, to testify over its objections that there was danger in greasing the cog gears on the edger table, and that it was more dangerous to do so than putting grease in the grease boxes along the line shaft. This was another simple statement of fact which every person knows to be true, and moreover the witness was a millwright of twenty-five years' experience and was testifying as an expert. We think no prejudicial error occurred in the admission of this testimony.

Another assignment of error relates to the testimony of Isom Brewer, who testified as a millwright of long experience, which we have examined and found unobjectionable, at least not prejudicial to appellant. Three

farmers were permitted to testify as to the extent of the impairment of appellee by reason of the loss of the fingers on his right hand. Inasmuch as it is not claimed that the verdict in this case is excessive, which it manifestly is not, we fail to see wherein the testimony of these witnesses prejudiced appellant in any manner. Their testimony was to the effect that his impairment as a farm hand or common laborer, such as appellee's education and training fitted him for only, was, in their judgment, from fifty to seventy-five per cent. Of course, the jury was as capable of judging this matter as were the witnesses, but, conceding it to be erroneous, it was harmless.

The smallness of the verdict and judgment in appellee's favor shows that the jury probably considered that his injury was the result, in part, of his own negligence, and that they reduced the amount to which he would have otherwise been entitled under the comparative negligence statute as instructed by the court. We find no reversible error, and the judgment must be affirmed. It is so ordered.

DeMers *v.* Graupner.

4-2649

Opinion delivered October 3, 1932.

Ben D. Brickhouse and *T. N. Robertson,* for appellant.

Trieber & Lasley, for appellee.

BUTLER, J. Plaintiff and defendant, respectively, the appellee and appellant here, were adjoining property owners in the residential section of the city of Little Rock. Their properties consisted of adjacent lots upon which each had established and maintained a residence for a number of years. Between the lots the defendant some years ago had constructed an ornamental iron fence, but shortly before the institution of this suit she began the erection of a solid board fence separating her back yard from that of the plaintiff and continuing its construction along the line between the properties to a point about even with the front of defendant's house. Plaintiff brought this action to enjoin the further construction of said fence and to require that portion which had already been built to be torn down and removed. Plaintiff alleged that the defendant was maliciously constructing the fence for spite, which fence, when completed, would constitute a solid wall about eight feet in height; that it would be unsightly, obstruct his light and air and materially lessen the value of his property.

The defendant answered denying the allegations of the complaint and in effect alleging that the construction of the fence was not caused by malicious and spiteful purpose on her part, but was necessary for the quiet enjoyment of her property. She made counterclaim for damages because of the depredations by plaintiff's and neighbors' children, to which a reply was filed, and an amendment also made to the complaint in which it was alleged that plaintiff had acquired title by adverse possession to all of the ground south of the iron fence and prayed in addition to his prayer for injunction that his title to all of the land south of the iron fence be quieted in him because of his adverse holding.

The cause was heard upon the pleadings and testimony offered, and the court entered a decree finding in

favor of the plaintiff and dismissing the defendant's cross-complaint for want of equity.

It is conceded by the parties to this action that there is no statute in this State regulating the construction of fences of such character as it is alleged was in course of construction by the appellant, or that this court has ever been called upon to decide the precise issue here involved. It is the contention of the appellant that, according to the rule at common law and the great weight of authority, an owner of land may erect on his own property any kind of structure he may desire, even though it might have the effect of causing great annoyance to the neighboring owners, and that the motive or intent of the person erecting the structure cannot be inquired into unless the structure can have no benefit or advantage, but is for the avowed or manifest purpose of damaging a neighbor; nor could an owner be prevented, even though the purpose is a malicious one, from erecting a structure which merely prevents the free use of light and air by the adjoining property owner. In support of this contention counsel for the appellant has cited an array of authorities, among which are 1 C. J. 1229; 1 R. C. L. 399, and cases from courts of Kentucky, Ohio, Pennsylvania, South Carolina, Texas, Vermont and from a number of other respectable courts of last resort.

It is the contention of the appellee that, although the rule contended for by the appellant may have its foundation in common law and be supported by the greater weight of authority, yet the trend of modern decisions is to the effect that an adjoining landowner may enjoin the erection or maintenance of a structure erected for the purpose of annoying him and making the use of his property less desirable. To support this view, appellee cites cases from the States of Oklahoma, Michigan, Nebraska and other jurisdictions.

As we view the facts, it becomes unnecessary for us to express our adherence to either of the conflicting views. It is our opinion that the preponderance of the

evidence is to the effect that the fence complained of was being built, not for the sole purpose of annoying the appellee, but to preserve and protect appellant's property from trespassers and from the wilful destruction or damage of her flowers, fruit and windows inflicted by thoughtless persons some of whom at least were attracted to the neighborhood by reason of the means of recreation afforded by the appellee. While the fence to some extent obscured the vision of those looking from the appellee's kitchen and dining room windows and was not as attractive as the ornamental iron fence, it was not of an unusual height, considering the purpose for which it was being built, as it was not more than eight feet high—probably about seven feet. There is some testimony to the effect that obnoxious articles were hung upon the fence and that offensive language was used by the appellant to members of appellee's household, but this all occurred after the institution of this suit, and had but little bearing on the question of the motive which induced the construction of the fence.

We are also of the opinion that the decree of the chancellor quieting title in appellee to all of the land south of the iron fence was erroneous. The evidence is clear that the property line of appellant extended south of the iron fence about six inches at one end, gradually increasing to about eighteen inches at the other, and, while the appellee had mowed the grass on this strip for a number of years, there was no evidence of any act upon his part or any one for him which would indicate an intention to claim beyond the true boundary between his property and that of the appellant, or any conduct which would bring home to the appellant the knowledge that he was intending to divest her of title by adverse occupancy. Indeed, it is quite manifest that he never had any such intention until the unfortunate incidents occurred out of which this suit has arisen.

The decree of the trial court is therefore reversed, and the cause remanded with directions to set aside the

decree vesting title to the strip above described in the appellee and to dissolve the injunction.

McHaney, J., dissents.

Atlas Life Insurance Company *v.* Bolling.

4-2654

Opinion delivered October 3, 1932.

Silas W. Rogers and *C. C. Brewer,* for appellant.

H. G. Wade and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

Butler, J. This suit was instituted by the appellee to recover benefits for total and permanent disability under the terms of a policy of insurance issued to him by the appellant company. In the complaint appellee alleged in substance that the policy sued on had been at all times since the date of issuance and delivery to him in full force and effect, and that, while it was in force and effect, he became totally and permanently disabled so as to prevent him from engaging in any remunera-

tive occupation or performing any work; that the appellant company had denied liability, and that under the terms of the policy he was due the sum of $25 per month from the date of his disability. He prayed judgment for that amount and 12 per cent. penalty and reasonable attorney's fee.

The appellant answered denying the material allegations of the complaint and specifically denying that the appellee had at all times done and performed all things required of him to keep his policy in full force and effect, and that, since the date of the issuance of the policy or at the time of the filing of the answer, it was in full force and effect. The appellant subsequently filed an amendment to the answer in which it alleged that the policy was obtained through fraud on the part of the appellee, in that he had made false statements in his application on June 20, 1930, wherein he stated that he was in good health on that date; that this statement was not true as the alleged injury to the appellee was sustained on June 18, 1930, before the date of the application for, and issuance of, the policy.

On these pleadings and the testimony adduced the case was submitted to the jury which returned a verdict for the appellee for the sums sued for. Thereupon the court entered judgment for the sums found by the jury and for a 12 per cent. penalty and attorney's fee. From that judgment is this appeal.

One of the contentions made by the appellant is that the undisputed testimony shows that the injury out of which appellee's disability grew occurred on a day in June before the application was made for insurance and before the policy was issued and delivered, and that therefore, under the terms of the policy, no recovery could be had, and, if the evidence as to the date of the injury was not wholly uncontradicted, the great preponderance of the testimony was to the effect that the injury occurred before the date of the application, and that appellant was entitled to have that issue submitted

to the jury under its requested instruction No. 2 which in effect told the jury that, although the appellee (plaintiff) was wholly and permanently disabled within the meaning of the policy, yet, if the cause for said total and permanent disability resulted from an injury received prior to his application, there could be no recovery.

We have examined the contract of insurance with care, and are of the opinion that the construction placed upon it by appellant is not warranted by its terms. That part of the clause of the policy on which this suit is predicated provides as follows: "After one full annual premium shall have been paid upon this policy, and before default in the payment of any subsequent premium, if the insured shall furnish the company with due proof that he has since such payment * * * become wholly disabled by bodily injury or disease, not occasioned by military or naval service * * *, so that he is, and presumably will be, thereby permanently, continuously and wholly prevented from engaging in any occupation for remuneration or profit, or performing any work, and that such disability has then existed continuously for not less than ninety days, * * * the company will pay to the insured * * * a monthly income of $10 for each one thousand dollars face amount of insurance."

The above clause does not provide for exemption from liability where the cause of disability occurred prior to the date of the policy. If the insurer had so desired, it could have in plain terms made the provision for which it now contends, but, for us to sustain the contention made, we would have to write something into the policy which it does not in fact contain. It is well settled that policies of insurance must be interpreted according to the plain import of the language used, and where there is an ambiguity or a question of doubt arises, it must be construed in favor of the policyholder. *McClain* v. *Reliance Life Ins. Co.*, 170 Ark. 478, 280 S. W. 15; *Great American Cas. Co.* v. *Williams*, 177 Ark. 87, 7 S. W. (2d) 975; *Fowler* v. *Unionaid Life Ins. Co.*, 180 Ark. 140, 20 S.

W. (2d) 611. Therefore, although the injury which after resulted in total disability occurred before the application for insurance was made, this would not of itself prevent a recovery.

We are of the opinion, however, that the court erred in the giving of its instruction No. 1, which in effect told the jury that it should determine from all the facts and circumstances in evidence whether the policy of insurance was delivered to the plaintiff while he was in good health, and that the burden was upon the defendant to establish the fact that he was not in good health when the policy was delivered. It must be remembered that the defendant denied in its answer that the policy was in force, and that, by the terms of the entire contract, in order for the policy to be effective, the insured must have been in good health at the time of the delivery of the policy. In the case of *New York Life Ins. Co.* v. *Mason,* 151 Ark. 135, 235 S. W. 422, 19 A. L. R. 618, the court said: "The plaintiff alleged in the complaint that the policy was executed and put in force, and this was denied in the answer, and it was an essential part of the plaintiff's case to prove that there had been a delivery of the policy in compliance with the stipulation that the policy should not be in force until delivery to the assured while in good health and upon the payment of the premium." Under the authority of that case it is clear that the burden rested upon the plaintiff not only to prove delivery of the policy and payment of the premium, but that the assured was in good health at the time of the delivery of the policy.

The court gave instruction No. 3 over the objection of the appellant, as follows: "You are instructed that if you find from a preponderance of the evidence that the application for insurance issued by defendant to plaintiff was prepared by the agent for the insurance company and the doctor selected by the insurance company; and, if you believe that the plaintiff truthfully answered all questions asked him by the company's agent or examining physician, or if you find that the

material statements appearing in said application which it is now claimed are false, were written into said application by said agent or doctor for the insurance company, and were statements not made by plaintiff, or if you believe that the true facts alleged to be false statements were known to the doctor or agent of the insurance company, then you are told that such misstatements will not avoid the policy of insurance sued on." It will be seen that in the above instruction the jury was told that if the statements in the application were not made by the plaintiff, or if made and if false and known to the doctor or agent of the insurance company, then such misstatements would not avoid the policy. In response to that instruction, after it was given over the objection of the appellant, the appellant requested an instruction to the effect that if the agent and the applicant entered into a collusion to conceal facts with reference to a prior injury the verdict should be for the defendant. In commenting upon this instruction counsel for the appellee insist that it was properly refused because there was no evidence in the record showing that there was any collusion between the appellant's soliciting agent and the applicant, or any effort made by any one to conceal any facts from the insurance company. This contention we find to be correct. There is no evidence that there was any collusion between the doctor or agent of the insurance company and the applicant to conceal the facts or any knowledge on the part of the agent or doctor that any misstatements were made. Neither was there any evidence that either of them wrote any answers to the questions in the application not made by the applicant himself. On this branch of the case, the applicant testified that he did not remember what the statements were, but simply stated that whatever statements he made were true. He also testified that he did not remember the date of his injury. Therefore, that part of instruction No. 3 was abstract, and we are unable to say how it might have influenced the jury. It would indicate to the jury that

there was in the mind of the presiding judge some evidence to the effect that the agent did not write the answers as made by the applicant, and also that, if the applicant did make the answers as written, the agent knew they were false. This might have had a tendency to mislead the jury and induce them to indulge in conjecture. Therefore, we think the error was prejudicial. *Schirmer* v. *Hallman,* 135 Ark. 5, 204 S. W. 606; *St. Louis, S. F. R. Co.* v. *Townsend,* 69 Ark. 380, 63 S. W. 994; *Mo. Pac. Rd. Co.* v. *Kirby,* 152 Ark. 90, 237 S. W. 687; *Wisconsin & Ark. Lbr. Co.* v. *McCloud,* 168 Ark. 352, 270 S. W. 599.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

REYNOLDS *v.* STATE.

Cr. 3818

Opinion delivered October 10, 1932.

Edward Gordon and *Garner Fraser,* for appellant.

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

SMITH, J. This appeal is from a judgment sentencing appellant for a term of twenty-one years in the penitentiary upon a conviction for murder in the second

degree. Only one assignment of error appears to be of sufficient importance to require discussion, and that is, whether the testimony is legally sufficient to support a conviction for that crime.

There is no serious conflict in the testimony, which is to the following effect: Deceased, accompanied by Ott Reynolds and a son of Ott Reynolds, came to appellant's home early in the evening for the purpose of visiting one Jack Wilson, who was there at appellant's home suffering from a burned arm. Ott Reynolds is a cousin of appellant.

Appellant heard a noise at his barn, and took his shotgun and went to the barn to investigate. When he returned from his investigation, he found deceased and Ott Reynolds and the latter's son in the house. The visitors did not go into Wilson's room, but remained in the room where appellant and the members of his family and the wife of Mr. Wilson were. There was a small dog in the room, concerning which deceased made a remark so vulgar that only a man maudlin drunk would have made it. Deceased also injured the dog by trying to break its leg. Ott Reynolds enticed deceased out of the room and endeavored to take him home. Deceased refused to go, and declared he would re-enter the room. To prevent him from doing so, the door was closed and latched. The door consisted of four planks, held together by two braces or cross-pieces, with a wooden latch in the center. Deceased shook and kicked the door, and continued kicking it until he kicked it open, and in doing so one of the planks of the door had been kicked loose from the cross-pieces to which it had been fastened. The occupants of the house were screaming while deceased was kicking the door. The testimony is confusing as to whether deceased attempted to enter the room immediately after kicking the door open, or whether he kicked it open when he first left the house. In any event, deceased returned to the house, after having been taken away from it by Ott Reynolds, and was warned several times by appellant not to

re-enter. Deceased was shot with a shotgun, and fell on the porch just in front of the door, where he died in a short time.

For the reversal of the judgment, it is insisted that the undisputed evidence shows that appellant killed deceased in defense of his home and the inmates therein, from the aggression of one who was attempting, by violence, to enter it.

On behalf of the State, it is pointed out that all of the witnesses to the killing who so testified were either relatives or friends of the defendant, and it is insisted that the presumption arising from the proof of the killing under § 2342, Crawford & Moses' Digest, was not overcome by this testimony.

This section reads as follows: "The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

This statute has been construed in numerous cases, and the case of *Brock* v. *State,* 101 Ark. 147, 141 S. W. 756, is exactly in point on the application of the statute to the facts of this case. In the Brock case, *supra,* the court read the statute as an instruction in the case, and prosecuting counsel, in commenting upon the statute, said: "The instruction means that, the killing being proved, the burden of proving that he was justified in doing it is on the defendant; and if the defendant does not prove to your satisfaction that he is not guilty, you must convict him of murder." The trial court overruled an objection to this argument, and in holding that this was error, this court said: "The remarks of the counsel, sanctioned by the court in its refusal to sustain an objection to them, were a misinterpretation of the instruction that had been given by the court, and were an

incorrect statement of the law. It was a statement, too, in direct conflict with the instruction upon which the attorney was commenting.

"The court correctly instructed the jury in the instruction that the burden rested upon the State to prove the crime charged, and that this burden did not, at any time, shift to the defendant, but, according to the construction which the attorney placed upon the instruction, with the sanction of the court, the jury were told in effect that, after the killing had been proved by the State, then the burden shifted to the defendant to prove that he was not guilty of the crime charged, and that he must make such proof, too, to the satisfaction of the jury. This was well calculated to confuse and mislead the jury, and to cause them to fail to understand the true meaning of the instruction.

"The killing being proved, unless the evidence on the part of the State shows circumstances of mitigation, justification, or excuse, it devolves upon the appellant if he relies upon such circumstances to show them, but the burden is still on the State to show that the defendant is guilty of every grade or degree of crime included in the indictment. The burden, in other words, in a charge for murder, never shifts to the defendant, but always remains on the State. *Cogburn* v. *State,* 76 Ark. 110, [88 S. W. 822]."

Other cases to the same effect are as follows: *Scoggin* v. *State,* 109 Ark. 510, 159 S. W. 211; *Johnson* v. *State,* 120 Ark. 193, 179 S. W. 361; *Parsley* v. *State,* 148 Ark. 518, 230 S. W. 587; *Williams* v. *State,* 149 Ark. 601, 233 S. W. 776; *Black* v. *State,* 171 Ark. 307, 284 S. W. 751; *Walker* v. *State,* 100 Ark. 180, 139 S. W. 1139; *Maddox* v. *State,* 155 Ark. 19, 243 S. W. 853.

The burden was therefore upon the State to prove that appellant was guilty of murder, notwithstanding this statute, and we do not think the testimony was sufficient for that purpose. On the other hand, we are unable to say, as a matter of law, that the testimony excuses and

justifies the killing. There was no testimony of previous ill-will between the parties. Deceased was found to be unarmed after his death, but the testimony does not show whether appellant knew this. Appellant probably knew, or should have known, that neither he nor the other inmates of the house were in danger of great bodily harm from deceased, in view of the number of persons present to restrain him, but deceased's conduct was such as to arouse the anger of appellant to an irresistible point.

We therefore feel constrained to reverse the judgment sentencing appellant to a term in the penitentiary for murder in the second degree, and to cure that error by reducing the grade of the homicide to voluntary manslaughter.

The judgment of the court below will therefore be reversed, and the judgment will be modified by reducing the conviction to voluntary manslaughter, and a sentence of seven years, the highest punishment for that offense, is hereby imposed. *Blake* v. *State, ante* p. 77. It is so ordered.

LAKE *v.* WRIGHT.

4-2655

Opinion delivered October 10, 1932.

Mahony & Yocum, J. N. Saye and *W. T. Saye,* for appellant.

M. A. Matlock and *J. R. Wilson,* for appellee.

SMITH, J. This is a consolidated suit, brought by two plaintiffs, who alleged that they were each members of a mercantile firm operating under the name of the Star Clothing Company, to require an accounting of the

earnings of the partnership, and we now have before us the third appeal which has been prosecuted to this court in that suit.

The first appeal was from a judgment of the circuit court sustaining a demurrer to the complaint, and the opinion which sets out the allegations of the complaint recites the issues in the case. *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826. We there held that a cause of action had been stated, and the question involved in this appeal, like that on the second appeal (*Wright* v. *Lake,* 183 Ark. 954, 39 S. W. (2d) 712), is whether the plaintiffs proved their alleged cause of action. There was a verdict and judgment in their favor on the last trial of this cause, from which is this appeal.

For the reversal of this judgment it is first insisted that a verdict should have been directed in favor of appellant, for the reason that the suit was not commenced within three years after the cause of action accrued. This was the theory upon which the court below sustained the demurrer to the complaint, but we held on the first appeal, *supra,* that, where there had been a fraudulent concealment of a cause of action, the statute of limitations did not begin to run until the fraud was discovered. This question of fact was submitted at the trial from which the present appeal comes upon conflicting testimony, and is concluded by the verdict of the jury.

Appellant kept the books of the partnership, and appellees were salesmen, and it was shown that settlements were had at the end of each year, and a final settlement was had when appellees severed their connection with the partnership, and it is insisted that these settlements were binding on all parties. So they were in the absence of fraud or mistake, but the question in the case is the one of fact, whether there was a mistake in the settlements and a fraudulent concealment thereof; and, as we have said, this issue was submitted to and was passed upon by the jury.

It is urged for the reversal of the judgment that the court erred in permitting appellee Wright to testify con-

cerning a proposed compromise agreement between himself and appellant. It is, of course, incompetent to prove an offer of settlement made as a compromise, but the testimony in question was not offered or admitted for that purpose. The court, in admitting the testimony, stated that it could be considered by the jury only as a circumstance relating to the question of the concealment of the cause of action. It will be borne in mind that the cause of action was apparently barred by the statute of limitation, and the plaintiff was required to prove, and was endeavoring to prove, that the cause of action had been fraudulently concealed, and that therefore the bar of the statute had not fallen. This testimony was to the following effect: The suit embraced the partnership earnings for the years 1922, 1923 and 1924, and Wright testified that he would not have known that the settlements were not correct, had he not received notice from the United States Revenue Department advising him that he owed the Government additional income taxes for the year 1922 on his part of the earnings of the partnership. This notice related only to the earnings for the year 1922, and Wright did not know, when he discussed the settlement with appellant, that a mistake had been made for the subsequent years of 1923 and 1924. There appears to have been no question as to the amount of the mistake for the year 1922, and appellant proposed to pay that amount, but he demanded the execution of a receipt in full for all demands against the partnership. Wright insisted that there be added to the receipt the words, "for the year 1922," and when appellant declined to permit this addition the attempt to settle the 1922 account failed. We think this testimony has some probative value tending to show, not only that there was a mistake in the accounts for the subsequent years, but also to show a concealment of, or an attempt to conceal, that fact. The testimony was therefore admissible for the purpose for which it was admitted.

The cause appears to have been submitted to the jury under correct instructions, although certain of them

were objected to on the ground that there was no evidence upon which to base them. We think there was, and the instructions given fully submitted appellant's theory of the case.

The testimony tended to support the allegations of the complaint, which were recited in our first opinion in this case, and we there said that a cause of action was alleged.

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

STANDARD PIPE LINE COMPANY *v.* GWALTNEY.

4-2662

Opinion delivered October 10, 1932.

T. M. Milling and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

McNalley & Sellers, for appellee.

KIRBY, J. (after stating the facts). It is first urged that the court erred in refusing to direct a verdict in appellant's favor at the conclusion of the testimony for appellee and also after all the testimony was introduced. It is insisted that there was no substantial testimony supporting the allegations of negligence on the part of appellant or that working in the water and slush caused the injury to appellee; appellant insisting that the undisputed testimony disclosed that appellee was an experienced workman, knew as much about the conditions under which the work was to be done as any one, and assumed the risk of any injury therefrom. It is undisputed that one of the men in the gang, when they were ordered to clean up the pumping station in the presence of appellee asked Mr. Hamilton, the foreman, "What about some boots to get in and clean it out," and that he was told they didn't need any boots, that it was not dangerous and that they couldn't do any good with boots in there.

Appellee testified about his experience working in the oil fields, denied that he knew that he might become infected from working in oil and slush in cleaning out the pumping station, saying: "No, sir. I never heard of it before; I didn't know anything about it."

It was not denied that the men had requested that they be furnished rubber boots for doing the work; and the foreman stated that the company did furnish rubber boots to employees in certain places "where they were working in oil, where there was acid and stuff like that, like down here below these refineries." He also said that several of the men under his supervision had complained about sore feet, which they said was the result of oil poisoning.

The company's physician, to whom appellee was sent for treatment, pronounced the trouble "oil poisoning" and cautioned appellee not to work around where he would get oil on his feet after he begun to recover.

Appellee had the right, in the absence of knowledge on his part, to rely upon the assumption that the master had performed his duties so as not to expose him to extraordinary hazards, and, being directed by his foreman to do this work in this place, was justified in obeying the order and did not assume the risk incident thereto, not realizing the danger to which he was thereby exposed. *A. L. Clark Lumber Co.* v. *Northcutt,* 95 Ark. 291, 129 S. W. 88, *Woodley Pet. Co.* v. *Willis,* 172 Ark. 671, 290 S. W. 953; *Dickinson* v. *Mooneyham,* 136 Ark. 606, 203 S. W. 840; *Central Coal & Coke Co.* v. *Fitzgerald,* 146 Ark. 109, 225 S. W. 433; *St. L. S. W. Ry. Co.* v. *Gant,* 164 Ark. 621, 262 S. W. 654; and *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357.

The jury was also warranted in finding from the testimony that the performance of the service under the direction of the master resulted in the injury, as appellant's physician, to whom appellee was sent for treatment, declared he was suffering from oil poisoning; and he was not shown to have been so afflicted before he did this work, nor was there any evidence or indication that

he had performed any labor of any kind thereafter which did expose him to the danger of oil poisoning. The testimony is sufficient to support the verdict, and the court did not err in refusing to direct a verdict in appellant's favor.

Neither did the court err in giving appellee's requested instruction No. 1, which was not abstract, and submitted to the jury the question of appellant's negligence in not exercising proper care to furnish appellee a reasonably safe place in which to work. If the foreman knew, or by the exercise of ordinary care could have known, that it was not safe to work in the oil and slush without protective covering, and the plaintiff did not know of such danger, he should have been notified thereof, and certainly did not assume the risk of any such danger. Appellee stated he did not know of any such danger; and it was shown that appellant's foreman knew that many of the men under his supervision had complained of oil poisoning, and that the company supplied rubber boots for the protection of its employees who were required to work where there was oil and acid and stuff like that.

Neither was error committed in the instruction complained of upon the assumption of risk. Appellee might well have been considered inexperienced, in so far as being unacquainted with the dangers that might result from working in the oil and slush without rubber boots where he was directed to work, and the jury could have found that appellant knew such danger, or should have known of such danger, through the knowledge of its foreman from the different cases of poisoning with which he was shown to have been acquainted, leaving the jury to determine whether he exercised reasonable care in failing to warn the appellee of such danger. Appellee was experienced in many kinds of service about an oil field, but testified he knew nothing about any oil poisoning resulting from working in the oil, and he was not only not warned about the attendant danger but was assured

by the foreman that there was no danger when directed to do the work.

Neither did the court err in refusing to give appellant's requested instructions telling the jury that appellant would not be liable for injury resulting from walking and standing in the oil and slush while cleaning out the pumping station, if they believed that an ordinary individual under the same circumstances doing the work would not have been injuriously affected by it, or if appellee's feet were over sensitive and more susceptible to poison for any reason than any ordinary person making it a place of peculiar danger to him on account of his physical condition, unless the foreman was aware of such fact or by the exercise of ordinary care could have known of it. There was no testimony to show that appellee was any more susceptible to oil poisoning than the ordinary man, nor that he had knowledge of such condition, if it had been a fact, and did not disclose it to appellant's foreman when he was directed to assist in cleaning out the pumping station, where he would be compelled to walk and stand in the slush and waste oil.

It is true that only one of the other men engaged in the service of appellant with appellee in cleaning out the pumping station was poisoned, and the effects of the poisoning developed on his arm, but such fact does not show that appellee had any knowledge of any such physical condition that would make him more susceptible to oil poisoning than the ordinary man, and certainly he was ignorant of any such condition if it existed, never having suffered from such poisoning theretofore. The negligence here consisted in not exercising ordinary care to furnish a reasonably safe place in which to do the work which appellee was directed to and did perform in cleaning out the pumping station, being assured that the work was not dangerous and that the employees did not need to use rubber boots, which were usually supplied the workmen for performance of such service under conditions that might otherwise result in injury to them.

The appellee was injured, has suffered much and has long been out of employment and has not yet recovered, but the verdict is not claimed to be excessive. We find no error in the record, and the judgment is affirmed.

CROWN COACH COMPANY *v.* MEADORS.

4-2663

Opinion delivered October 10, 1932.

James B. McDonough, for appellant.

Partain & Agee, for appellee.

MEHAFFY, J. The appellee brought this suit for damages, claimed to have been suffered by him, by reason of the negligence and carelessness of appellant, in giving appellee erroneous information as to whether the bus of appellant had already left Van Buren, Arkansas.

The appellant is a corporation organized under the laws of Missouri, and owns and operates a bus line through the States of Missouri, Arkansas, and other States, and operates upon a regular schedule through Crawford County, Arkansas.

Appellee alleged that on August 28, 1931, he received a message informing him of the serious illness of his daughter at Harrison, Arkansas, and that she was going to be operated upon immediately for appendicitis; that when he received the message he went to the ticket office of appellant in Van Buren, which was located in a drug store, and asked when he could obtain passage on one of appellant's busses to Springdale, Arkansas, so that he could go there and then continue his journey at the earliest possible moment; that the agent of appellant carelessly, negligently and wrongfully informed appellee that the bus had already gone, and there was no other bus or means of transportation that day; that said bus had not in fact gone, but left the city of Van Buren 15 or 20 minutes later, but that appellee relied on the information and was unable to catch the bus, and because of the wrongful information given him, he was delayed several hours in arriving at the bedside of his daughter, and was forced to make a part of the trip in an open car, and the exposure caused him to have a severe cold, and he became sick and suffered great mental agony on account of being deprived of being present at the bedside of his daughter during her illness and during the operation. He alleged that he was damaged in the sum of $2,500.

The appellant filed answer admitting that it was a corporation, and was operating busses for the transportation of passengers in and through Crawford County, Arkansas, and admitting that its busses stopped at or near the Palace Drug Store to permit passengers to alight and to take on passengers, and denied all the other material allegations of the complaint.

It also alleged that appellee was guilty of contributory negligence, and that he assumed the risk. It also

alleged that there were other means of traveling to Harrison, Arkansas, and that appellee could have gone much more directly and quickly by other means of travel. Appellant also filed motion to quash service.

There was a jury trial and a verdict for $200, and the case is here on appeal.

It is admitted that appellant is a public carrier; that it operates its busses on regular schedule; and that the drug store where appellant claims to have gone for information is a regular stop for discharging and taking on passengers; and that its agents there sell tickets.

Appellant insists that the relation of passenger and carrier never existed between appellant and appellee, and that the court should have directed a verdict for appellant.

The appellee testified that he had received a message advising him of the serious illness of his daughter, and that an operation would be performed almost immediately; that he desired to go to Harrison by way of Springdale because his wife was at Springdale, and it was his intention that he go to Springdale, get his wife, and that both of them make the trip to be with their daughter.

The appellant operated a bus from Van Buren to Springdale. It was appellee's intention to take passage on this bus to Springdale, and then he and his wife would get other conveyance to Harrison.

He went to the ticket agent at the drug store, Mr. Triplett, and inquired of him the time the bus would leave for Springdale. Mr. Triplett told him it had already gone. Relying on that information, and knowing that there was no other means of transportation to Springdale until late in the afternoon, he went to a restaurant to get lunch, and then saw the bus leaving the city of Van Buren.

If the agent of appellant had given the correct information, he would have taken passage on this bus, and would have arrived at Springdale several hours earlier than he did arrive, and would have taken passage from there on some conveyance other than appellant's bus.

After the bus had left Van Buren appellee went to Springdale on the six o'clock train, the first conveyance by which he could go to Springdale. It took him about 30 minutes to get his wife and get a conveyance from Springdale to Harrison. They drove practically all night, arriving at Harrison about six o'clock in the morning. The weather was inclement; there was a heavy fog, and it was necessary to keep the door open a great portion of the time in order that they could see to drive. From this exposure he contracted a severe cold, and became sick and was treated by a physician. He paid a man $10 to take him and his wife in his car from Springdale to Harrison.

This evidence of appellee was corroborated by other evidence.

Triplett testified that he did not remember seeing the plaintiff that day; he did not think he gave him the information about the bus, but did not remember. Other clerks in the drug store who sold tickets also testified that they did not remember about the matter.

As to whether appellee went to the drug store and asked for information about the bus, and as to whether Triplett told him it had already gone, were questions of fact for the jury.

Appellant first contends that there is no liability because the relation of carrier and passenger never existed. A common carrier of passengers owes a duty to the public, and to any one of the public intending to become a passenger who applies to the agent for information as to the arrival and departure of trains or busses.

"It is the duty of a carrier to furnish intending passenger with such information, instructions and directions as to its own system or course of conduct as may reasonably be necessary to enable them to pursue their journey, and the passenger has the right to rely upon the representations and replies to inquiries made by him of the proper agents or employees of the carrier. Thus when a railroad company authorizes an agent to sell tickets

over its line, such agent has authority and it is his duty, upon application made to him, to furnish information to persons desiring to purchase tickets over the road he represents as to the proper trains upon which to travel, and whether such trains will stop at the station to which the ticket is sold, and other like information regarding the use of the ticket. It is also the duty of the carrier to give a passenger reasonable notice of the necessity for changing cars at junction points.'' 4 R. C. L. 1068.

When one intending to take passage applies to the ticket agent of the carrier for information as to the arrival and departure of its trains or busses, it is the duty of the agent to give correct information, and the person intending to take passage has a right to rely on the information given him by the agent. In such case, if the agent of the carrier gives erroneous information which results in damage to the person applying for information, the carrier is liable if its negligence is the proximate cause of the injury. *St. Louis S. W. Ry. Co.* v. *White,* 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110, 122 Am. St. Rep. 631; *Shockley* v. *So. Ry. Co.,* 93 S. C. 533, 77 S. E. 221; Hutchinson on Carriers, vol. 3, 1240.

It was, of course, the duty of the appellee to exercise ordinary care; but, when he received information that his daughter was seriously ill, he had a right to go to her bedside, and to take passage on whatever conveyance he could, exercising reasonable care. If he did what a person of ordinary prudence would have done under the circumstances, he was not guilty of contributory negligence, and his acts, if not guilty of contributory negligence, would not prevent him from recovering damages for the wrongful conduct of appellant, if such conduct was the proximate cause of his injury.

Appellant contends that some of the instructions given at the request of the appellee were erroneous, and that the court refused to give instructions requested by the appellant which should have been given. The instructions are lengthy, and we do not deem it necessary to set

them out. We have carefully examined all the instructions given by the court, and the instructions, as a whole, fairly submitted the case to the jury.

The jury returned a verdict for $200, and it is not contended that the verdict is excessive. The questions as to the negligence of the appellant and the contributory negligence of the appellee were submitted to the jury on correct instructions, and their findings of fact are conclusive here.

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

OIL FIELDS CORPORATION *v.* HESS.

4-2667

Opinion delivered October 10, 1932.

Albert L. Wilson, for appellant.

Mahony & Yocum, for appellee.

MEHAFFY, J. The Oil Fields Corporation is a Delaware corporation authorized to do business in Arkansas, its principal place of business being in Union County.

Appellee, George L. Hess, was a director and president of the Oil Fields Corporation from May, 1925, until the latter part of August, 1928, and he was general manager of the corporation from December, 1925, until the latter part of August, 1928.

Appellee, W. E. Knappenberger, was elected a director in August, 1926, and was superintendent of production at a salary of $450 a month, which was afterwards increased to $500 a month.

On December 4, 1925, the board of directors of the Oil Fields Corporation passed a resolution authorizing and directing appellee Hess to manage the affairs of the corporation subject to the orders of the board of directors, and authorized and directed him to employ such assistants as might be necessary for the producing properties of the corporation, and fix the compensation therefor subject to the approval of the board of directors, and said resolution provided that any contract of employment made by Hess should set forth that the employee consents that he may be discharged at any time by vote of the board of directors or the person employing him, and that the only liability of the corporation shall be for actual compensation for the time such employee has actually been in the service of the corporation. The business of the corporation was producing crude oil.

Under the authority given Hess by the resolution of the board of directors, he, on December 15, 1925, employed W. E. Knappenberger as his assistant as the superintendent of production, with the understanding that Knappenberger should devote his full time to the business of the corporation.

The board of directors approved the employment of Knappenberger by Hess, and in August, 1926, elected Knappenberger a member of the board of directors, at that time fixing his salary at $500 per month.

Albert L. Wilson was a director and general counsel for the corporation at a salary of $1,000 per month.

The evidence introduced by appellees tended to show that it was the custom of the corporation to give employees a vacation with full pay; that the board of directors had discussed this and agreed to it, although no formal resolution was adopted.

The evidence offered by the appellants contradicts this evidence on the part of the appellees and tends to show that there was no discussion by the board, and that it was not the custom to give an employee leave of absence or vacation with pay.

It would serve no useful purpose to set forth the testimony. The testimony is in conflict, and it was a question for the jury to determine what the truth was.

A verdict based on conflicting evidence, if there is any substantial evidence to support it, is conclusive here, although we might believe that the verdict was against the preponderance of the evidence.

It is contended by appellant first that a contract with Knappenberger to give him a vacation on pay would, in effect, be giving away $500 of the money belonging to the corporation to one of its directors, and that such contract would be void. It is argued at some length by appellant that a director cannot contract with the corporation, and numerous cases are cited and relied on by appellant. It appears that several of the directors were employed by the corporation and received salaries.

Mr. Wilson, the general counsel, is a director, has been for a long time, and has been receiving a salary of $1,000 a month. Mr. Hess, as general manager, was a director, and received a salary of $1,000 a month.

The general counsel, Mr. Wilson, was not only a director and stockholder, but held proxies for four-fifths of the stock of the corporation.

The evidence shows that in July, 1928, Knappenberger's father was sick in Pennsylvania, and Knappenberger came to Hess and told him about his father being sick, and that he, Knappenberger, had never taken a formal vacation, and that he would like to take his vaca-

tion and go back to see his father, who was very ill and getting old.

Hess, the president and general manager, had some work to do in Texas in July, and asked Knappenberger to wait until he got back from Texas, and he could then take his vacation. After Hess came back from Texas, Knappenberger, about July 28th, left on his vacation.

Hess testified that when Knappenberger was planning his vacation, he told Knappenberger to go to Judge Wilson and tell him about it, so that there would be no misunderstanding. Witness told Knappenberger that Mr. Wilson understood the conditions, and that Knappenberger went to Wilson's office, which was connected with Hess' office, heard him tell Wilson that Hess had granted him a vacation.

Witness testified that, when Knappenberger took the matter up with Wilson, he was very gracious, and that witness said to Judge Wilson: "You understand he is taking his vacation like all the other employees and officers have taken their vacations." Witness then testified that Wilson had taken vacations on full pay, and that witness also had. He testified Judge Wilson laughed, and said: "Of course, it is expected that he would do that." This evidence on the part of appellees was denied by Mr. Wilson.

Knappenberger went on his vacation and got back to El Dorado on the night of August 26th. Wilson had directed Hess to discharge Knappenberger, but Hess did not do this, but wired him to ascertain when he would return. After his return Wilson told Hess that he intended to take the matter up with the board of directors, and ask them to discharge both Hess and Knappenberger. Suits were brought to prevent this, and for the appointment of a receiver for the corporation, but this suit was withdrawn, and the suit for the purpose of getting a receiver appointed was filed.

The board of directors met in their regular meeting on Monday. Neither Hess nor Knappenberger attended

the meeting. Judge Wilson attended and reported on Hess and Knappenberger, and asked that they be removed from the board of directors, and the board adopted a resolution removing them.

Knappenberger then claimed that appellant owed him salary for the month of August. The corporation declined to pay this salary, and Knappenberger, for the consideration of $1, assigned his claim to Hess.

On August 14, 1931, the appellees, Hess and Knappenberger, filed suit in the Union Circuit Court against the appellant, Oil Fields Corporation, for $500 salary. The appellant, Oil Fields Corporation, filed answer denying the material allegations in the complaint, and alleged that Knappenberger was discharged for inefficiency; denied that it was indebted to appellees or either of them in any sum, and denied that Hess had any authority to give Knappenberger a vacation on pay, and also alleged that, since the removal of Hess and Knappenberger as directors, Hess had been filing fictitious suits against appellant, and that Hess took the assignment from Knappenberger with the full knowledge that appellant was not indebted to Knappenberger in any amount. The assignment showed a consideration of $1, but Hess testified that there were some matters between them; that they had not had a settlement yet. Judgment was asked in favor of Hess for $500 and costs. There was a jury trial and a verdict in favor of Hess for $500. The case is here on appeal.

Counsel have furnished the court with excellent briefs citing many authorities, but we do not deem it necessary to review or call attention to all these authorities.

Appellant, in support of its contention that a director cannot deal with a corporation, calls attention to several authorities. We think, however, the law is settled that a director may be employed and paid a salary to perform services for the corporation. He could not, of course, vote on the proposition himself, but, if the other directors, constituting a quorum, voted to employ him to

perform certain services at a fixed salary, the contract would be valid, and, if he voted himself, it would not make the contract invalid, if a majority other than himself voted for the proposition.

"The rule obtaining in a majority of jurisdictions is that a director may deal or contract with the corporation where he acts in good faith and the corporation is represented by a quorum of disinterested directors or other independent officers or agents authorized to contract for it. Such a contract is not void *per se* nor is it voidable, except for unfairness or fraud, for which it will be closely scrutinized in equity. Similarly an officer may deal with the corporation if his acts are open and fair and known to the directors and stockholders; but all dealing between an officer of a corporation and the board of directors must be scrutinized carefully, and to bind the stockholders must bear evidence of having been in the interests of the corporation." 14a C. J. 118.

In the instant case the directors were employed as general counsel, general-manager and superintendent, etc., and there is nothing in the record to indicate that the director in each instance was not employed by a majority of the board other than himself. Their compensation was fixed, and the board had a right to make these contracts.

"A director or other fiduciary officer of a corporation presumptively serves without compensation. He is entitled to compensation for performing the usual and ordinary duties of his office when and only when there is a valid express agreement therefor; he cannot recover on an implied contract." 14a C. J. 136.

Here all the evidence shows there was an express contract employing Knappenberger at a fixed salary, and nothing to indicate that Knappenberger himself took any part in voting for his employment, or in fixing his salary.

"An officer is without authority to fix or increase his own salary. Directors are precluded from fixing, increasing, or voting compensation to themselves for either past or future services by them as directors or officers,

unless they are expressly authorized to do so by the charter or by the stockholders. The director who claims compensation for his services, being disqualified from voting on the question, if he is necessary to make up a quorum of the board, or if his vote is necessary to the result, the resolution will be void. But where his vote is not necessary to the adoption of such a resolution, it will not necessarily be void, although he may have voted for it, or although he may have been present when the vote was taken." 14a C. J. 143-144.

We think therefore, the general rule is that a director may be employed to perform services for the corporation, to act as general manager or superintendent or to perform other duties. His employment, however, must be voted for by a quorum of the directors other than himself.

There is evidence in this case that officers and employees were granted leave of absence or vacations with pay, and that this was known to and acquiesced in by the board of directors.

This court, in passing on the question of whether a reward offered by the general manager of a railroad company was binding on the company, said: "The proof showed that one who had acted for more than three years under the title and in the capacity of general manager of the road, with the knowledge of the president, had posted the reward. He had received the card offering the reward by express from the office of the vice-president in St. Louis, with instructions to post same. This was done at every station, and the president of the road passed over it as often as every ten days. * * *

"The company can only act through its representatives. The president of the company, as we have said, went over the road every ten days, and these rewards were posted at every station. This and other evidence, such as the fact that the reward came from the office of the vice-president, was entirely sufficient to show that the company had knowledge of the act of Kress in offering

the reward." *Arkansas Southwestern Ry. Co.* v. *Dickinson,* 78 Ark. 483, 95 S. W. 802.

It seems to be well settled that a director of a corporation may make a valid contract to perform services for the corporation, and this contract may be made with the general manager if he is authorized, as he was in this case, to hire and discharge employees.

The next question is, can the corporation make a contract allowing the employee compensation for the time he is on a vacation or leave of absence?

"Where an employee is given a vacation with pay, or a leave of absence is granted, or where the employee's absence is involuntary, as where the employer fails to furnish work, the employee is entitled to his wages for the time off." 39 C. J. 148; Thompson on Corporations, 3 Edition, vol. 3, 461, § 1869; Fletcher, Cyclopedia of Corporations, vol. 4, 424, § 2766; *M. K. & T. Ry. Co.* v. *Bryant,* (Tex. Civ. App.) 178 S. W. 685.

If the testimony of appellees is true, then the board of directors fixed the compensation of Knappenberger, and also authorized pay during leave of absence or vacation. As we have already said, this evidence is contradicted by the evidence offered by appellant, but it was a question of fact properly submitted to the jury, and its verdict on these matters is conclusive. There is no question in this case of giving away the company's money. Of course, the board would have no right to do this, but they may have thought they would get better service from an employee by giving him a vacation on pay than they would otherwise. Many corporations permit their employees to take vacations on pay, and doubtless believe that this secures better service, and is not giving away money of the corporation.

As we have already said, the law is well-established that a director may make a valid contract with a corporation at a salary fixed by it. He cannot, of course, himself vote for his employment nor in fixing his salary. The

law seems also to be well settled that an employee may be granted a vacation on pay.

Whether the corporation did employ Knappenberger, and whether they agreed to give him a vacation on pay, were questions for the jury.

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

SMITH *v.* NEW HAMPSHIRE SAVINGS BANK.

4-2658

Opinion delivered October 10, 1932.

Ingram & Moher, for appellant.

G. W. Botts, for appellee.

McHANEY, J. Appellants, husband and wife, on March 9, 1927, executed their promissory note for $6,500, secured by a mortgage on 320 acres of rice land in Arkansas County, to the American Investment Company, who, for a valuable consideration, sold and assigned same to appellee. The principal note was made due and payable April 1, 1937. Attached to said note were ten interest coupons for $390 each, representing the annual interest on the principal note, and one became due on the first day of April each year until the principal note became due. Default was made in the payment of the interest coupon due April 1, 1930, and on March 12, 1931, appellee, under the power contained in both the note and mortgage, elected to and did declare the whole amount due and payable, there being an acceleration

clause in both the note and mortgage. Thereafter appellee brought this suit to foreclose the mortgage and prayed for judgment against appellants for the debt and interest, which then amounted to $7,035.02 together with interest from April 1, 1930, (the date default was made in payment of the coupons) at 10 per cent. per annum until paid. There is a clause in the coupon notes providing that interest might be charged at 10 per cent. after maturity. A decree was rendered in conformity with the prayer of the complaint, fixing a lien upon the land and ordering same sold in satisfaction of the debt.

Appellants, although personally served with summons, did not appear in the lower court but wholly made default.

The only question raised on this appeal is that the court erred in rendering a decree for the debt with 10 per cent. interest from the accelerated maturity, April 1, 1930, and they rely upon the authority of *Jewell Realty Co.* v. *Kansas City Life Ins. Co.*, 182 Ark. 397, 31 S. W. (2d) 521, where this court had occasion to pass on a similar question. We think appellants are not in position to question the validity of the decree against them for several reasons, one of which will be sufficient. The record shows that appellants have recognized the validity of the decree. While they did not appear in the trial of the cause, filed no pleading and made no objection in the lower court to the decree in any manner, they did, at a later date, appear and ask the court to postpone the date of sale, which the court did, appellee consenting thereto. Thereafter appellants came into court and petitioned the court to appoint a receiver to take charge of said lands and rent same for the year 1932. This order was made, appellee consenting, the sale being postponed until December 1, 1932, and appellants agreed to cultivate 120 acres of the lands in rice and to pay appellee one-fifth of said crops as rents. These were inconsistent positions with the right now asserted for appellants to assume, and as said in *Jones* v. *Hall,* 136 Ark. 353, 206

S. W. 671: "He waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal." By asking for and obtaining a postponement of the sale and by asking for the appointment of a receiver to rent the land and actually renting a portion of it for the year 1932, without raising any question in the lower court as to the validity of the decree or the amount of the judgment against them, they are precluded from raising the question in this court for the first time.

Affirmed.

HOLMES *v.* HOLMES.

4-2669

Opinion delivered October 10, 1932.

Fred A. Isgrig and *Harry Robinson,* for appellant.

Owens & Ehrman, for appellee.

McHANEY, J. On February 12, 1927, appellant secured a decree of divorce from appellee. That part of the decree relating to the settlement of the property rights and the alimony reads as follows: "And it further appearing to the court that there were no children born of said union, and that the parties hereto have agreed upon a settlement of the property rights, it is ordered under said agreement that the defendant herein pay to the plaintiff herein by way of alimony the sum

of one hundred fifty dollars ($150) at this time and one hundred fifty dollars ($150) on the first day of each and every month hereafter. * * * The court doth retain control of this cause for such further orders and proceedings as may be necessary to enforce the rights of the parties hereto.''

In 1931 appellee filed a petition in the chancery court to modify the above-mentioned decree by striking therefrom the provision relative to the payment of alimony, and that the court determine the amount of delinquent alimony which had accrued and extend the time for paying same upon such terms as the court might deem just and proper under the circumstances. The petition for this purpose was based on the ground that his income as a physician and surgeon had been greatly reduced both on account of his physical condition and the depressed business conditions generally prevailing throughout the country. A hearing was had on this petition on March 14, 1932, and the court made an order finding that appellee was delinquent in alimony installments as provided in the original decree in the sum of $4,650, and that he thereafter pay appellant $60 per month beginning March 15, and a like sum on or before the fifteenth of each succeeding month until the total amount found to be delinquent had been paid. It was further provided that, if he failed to pay as therein provided, the amount to be paid should be increased $60, but if he pay in the manner provided at the time when due, same should constitute full and complete settlement of the claims for alimony provided in the original decree. The order further provided that the original decree should be set aside in so far as future alimony is concerned, save and except that, if he fails to make the payments as therein provided, then the sum shall be increased $60 per month.

From this decree modifying the original decree as above stated this appeal is prosecuted.

The principal ground urged for a reversal of the judgment is that the court did not have the power to

set aside a former decree based on an agreement of the parties. Appellant relies upon the cases of *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, and *Erwin* v. *Erwin,* 179 Ark. 192, 14 S. W. (2d) 1100, and cases therein cited to support this contention. We cannot agree with appellant that the cases relied upon go to the extent now contended for. It must be remembered that the statute (§ 3510, Crawford & Moses' Digest) provides: "The court, upon application of either party, may make such alterations from time to time as to the allowance of alimony and maintenance, as may be proper, and may order any reasonable sum to be paid for the support of the wife during the pending of her bill for divorce." It has been held by this court that an allowance of alimony is subject to modification by the court to meet changed conditions. *Kurtz* v. *Kurtz,* 38 Ark. 119; *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700; *McConnell* v. *McConnell,* 98 Ark. 193, 136 S. W. 931. It is true in the Pryor case the court held that, where, in contemplation of divorce, the husband and wife entered into a contract by which he agreed to pay her certain sums of money at stated times and they caused this contract to be made a part of the decree for divorce, the decree cannot subsequently be modified in so far as it is based on the contract. But even then the court said that, if the court should subsequently find the allowance excessive, it might decline to permit its extraordinary process to be used to collect more than a just and reasonable allowance for alimony. In that case the agreement was incorporated in the decree by the voluntary consent of the parties, and the court in construing the above statute said: "Does the fact that the allowance is based on an agreement entered into between the parties hamper the power of the court to subsequently alter it? We think not, so far as the dependence of the allowance on the decree of the court is concerned. The statute gives the court the power to alter any of its decrees allowing alimony. The court is not, in the first instance, bound by the agreement of the parties concerning the amount of alimony to be allowed to the wife (2

Nelson on Divorce and Separation, § 915, *Calame* v. *Calame,* 25 N. J. Eq. 548); and, *a fortiori,* the agreement cannot, in the face of the statute, hinder the court in altering its own decree of allowance. The decree is not entirely dependent upon the agreement, and therefore the power to subsequently alter cannot be controlled by it. *Parsons* v. *Parsons,* (Ky.) 80 S. W. 1187. The agreement of these parties was not merely one as to the amount the court by its decree should fix as alimony, but it was manifestly intended to be an independent agreement, in contemplation of divorce, for the payment of alimony."

The language of the decree in this case is "that the parties hereto have agreed upon a settlement of the property rights, it is ordered, under said agreement, that the defendant herein pay to the plaintiff herein," etc. It will be seen therefore that the agreement of the parties was "merely one as to the amount the court by its decree should fix as alimony," and was not intended as an independent agreement for the payment of alimony. So in *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1, this court again said: "Section 2683 of Kirby's Digest (now § 3510, Crawford & Moses' Digest) provides that upon the application of either party, the court may make such alterations from time to time as to the allowance of alimony and maintenance as may be proper. Under this clause of our statute, the court has the power to alter the allowance of alimony at any time when the changed conditions of the parties justify such action. *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700." The decision in the other case relied upon, *Erwin* v. *Erwin,* 179 Ark. 192, 14 S. W. (2d) 1100, is distinguishable from this case in the same way.

It is suggested that the testimony of the appellee as to his present condition was not sufficient to justify the court in setting aside the order for alimony, and that there is no assurance that he will carry out the last order. We think the evidence was sufficient to support the chancellor's finding, and that the matter of carrying out the last decree, the one appealed from, rests in the power

of the court to compel performance by the extraordinary remedies provided by law, and it is not such a debt as may be avoided by proceeding in bankruptcy as debts for alimony due or to become due are not dischargeable under the bankruptcy act. USCA, title 11, § 35. We find no error, and the decree is accordingly affirmed.

DANIELS *v.* STATE.

Crim. 3816

Opinion delivered October 10, 1932.

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

BUTLER, J. The appellant was indicted, tried and convicted of the crime of rape committed on a thirteen-year-old girl. He was represented by counsel as eminent as any in the State who conducted his defense in a courageous and able manner. During the trial timely objections were made and proper exceptions saved to the action of the court, and these were preserved in a motion for a new trial in which a number of assignments of error were made. We have carefully reviewed the evidence in the case, and find that it is ample to sustain the verdict and judgment of the trial court.

The prosecuting witness, a child of about thirteen years of age, gave a circumstantial account of how she was ravished, stating that her assailant was a stranger to her, but that she observed certain peculiarities about him which she described immediately after she reached her home. She said that he was a young negro man; that he had two scars on the side of his neck, one tooth missing and a deformity of one eye. A negro answering this description had been seen a few hours preceding the commission of the crime in that vicinity, and appellant was taken in charge on the following day because he answered that description. An examination of the tracks at the scene of the crime showed that they were made by a shoe having a rubber heel with a hole in it and when these were compared with the shoes of appellant it was ascertained that they matched. After appellant was taken into custody he was delivered to the deputy sheriff and was allowed to talk with a negro minister. After some conversation the appellant admitted the crime, and when placed on the witness stand in

his own behalf he did not deny having made the assault and stated that he had admitted it because his preacher told him it would be best to plead guilty; that he was frightened, and that was the reason he had made the confession. When testifying as a witness however, he stated that he did not remember where he was or what he did on the afternoon of the assault because he had found a quart jar of whiskey in the woods and had drunk about a pint of it and became so drunk that he did not remember whether he met the little girl or not and only remembered when he awoke in the woods late in the evening.

The witnesses who had seen appellant in the vicinity of the crime testified that he had no appearance of being under the influence of liquor, and one witness stated that appellant drew water from witness' well and made some inquiries as to where Bill Perry lived and told the witness his name.

The testimony, without the admission of the appellant, was ample to establish his identity, and it was also ample to establish the fact that the child had been ravished, and that the appellant had committed the crime. This, together with the admissions of the appellant and his testimony on the witness stand, was enough to lead to the conclusion of his guilt beyond a reasonable doubt.

The appellant was indicted in the name of Freeling Daniels. He and his father testified that his name was Frelorn Daniels, but a witness upon whose place appellant and his father had lived, and who was well acquainted with the appellant, testified that appellant's name was Freeling Daniels. One of the assignments of error was that the court erred "in refusing to hold that the name of the defendant was not Freeling Daniels and that his name was not *idem sonans* with the name of the defendant mentioned in the indictment." The court did not err in this regard because there was a conflict in the testimony as to whether appellant's name was Frelorn or Freeling Daniels, and for the further reason that there was no question as to the identity of the

appellant. The mere fact that his name was incorrectly spelled in the indictment is not ground for reversal, as all the proof shows that he was the person intended to be charged with the crime. *Joiner* v. *State,* 113 Ark. 112, 167 S. W. 492; *Bridger* v. *State,* 122 Ark. 395, 183 S. W. 962; § 3017, Crawford & Moses' Digest.

Complaint is made of the court's action in refusing certain instructions asked by the appellant and to those given by the court at the request of the State. Some of the instructions requested by the appellant were covered by instructions given, and therefore were not improperly refused. In one of the instructions requested the court struck from it the sentence: "If any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, then it is your duty to adopt such view and acquit."

Another instruction was refused which told the jury they could not convict unless the offense had been established to the exclusion of every other reasonable hypothesis of the defendant's innocence. The court gave at the request of the appellant correct instructions on the presumption of innocence and reasonable doubt, and, as the State did not rely entirely upon circumstantial evidence, it was not error to modify the instruction in the particular mentioned above or to refuse to grant the other. *Osburn* v. *State,* 181 Ark. 661, 27 S. W. (2d) 783, and cases therein cited.

Complaint is made of the action of the court in refusing to give an instruction which in effect told the jury that it was prosecuting witness' duty to make outcry at the time she alleged the appellant assaulted her, and that failure to do so might be considered in determining whether appellant did in fact commit rape upon her. This instruction was properly refused; first, because there was no evidence at all tending to show that rape had not in fact been committed, and, second, because the evidence showed she feared, because of appellant's threats, to cry out or resist, and because any outcry would have been unavailing since the scene of the crime was re-

mote from human habitation. *Jackson* v. *State,* 92 Ark. 71, 122 S. W. 101; *Meisenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494.

One of the defenses interposed was that of insanity, and the court correctly instructed the jury on that defense. The court refused request for instruction No. 10 which would have told the jury that in considering the degree of punishment in the event the defendant should be found guilty that they might take into consideration whether or not the defendant's mind was undeveloped and not the mind of a normal person. A number of witnesses testified regarding the mentality of the defendant, including a number of physicians. All of them testified that defendant was sane, and some of them testified that he was an uneducated young negro with the mind of about a fifteen-year-old person. The court gave the proper test by which the accountability of the defendant might be measured, and told the jury that, if they found the defendant innocent under the rule given, they should acquit him. The court's instruction on this question was a correct declaration of law, but it might properly have refused to so instruct, as all of the testimony showed that the defendant was sane. All courts agree that mere mental weakness does not exempt from responsibility, nor can one with a mind below normal be exempted from punishment, any more than a person with normal mind.

There are other instructions complained of, but which we find it unnecessary to comment upon because from a comparison of all of the instructions given we find no error.

In assignments of error Nos. 26, 27, 28 and 29 in the motion for a new trial it was alleged that the verdict of the jury was influenced by a large assembly of enraged persons present at the trial; that a lynching had been anticipated before the trial, and, in order to prevent the same, the sheriff had caused to be present in and about the court room a number of soldiers armed and in uniform, and these remained throughout the trial and

until the jury had returned their verdict; that the presence of the soldiers and the great crowd of people coerced the jury.

The evidence taken at the hearing on the motion for a new trial disclosed that, while there was a large crowd in and about the court room, it was orderly; that no threats were made by any of its members, nor was there any demonstration indicating any rage or resentment upon its part toward the appellant. The soldiers were in attendance at the request of the court as a precautionary measure, and it was shown that counsel for the defendant acquiesced in the presence of the soldiers, and that these performed only such duties as were assigned to them in a respectful manner. The trial was orderly throughout its entire course, and the verdict of the jury is not shown to have been influenced by anything except the evidence, which, as we have said, was ample to sustain it.

Finding no prejudicial errors in the admission or rejection of testimony or in the instructions given by the court, the judgment is affirmed.

YORK *v.* STATE.

Cr. 3820

Opinion delivered October 10, 1932.

J. S. McConnell and *Geo. R. Steel,* for appellant.

Hal L. Norwood, Attorney General, for appellee.

PER CURIAM. The bill of exceptions in the instant case is identical with the one held insufficient in the case of *Ward* v. *State,* 135 Ark. 259, 204 S. W. 971. In this

case, as in that the bill of exceptions was signed by the prosecuting attorney and counsel for appellant, but had not been submitted to nor approved by the trial judge. The appellant in each case had been convicted of a felony. It was there held that it is necessary that a bill of exceptions in a case where defendant has been convicted of a felony be signed by the trial judge, and that the bill of exceptions did not become a part of the record until it was so signed.

The errors complained of in the instant case, like those in the Ward case, *supra,* are such as must be brought into the record by a proper bill of exceptions, and, as no error appears in the absence of a bill of exceptions, the judgment must be affirmed, and it is so ordered.

WILSON *v.* CARDWELL.

4-2835

Opinion delivered October 17, 1932.

Proctor F. Johnson and *Duty & Duty*, for appellant.

John W. Nance, for appellee.

SMITH, J. Appellant and appellee were the opposing and only candidates for the Democratic nomination for State Senator from the Fifth Senatorial District, composed of Washington County, in the State-wide primary election held August 9, 1932. The returns, as certified by the county democratic central committee, showed that appellant was defeated by a majority of 249 votes, and within ten days thereafter a complaint was filed by appellant contesting this certification.

A demurrer was interposed to numerous paragraphs of the complaint, which was sustained, and these paragraphs were dismissed, but permission was given to amend. Later, and more than ten days after appellee had been certified as the nominee, an amendment was filed to the complaint. A motion was filed and sustained to strike the amended complaint from the record for the following reasons: (1) That the amended complaint alleged new and different grounds for contest, and was not filed within ten days of the date of the certification of the nomination; (2) that the amendment was not supported by the affidavit of ten reputable citizens of Washington County; and (3) that the amendment seeks to change and enlarge the grounds of contest set forth in the original complaint.

When the motion to strike the amended complaint was sustained, the court offered to permit the plaintiff to further amend his complaint, but he declined the offer, and has appealed from the action of the court in sustaining the demurrer to portions of his complaint and in striking his amendment to the paragraphs of the com-

plaint which had been dismissed when the demurrer thereto was sustained.

A motion has been filed here to dismiss the appeal upon the grounds that no final judgment has been rendered, and that the appeal is premature.

A headnote in the case of *Security Mortgage Co.* v. *Bell,* 175 Ark. 128, 298 S. W. 865, reads as follows: "An appeal from an order dismissing a complaint as to certain paragraphs, but leaving the paragraph which presented a triable issue, *held* prematurely taken, since the issue should have been tried and objection to the demurrer urged on final appeal from the whole action."

It is insisted, upon the authority of the case from which we have just quoted, that the motion to dismiss the appeal should be sustained. We do not, however, concur in this view, for the reason that, in our opinion, no triable issue was left after the demurrer had been sustained to certain of its paragraphs. The portion of the complaint, left after the demurrer to certain of its paragraphs had been sustained, was itself demurrable, as failing to sufficiently state a cause of contest. The vital parts of the complaint were deleted when the demurrer was sustained, and, in our opinion, the demurrer, if sustained at all, should have been sustained to the complaint in its entirety, and that there was not left thereafter a triable cause of action. *Hill* v. *Williams,* 165 Ark. 421, 264 S. W. 964.

The allegations of the original complaint are somewhat general in their nature, and, if the demurrer had been treated as a motion to make more specific, it should have been sustained on that ground.

We think, however, that the original complaint stated a cause of action, as its allegations, if supported by the testimony, show that appellant received a majority of the votes of the qualified electors of Washington County, which county composed the Fifth Senatorial District.

These allegations are lengthy, and will not be set out *in extenso,* but they are to the effect that appellee and certain of his political supporters conspired with a

candidate for the nomination for sheriff and certain of his adherents to illegally assess two thousand poll-tax payers, and to provide poll-tax receipts for them for the purpose and in consideration of having the persons to whom the poll-tax receipts were issued support appellee and the candidate for sheriff aforesaid. And, further, that persons had voted in the election who had no poll-tax receipts, as had others who were not otherwise qualified, although they held poll-tax receipts, among the latter class being many Republicans. That illegal absentee ballots had been received and counted for appellee, as had also the ballots of certain other persons who had not voted at all, and that certain ballots had been changed from appellant to appellee, and "that, by reason of the illegal and unlawful acts claimed, as aforesaid, the plaintiff had been cheated out of more than fifteen hundred votes in said county, and if the legal votes cast for him had been counted and the illegal votes that had been cast for the defendant were thrown out, this plaintiff would have received the nomination for the office of State Senator by a large majority."

These allegations were made more definite and certain by the amendment to the complaint.

It was held in the case of *Logan* v. *Russell,* 136 Ark. 217, 206 S. W. 131, which was the first case construing the primary election law, appearing as §§ 3757 *et seq.,* Crawford & Moses' Digest, that the complaint in a proceeding to contest the certification of a primary nomination shall be supported by the affidavits of at least ten reputable citizens, and shall be filed within ten days of the certification complained of, and that the complaint and the affidavits are jurisdictional, and must be filed within the time specified. It has, however, been also held that, where a contest has been instituted within the time and in the manner required by law, the complaint may be amended to make the allegations thereof more definite and certain and more specific; but the complaint may not be amended to allege new and additional grounds of contest. The statute does not require supporting affidavits

of the citizens to these permissible amendments. These amendments may be made without the supporting affidavits, and after the expiration of the original ten days, when unreasonable delay in the trial of the cause will not result therefrom. *Robinson* v. *Knowlton,* 183 Ark. 1127, 40 S. W. (2d) 450; *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. (2d) 319; *Gower* v. *Johnson,* 173 Ark. 120, 292 S. W. 382; *Bland* v. *Benton,* 171 Ark. 805, 286 S. W. 976.

It was not ground therefore to strike the amended complaint from the record because it was not verified by the affidavit of ten reputable citizens, and was not filed within ten days after the certification of appellee as the nominee. Nor was it ground to strike the entire amended complaint making more definite the allegations of the original complaint because a ground of contest was alleged which the original complaint did not contain. Only that additional ground of contest, if such there was, should have been stricken out.

As we interpret the pleadings, a cause of action to contest appellee's nomination was stated in the original complaint, and the court erred in striking out certain paragraphs thereof upon sustaining the demurrer thereto; but, with these paragraphs deleted, a triable cause of action did not remain, and an appeal was proper from that order.

We are also of the opinion that the court was in error in striking out the amendment to the complaint, and, upon the remand of the cause, this motion will be sustained only as to such grounds of contest as were not alleged in the original complaint.

The judgment of the court below is therefore reversed, and the cause will be remanded for further proceedings in accordance with the directions as above contained.

CITY NATIONAL BANK *v.* FITE.

4-2671

Opinion delivered October 17, 1932.

Evans & Evans and *James B. McDonough,* for appellant.

Cochran & Arnett, for appellee.

HUMPHREYS, J. On October 27, 1931, the City National Bank of Ft. Smith, one of the appellants herein, brought suit against the Smith Trading Company of Paris in the chancery court of Logan County, Northern District, to foreclose its pledges and mortgages in the sum of $25,000, deposited with it as collateral by said Smith Trading Company, and to obtain the appointment of a receiver to take charge of the property described in said pledges and mortgages which was not already in the possession of appellant. A part of the property consisted of 105 bales of cotton raised in 1931 on a farm of 320 acres, owned by the estate of Mrs. Ella Stroupe, deceased, wife of Henry Stroupe.

Her administrator, H. T. Fite, intervened in said suit, claiming a landlord's lien for rent in the amount of $2,000 on said cotton. Issue was joined in this suit as to the amount of rent due the administrator for the year 1931.

On October 14, 1931, the Smith Trading Company brought suit against Henry Stroupe in the circuit court of Logan County, Northern District, on a promissory

note for $574, including interest, which was executed to it for supplies on March 9, 1926, by Stroupe. The defense of payment was interposed to this suit, and, by agreement, it was transferred to the chancery court and consolidated with the foreclosure suit.

The cause was submitted upon the issues joined and the testimony adduced by the parties responsive thereto, which resulted in a finding that the amount of rent due was $2,000, and that the Stroupe note had been paid, and a decree in accordance therewith, from which is this appeal.

Four witnesses were introduced who testified as to the amount of rent due for the year 1931.

Rufus Smith, who was a stockholder in the Smith Trading Company, testified, in substance, that the trading company leased the 320-acre tract from the Stroupes in September or October, 1928, for five years, at a rental of $1,500 for 1929, $1,750 for 1930, and $1,800 a year for the next three years, and that it entered into possession thereof and made extensive and valuable improvements thereon with the understanding that a written contract would be drawn up and executed in keeping with the oral agreement; that, in the spring of 1929, he drafted a contract providing for the payment of $1,800 per year for the rents of the last three years and handed it to Stroupe; that this agreement was not signed by either party; that later Stroupe handed him a written lease and copy signed by himself and wife, which he retained, but never signed, which provided for a rental of $2,000 per year for the last three years; that he gave the original to his attorney when this suit was instituted, and prior to that time had given the copy to the manager of the farm; that it paid $1,500 for 1929 and $1,750 for 1930, and owed only $1,800 for 1931. He also denied that he admitted to Tom Fite and Almond Stroupe that it owed $2,000 rent for the year 1931.

Henry Stroupe testified, in substance, that, when Rufus Smith handed him a written contract which he had prepared, he told him it was not in accordance with their

oral contract; that thereafter he had Mr. John Arbuckle draw up a contract and copy providing for the payment of $1,500 for 1929, $1,750 for 1930, and $2,000 per year for the next three years, which he and his wife executed; that he delivered same to Rufus Smith, who accepted it and complied with its terms until its refusal to pay the 1931 rent. When interrogated concerning the whereabouts of the contract prepared and delivered to him by Rufus Smith, he said it was somewhere in his papers.

H. T. Fite testified that he demanded $2,000 for the rent of 1931 from Smith, who did not deny or dispute the amount due, but who stated that, on account of conditions prevailing, he should not be required to pay that much.

Almond Stroupe testified that he assisted the administrator in collecting the rents and the management of his mother's estate, and that in conversation with Rufus Smith he admitted that it owed $2,000 for the rent of the 320-acre tract for the year 1931, but stated that, on account of the price of cotton, they ought to reduce it to $1,500.

Three witnesses testified relative to the payment of the Stroupe note.

Henry Stroupe testified, in substance, that Rufus Smith owed him rent on his upper place, amounting to some more than the note he owed Rufus Smith, and that in the month of February, 1930, they had an agreement in the store of the Smith Trading Company that they would offset one against the other, and that Rufus Smith told him he would hand him the note later as he was in a hurry to go to the bottom farm; that nothing more was said about it until some three years later, when this suit was brought; that no request or demand was ever made upon him for the payment of the note after the settlement.

Tom Fite testified, in substance, that he was doing some collecting for Henry Stroupe in 1930, and that he attempted to collect the rents Rufus Smith owed Stroupe

on the upper place; that Smith said to him he would like to talk the matter over with Stroupe, and that they subsequently met at the store, and that, after conversing about the matter, it was agreed between them that they would offset the note against the rent; that the proposal to do so was made by Stroupe and accepted by Smith, and that Smith said he would look up the note and hand it to him later, as he was then in a hurry to go to the bottom farm.

Rufus Smith testified, in substance, that no such settlement was made as detailed by Stroupe and Fite; that he owed Stroupe nothing in 1930 for rents on his upper place; that he never asked Stroupe to pay the note because Austin Smith had charge of the store and notes; that it was his business to look after the farms, and Austin's business to look after the store and notes.

(1) Upon the rent issue, there is no dispute as to the term of the lease nor the amount of rents to be paid the first and second years, nor that Rufus Smith entered into the possession of the land and made improvements thereon contemplated by the parties, nor that the oral contract of lease should be reduced to writing and executed at a later date, nor that Rufus Smith paid the rent for the first two years and continued to operate and cultivate the farm, nor that during the third year he planted, cultivated and picked 105 bales of cotton, part of which was in the possession of appellant bank and part in the possession of Smith Trading Company. The only dispute in the testimony is as to the amount of rent to be paid by the Smith Trading Company for the use of the farm for the year 1931.

Stroupe testified that the trading company was to pay $2,000, and Smith that it was to pay $1,800 rent for that year, and Stroupe is corroborated by his son and Fite. The finding of the chancellor that $2,000 was due for rent for the year 1931 is supported by the weight of the evidence.

The contention of appellant that the oral contract was void under the statute of frauds is not tenable, if

for no other reason, because the lease contract was partially performed. The lessee entered into possession of the farm, made valuable improvements thereon, and had planted, cultivated and gathered the cotton crop the third year at the time this suit was instituted, and, under these circumstances, the lessee was bound to pay the amount of rent agreed upon. Having concluded that the oral contract is binding, it is unnecessary to determine whether the oral contract was supplanted by the written lease executed by Stroupe and delivered to the lessee.

Relative to the issue of payment of the Stroupe note, we cannot say that the finding of the chancellor is contrary to the weight of the evidence. The settlement is supported by two witnesses as against one, and the fact that three years elapsed between the settlement and the institution of the suit without any demand being made upon Stroupe for payment is a potent circumstance in corroboration of the evidence of the two.

No error appearing, the decree is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HALL.

4-2679

Opinion delivered October 17, 1932.

Thos. B. Pryor and *Daggett & Daggett,* for appellant.

Giles Dearing, for appellee.

HUMPHREYS, J. Appellees, husband and wife, recovered judgment for damages in the total sum of $905 in the circuit court of Cross County against appellant on account of an injury received by the wife, causing her to miscarry, through the alleged negligence of appellant, from which is this appeal.

A reversal of the judgment is sought upon the alleged ground that there is no substantial evidence in the record to support it. The argument is made that the evidence wholly fails to show that the injury received was the proximate cause of the miscarriage.

Appellees purchased tickets at Fairoaks, Arkansas, for transportation to Wynne, Arkansas. According to the testimony introduced by them, they boarded appellant's train at eleven o'clock A. M., and about the time the wife reached a seat, and before she had time to sit down, the train started with a jerk, which caused her to fall and strike her side against the arm of the seat; that she was pregnant and had been for three months; that the lick in her side produced great pain in her stomach, causing nausea and a hemorrhage from the genital organs; that, upon arrival at Wynne, she repaired to Stewart's Drug Store, where she had additional hemorrhages, causing her to suffer great physical and mental pain, and to become faint; that, after receiving medical attention, she was carried in a taxi to the home of a friend, where she remained for four hours in bed and in a semi-conscious condition, and then was carried to the home of her sister, where she continued to have hemorrhages and suffer until about five o'clock the next morning, at which time she miscarried; that, after being delivered of the fetus, she continued to suffer and was confined to her bed for ten days or more.

Dr. Stewart testified, in response to a hypothetical question, that, in his opinion, the miscarriage might have resulted from the injury.

Dr. Wilson testified on behalf of appellant, in response to a hypothetical question, that in his opinion the miscarriage did not result from the injury, because the injury was not inflicted on the uterus, and because sufficient time had not elapsed between the time of the injury and the delivery of the fetus for the injury to have been the proximate cause of the miscarriage.

The testimony detailed above justified the court in submitting to the jury the issue of whether the injury was the proximate cause of the miscarriage. Courts are not required to accept opinions of expert witnesses as absolutely true, and peremptorily instruct verdicts based upon their opinion regardless of all other facts and circumstances in the case tending to conflict with such opinion. Expert witnesses themselves frequently differ in conclusions and opinions in response to identical hypothetical questions; hence their opinions do not rise to the level of physical facts.

In the instant case, the testimony of the lay-witnesses tends to show that the injury was the direct cause of the miscarriage, and is supported to some extent by the testimony of Dr. Stewart.

The testimony of Dr. Wilson, appellant's expert witness, tends to show that the injury was not the proximate cause of the miscarriage.

This produced a conflict in the testimony for determination by the jury and not the court. The peremptory instruction therefore requested by appellant was properly refused.

Appellant also urges that the amount of recovery is excessive and the result of passion and prejudice. We cannot agree with learned counsel in this contention. The wife was entitled to recover for mental anguish as well as physical pain and suffering. According to the evidence adduced by appellees, she began to suffer acute and severe pain coincident with the injury, which continued in its intensity until four or five o'clock the following morning, at which time she miscarried. Her suffering was so great that she had fainting spells, and at times became

unconscious. She continued to suffer physically thereafter for ten days or more. When these facts are considered in connection with the mental anguish a woman must necessarily suffer in having a miscarriage instead of a child born alive, we cannot say that a verdict for $905 is the result of passion and prejudice.

No error appearing, the judgment is affirmed.

McCown *v.* Taylor.

4-2672

Opinion delivered October 17, 1932.

[redacted]

[redacted]

Lake, Lake & Carlton, for appellant.

E. K. Edwards, for appellee.

KIRBY, J., (after stating the facts). The legal principles governing transactions between husband and wife where the interest of third parties intervene are well settled by numerous decisions of this court. While such transactions are closely scrutinized, they are, when made in good faith and for a fair consideration, upheld by our court to the same extent as transactions between strangers. In *Mente* v. *Westbrook,* 181 Ark. 96, 24 S. W. (2d) 976, the court, discussing an alleged fraudulent conveyance between a husband and wife, said:

"It is also well settled that, if the evidence shows that the grantor had abundant means other than his property to satisfy all his creditors, the conveyance will not be declared fraudulent. It is also well settled that, to entitle a creditor to set aside a conveyance as fraudulent, it is necessary, not only that there be fraud on the part of the vendor participated in by the vendee, but also that there be an injury to the person complaining. The creditor who seeks to set aside a conveyance as fraudulent must show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. And not only that, but he must show that the debtor did not have other property sufficient to pay the creditor. * * * If the evidence shows that one had ample means to pay all his debts, the conveyance to his wife of property of small value, as compared with his whole

property, together with other facts tending to show good faith, would be sufficient to justify the conclusion that the transfer was not fraudulent." The opinion quotes extensively from 12 R. C. L. 513-514.

It has likewise been held that an insolvent husband may, without fraud, when justly indebted to his wife, prefer her claim to those of other creditors and make a valid appropriation of his property to pay it, notwithstanding the result be to deprive other creditors of means of satisfying all their claims. *Stallings* v. *Galloway-Kennedy Co.*, 171 Ark. 24, 283 S. W. 41. See also *Davis* v. *Yonge*, 74 Ark. 161, 85 S. W. 90; *Godfrey* v. *Herring*, 74 Ark. 186, 85 S. W. 232; *Driggs* v. *Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Taylor Com. Co.* v. *Bell*, 62 Ark. 26, 34 S. W. 80.

At the time of the agreement of conveyance of the lands in controversy to Mrs. McCown, in consideration of her execution of the mortgage on the home place and in satisfaction of the notes executed by McCown for the purchase money thereof and given to her by her mother, the testimony tends strongly to show, if there is no decided preponderance thereof, that McCown was worth much more than his indebtedness; and the virtually undisputed testimony shows that he was indebted to his wife in a sum aggregating about $4,000, the amount due on the notes that he executed to his mother-in-law, which were later given to his wife when he purchased the homestead. It is true that the value of his holdings was greatly diminished at the time of this conveyance because of the failure of many of the banks in which he held stock and the general existing financial depression, but it is virtually undisputed that he owed the amount of the notes given to his mother-in-law, and by her to appellant, at the time of the execution of the mortgage to the Bank of Dierks, when he agreed with his wife to convey the land in controversy to her in consideration of her joining in the execution of a mortgage of the home and in satisfaction of the notes held by her. The husband could not have incumbered or disposed of the homestead without the

consent of his wife, who could compel any reasonable terms as a condition for her joining in the execution of the mortgage, and the relinquishment of her dower and homestead rights in the conveyance would have been a sufficient consideration for his conveying the lands herein to his wife, as was agreed to be done. Section 5542, Crawford & Moses' Digest; *Davis* v. *Yonge, supra; Baucum* v. *Cole,* 56 Ark. 259, 19 S. W. 671; *Hershey* v. *Lathem,* 46 Ark. 542.

She not only joined in the execution of the mortgage, but surrendered the notes, valid claims against her husband for more than $4,000, and the value of the lands which he was to convey to her under the agreement at the time, the lands involved herein, was only three or four thousand dollars. McCown owned only an undivided two-thirds interest in the lands, which was subject to the dower rights of his mother and wife, and which would be restored to them upon cancellation of the conveyance herein; this without regard to whether she had participated in any fraudulent intent in the execution of the conveyance. *Elliott* v. *Locklar,* 185 Ark. 269, 46 S. W. (2d) 1105.

This was not a fraudulent conveyance as shown by a great preponderance of the testimony, nor was the agreement to make it, at the time of the wife's joining in the execution of the mortgage to the Bank of Dierks and her surrender of the valid notes against her husband in consideration thereof, made with any fraudulent intent to cheat, hinder or delay existing or subsequent creditors, and, in fact, no complaint of the transaction was made by any creditor existing at the time of such agreement to convey the lands, and the testimony does not warrant the finding that there was a fraudulent intent on the part of the wife to cheat, hinder or delay such subsequent creditors in the collection of their debts; the burden being upon them to show the existence of such intent. *Townes* v. *Krumpen,* 184 Ark. 910, 43 S. W. (2d) 1083; *Williams-Echols D. G. Co.* v. *Bloyd,* 169 Ark. 529, 276 S. W. 1; *Buchanan* v. *Williams,* 110 Ark. 335, 160 S. W. 190; *Mente*

& Co. v. *Westbrook, supra; Miles* v. *Monroe,* 96 Ark. 531, 132 S. W. 643.

The testimony is not sufficient to warrant the belief that McCown was influenced by fraudulent intent in making the conveyance of these lands, which should have been conveyed at the time of the agreement therefor, and the chancellor made no finding that Alta V. McCown, appellant, knew of, or participated in, any fraudulent design of her husband in making such conveyance, if he harboured any such intention. She had the right to expect the immediate conveyance of these lands upon execution of the mortgage with her husband to the Bank of Dierks and the surrender of the notes of her husband in accordance with the agreement, and delay in its execution was not through any fault of hers. She, in fact, thought the conveyance had been made, and, although she could have compelled its being done by a suit for specific performance, she was not at fault in not doing so, so long as she thought the conveyance had been made, as the husband indicated an intention to perform the agreement and make the conveyance, which should be regarded, so far as any intention on her part is concerned, to have been made and related back to the time of the agreement for the making of it. *Loftin* v. *King,* 185 Ark. 421, 47 S. W. (2d) 578; *Block* v. *Smith,* 61 Ark. 266, 32 S. W. 1070.

Under the circumstances of the whole transaction, the finding that appellant, Mrs. McCown, should be estopped from holding the property agreed to be transferred to her at the time of her joining in the execution of the mortgage to the Dierks bank because the conveyance was not sooner made is not warranted, and the chancellor erred in holding otherwise.

The decree is accordingly reversed, and the cause remanded with directions to enter a decree dismissing the complaint for want of equity.

WILLIAMSON *v.* LESSER-GOLDMAN COTTON CO.

Opinion delivered November 30, 1925.

M. E. Sanderson, for appellant.

Shaver, Shaver & Williams, for appellee.

MCCULLOCH, C. J. Appellants sold a farm in Miller County, Arkansas, to W. L. Perkins, and received from Perkins a mortgage on the land and all crops produced on the land by Perkins in which he was interested in the year 1923, to secure the purchase price of the land and also for money loaned to Perkins to enable him to operate the farm. Perkins cultivated the farm for that year through tenants, or croppers, and was to receive a share of the crop. Appellees, Lesser-Goldman Cotton Company and Friedman & Hasson, were engaged in the cotton business, and each maintained a place of business in Texarkana.

During the autumn of 1923 Perkins marketed the cotton crop gathered from the farm, and the appellees purchased some of the crop from Perkins and settled with him. The Lesser-Goldman Cotton Company bought forty-one bales, and Friedman & Hasson bought two bales. The cotton was brought to market by Perkins, usually accompanied by the tenants or croppers, who produced the cotton, and it was sold in the usual and regular way on the streets of Texarkana.

Appellants filed this action in the chancery court of Miller County to foreclose the mortgage on the land and the crops, and Lesser-Goldman Cotton Company and

Friedman & Hasson were made defendants, and a decree was asked against them, respectively, for the value of the cotton which they had purchased from Perkins. Appellees answered, admitting that they had purchased the cotton from Perkins and settled with him for the price, and alleged that appellants had consented for Perkins to sell the cotton and thereby waived their lien, if they had any. They also denied that Perkins had any such title to the crops which he could mortgage, and alleged that he was merely the landlord of the croppers who produced the cotton. On final hearing the chancery court found in favor of appellees, and dismissed the complaint of appellants for want of equity.

We pass over the disputed questions of law and fact as to whether or not Perkins had such an interest in the cotton crop as he could mortgage to appellants, for we are of the opinion that the decree should be affirmed on the ground that appellants, through their agent, N. H. Williamson, waived their lien by consenting for Perkins to sell the cotton.

Mr. Turquette, who was the resident agent of Lesser-Goldman Cotton Company, and who purchased the cotton in controversy from Perkins, testified that at the beginning of the cotton season in September, and before he had purchased any cotton from Perkins, he had a conversation with N. H. Williamson, the authorized agent of appellants, and that the latter told him that he could buy the cotton raised on the farm directly from Perkins. The witness stated that the conversation first arose with reference to the sale by a Mr. Warmack of cotton in which appellants were interested, and that Williamson instructed the witness not to settle with Warmack for cotton purchased, but to call him (Williamson) over the telephone, so that he could come in and make a settlement, but that the witness could go ahead and buy cotton from Perkins. He testified that, pursuant to this con-

versation and knowing that Perkins was from time to time marketing cotton within the knowledge of Williamson, he bought the cotton in controversy, as well as other cotton, from Perkins. The last purchase was six bales, and before settlement was made for the purchase, Perkins left the community, and settlement was made with Williamson for appellants.

Mr. Willis, the resident agent for Friedman & Hasson, testified that he bought the two bales of cotton from Perkins, knowing that he had been marketing cotton throughout the season, and that Williamson was frequently on the street and cotton yard and was bound to have known that Perkins was marketing the cotton.

Other witnesses, who apparently have no interest in this controversy, testified that they saw Williamson on the street when Perkins was marketing cotton. One witness testified that he saw Williamson standing on the street near the wagon when Perkins sold a lot of cotton to Turquette.

The testimony is undisputed that N. H. Williamson was the authorized agent of the appellants, one of whom is his wife and the other his sister. Williamson testified as a witness and denied that he had a conversation with Turquette related by the latter on the witness-stand. He testified that he did not authorize Perkins to sell the cotton, and denied that he knew that Perkins had sold the cotton until after the sales were made.

The evidence clearly preponderates in favor of appellees in their contention that Williamson was present on the streets when Perkins was selling cotton and made no objections to the sales; and, as to the question whether or not Williamson expressly agreed with Turquette that the latter could buy cotton from Perkins, there is a sharp conflict between Turquette and Williamson, and it cannot be said that the finding of the chancery court is against the preponderance of the evidence.

It is a mere statement of elemental principles of law that where a mortgagee of chattels authorizes the mortgagor to sell the property, he is bound by a sale made to a purchaser from the mortgagor, and cannot complain, even though the purchaser knew of the existence of the mortgage. *Fincher* v. *Bennett,* 94 Ark. 165, 126 S. W. 392.

The finding of the trial court not being against the preponderance of the evidence, it becomes our duty to leave the decree undisturbed.

Affirmed.

BUCKEYE COTTON OIL COMPANY *v.* TAYLOR.

4-2673

Opinion delivered October 17, 1932.

Cockrill & Armistead, for appellant.

Bridges, McGaughey & Bridges, for appellee.

MEHAFFY, J. This action was begun by appellee in the Lincoln Chancery Court, in which judgment was asked against the appellant for $2,450 and interest.

In 1929 the appellant made a loan in the sum of $10,000 to the Merchants' & Farmers' Gin Company, and, as security therefor, took a mortgage on the gin and land on which it was located.

The Merchants' & Farmers' Gin Company, in addition to the mortgage, executed a written contract by which it agreed to sell and ship to the Buckeye Cotton Oil Company all cotton seed ginned at its gin during the year 1930, and until said loan was repaid.

The complaint alleged that on February 22, 1930, the Merchants' & Farmers' Gin Company executed and delivered to the Merchants' & Planters' Bank & Trust Company its promissory note in the sum of $5,000, due November 1, 1930, bearing interest from date until paid at the rate of 10 per cent. per annum; that on April 25, 1930, the Merchants' & Farmers' Gin Company executed and delivered to the Merchants' & Planters' Bank & Trust Company its promissory note in the sum of $7,000, due on or before November 1, 1930, bearing interest from date at the rate of 10 per cent. per annum, this note being indorsed and the payment guaranteed by W. E. Massey.

It further alleged in the complaint that, in order to secure the payment of said $5,000 note and all other sums which might be advanced by the bank to the gin company during the year 1930, the said gin company, on February 22, 1930, executed a deed of trust conveying all crops of cotton, cotton seed, corn, hay and all other agricultural crops grown or caused to be grown by the parties of the first part, or either of them, or grown by their tenants or share-croppers, or in which the mortgagor might have any interest, to the Merchants' & Planters' Bank & Trust Company. The deed of trust also covered other property, but it is not involved in this suit.

It was further alleged that the appellant, during the months of October and November, 1930, obtained and took possession of cotton seed which was mortgaged to the bank to secure its indebtedness, being cotton seed grown by or for W. E. Massey, and the Merchants' & Farmers' Gin Company, on lands owned and cultivated by Massey and the gin company, in Lincoln and Desha counties.

The complaint then described the seed, the date on which it alleged the appellant got possession of them, and the number of pounds, and alleged that the value of the mortgaged property received by the appellant was $2,450, and that said seed was in the possession of the appellant, or had been appropriated, used, and converted for its use and benefit.

It was further alleged that Massey and the gin company were insolvent, and that the value of the mortgaged property was entirely inadequate to discharge the mortgage debt.

The appellant filed answer denying all the allegations of the complaint.

There was a decree in favor of the appellee against the appellant for the sum of $1,474.97. The case is here on appeal.

It appears that the gin company not only ginned cotton for Massey and the gin company, but for the public, and on the seed from the cotton ginned for the public the appellee had no mortgage.

The court found that on October 17, November 18, and November 25, shipments of seed were made to the appellant aggregating 175,000 pounds (108,660 pounds, of the market value of $1,391.97), were seed mortgaged to the plaintiff, and found that the appellant was liable to the appellee in this sum, together with interest at the rate of 6 per cent. per annum, making a total sum of $1,474.97.

The seed from the cotton ginned for the public is called free seed. When the cotton was ginned, the seed from the cotton on which there was no mortgage, and the seed from the mortgaged cotton, were all put in the same seed house, and thereby became mixed, so that it was impossible to segregate the mortgaged seed from the free seed.

It is appellant's first contention that appellee assented to the intermixture of the seed and thereby lost its right to the seed.

There is no evidence in the record showing that appellee assented to the intermixture, but it may be rea-

sonably inferred, we think, from the evidence that both appellant and appellee knew of the intermixture of the seed, and that neither made any objection.

The appellant knew of the mortgage to appellee, and it concedes that it was not entitled to any of the mortgaged seed, unless it was so entitled by the intermixture of the seed.

The evidence does not show that the appellee, in the instant case, permitted or assented to the confusion of the goods. The seeds were confused or put together by the mortgagor, and not by either the appellee or the appellant, but where there is a confusion of goods of the same kind and quality, such as the cotton seed in this case, there is no difficulty at all, where the quantity of each kind is known. The cotton seed were of the same kind, and the evidence showed how many pounds of mortgaged seed and how many pounds of free seed were put into the seed house.

The intermixture in this case was without the fault of either the appellant or the appellee, and therefore neither party forfeited any rights by such intermixture. 12 C. J. 492; 5 R. C. L. 1053.

The appellant contends that it is an innocent third party, that is, an innocent purchaser.

The evidence in this case tends to show that the appellee furnished the money to purchase the free seed, and that the appellant did not pay anything for the free seed, but only credited the account against the gin company with the purchase price of the seed. It was therefore not an innocent purchaser. *Hamilton* v. *Rankin,* 108 Ark. 552, 158 S. W. 496; *S. E. Lux, Jr., Merc. Co.* v. *Jones,* 177 Ark. 342, 6 S. W. (2d) 302; 32 C. J. 574.

Appellant calls attention to the rule stated in 12 C. J. 497, but we think this authority has no application here. We have already said that both parties probably knew that the mortgaged seed were intermixed, but the appellant had no lien on the free seed, and no more claim to the free seed than the appellee had. It knew that a portion of the seed was mortgaged to appellee. It was, in fact, no more entitled to the free seed than appellee was.

It is contended that appellee waived its lien, and appellant cites and relies on *Williamson* v. *Lesser, ante* p. 281.

In that case the mortgagee expressly authorized the mortgagor to sell the cotton. At least, the court held that the evidence clearly preponderates in favor of the appellee in their contention that Williamson, who represented the mortgagee, was present on the streets when Perkins, the mortgagor, was selling cotton, and made no objections to the sale. The lower court also found that the mortgagee expressly agreed with the purchaser that he could buy from the mortgagor, and this court said that it could not say that the finding of the chancery court was against the preponderance of the evidence.

It was stated in the opinion in that case:

"It is a mere statement of elemental principles of law that where a mortgagee of chattels authorizes the mortgagor to sell the property, he is bound by a sale made to a purchaser from the mortgagor, and cannot complain, even though the purchaser knew of the existence of the mortgage."

Appellant calls attention to several authorities or cases of replevin. They have no application here; this was not a suit in replevin, and, as we have already said, the mortgaged seed and the free seed were of the same kind and quality.

It was stated in one of the cases cited by appellant, *Rust Land & Lbr. Co.* v. *Isom,* 70 Ark. 99, 66 S. W. 434: "The plaintiff owns a certain number of staves, which, without its fault, have been mixed by defendant with other staves of his own. Conceding that this was innocently done, yet, if the staves are of the same kind, quality and value, a majority of us are of the opinion that plaintiff can in this action recover his staves, or an equal number to be taken from the common mass, if the separation can be made without injury."

The mixture of the seed in the instant case was innocently done. They were of the same kind, quality and

value. The appellant had no lien on any of the seed, and, as neither the appellant nor the appellee were the cause of the confusion of the goods, no rights were lost by the intermixture of the seed.

The court found that on October 11, 1930, the seed house was empty, and that the seed obtained from the ginning of cotton prior to that time had been disposed of, and that such seed did not enter into the calculation necessary to the determination of this cause. The chancellor also found from the evidence that the seed sold to the appellant after October 11 aggregated 175,000 pounds; that of this amount sold to the Buckeye Company after said date, 108,660 pounds, of the value of $1,391.97, were seed mortgaged to the appellee, and that the appellant was liable to the appellee for the value of this quantity of mortgaged seed.

There is very little conflict in the evidence. It would serve no useful purpose to set forth the evidence.

We have carefully examined the same, and have reached the conclusion that the finding of the chancellor was not against the preponderance of the evidence, and the decree is therefore affirmed.

VALLEY STATE BANK OF HARLINGEN, TEXAS, *v.* TAYLOR.

4-2653

Opinion delivered October 17, 1932.

H. L. Faulk (Brownsville, Tex.), *J. A. Comer* and *J. A. Watkins,* for appellant.

Sam Rorex, Nat Hughes and *Harry Meek,* for appellee.

SMITH, J. A citizen of Texas, who had both a savings and a checking account with the American Exchange Trust Company in Little Rock, drew checks, payable to the Valley State Bank of Harlingen, Texas, against these deposits for the total amount thereof, and delivered these checks for collection to the Valley State Bank. The checks were sent by the Texas bank direct to the American Exchange Trust Company, accompanied by a notation: "For collection and return." The drawee bank (American Exchange Trust Company) accepted the checks and remitted to the Texas bank in payment thereof its drafts on a Dallas, Texas, bank, with which it had deposits in excess of the drafts. Upon receipt of these drafts on the Dallas bank, the Valley State Bank paid the amount of one of the drafts to the original drawer—the Texas citizen—and gave her credit upon its books for the amount of the other draft upon the assumption that the exchange on the Dallas bank would be paid. But, upon presenting to the Dallas bank the drafts drawn upon it by the American Exchange Trust Company, payment was refused by the Dallas bank for the reason that the Dallas bank had information that the American Exchange Trust Company had closed its doors.

The checks drawn by the Texas citizen on the American Exchange Trust Company were dated November 10 and 12, 1930, and were received by the American Exchange Trust Company through the mail at its banking house in Little Rock on November 14, 1930, and on that day the exchange on Dallas was remitted to the Valley State Bank, and received by the latter on November 17, 1930, and disposed of as above stated. The American Exchange Trust Company became insolvent and closed its doors on November 17, 1930, of which fact the Dallas bank was advised, and for that reason it refused payment of the drafts drawn on it by the American Exchange Trust Company, although it had on hand funds belonging to the American Exchange Trust Company in excess of the drafts.

The assets of the American Exchange Trust Company have been taken over and are being wound up by the State Bank Commissioner, with whom the Valley State Bank filed its claim for allowance as a prior or preferred one. The court below disallowed the claim as a prior or preferred one, but did allow it as a common claim, and this appeal is from that decree. The question for decision is therefore whether, under the facts stated, the Valley State Bank, as the holder and owner of the remittance drafts, is a preferred creditor of the American Exchange Trust Company?

The answer to this question, and the one which accords with the previous holdings of this court, appears in the 1931 edition of Michie on Banks and Banking, vol. 3, page 321, where it is said: "Although probably contrary to the weight of authority, the modern trend of decisions seems to support the rule that, where paper is sent for collection and remittance, the collecting bank, as agent of the sender, holds the amount collected in trust so as to give a right of preference therefor upon its insolvency; and this is true, even though the collecting bank collects the paper by charging it against the account of the individual drawer and issues its draft on another bank in favor of the sender for the amount."

In the case of *Rainwater* v. *Federal Reserve Bank of St. Louis,* 172 Ark. 631, 290 S. W. 69, it was held (to quote a headnote) that "The claim of the Federal Reserve Bank against the Bank Commissioner in charge of a bank which made collections for claimant and had funds sufficient to honor drafts sent as remittance of collections, which were not paid, owing to the bank being closed, *held* a preferred claim, since the collecting bank was the claimant's agent and held the money collected in trust."

In reaching this conclusion, we recognized and stated in the Rainwater case, *supra,* that the authorities were not harmonious, but we there followed our own earlier case of *Darragh Co.* v. *Goodman,* 124 Ark. 532, 187 S. W. 673, which had announced the controlling principles.

The annotated cases of *Bank of Poplar Bluff* v. *Millspaugh,* 313 Mo. 412, 281 S. W. 733, 47 A. L. R. 754, and *Shull* v. *Beasley,* 49 Okla. 106, 209 Pac. 149, 77 A. L. R. 465, collect the leading cases on the subject and reflect the conflicting views of the courts.

Counsel for appellee Bank Commissioner endeavors to distinguish the Rainwater case, *supra,* from the instant case by pointing out that in the Rainwater case the remittance check transmitted the collection pursuant to a permanent arrangement existing between the banks. But this distinction is not of controlling importance. The remittance in the instant case was made pursuant to a custom, so uniform and well-established among banks, as to be as binding as a permanent arrangement; in fact, the banking custom, pursuant to which remittance was made, was, in effect, a permanent arrangement, because it conformed to a custom among banks so general and well known and so long established that parties will be presumed to have contracted with reference thereto.

We find nothing in the provisions of act 107 of the Acts of 1927, page 297, leading to a different conclusion. This act deals with and makes classification of the creditors of insolvent banks which have been taken over by the State Bank Commissioner.

In the recent case of *Taylor* v. *Union Trust Company,* 185 Ark. 128, 46 S. W. (2d) 18, the facts were as follows: On Saturday, November 15, 1930, the Union Trust Company delivered to the American Exchange Trust Company certain drafts with bills of lading attached, of which it was the owner, for collection and remittance, and received in payment therefor a check drawn by the American Exchange Trust Company upon itself for the amount of the drafts, which check was delivered to the messenger of the Union Trust Company. Before the check could be presented for payment on the following Monday—November 17—the American Exchange Trust Company closed its doors; but the chancery court held that the check was a preferred claim under the act of 1927, *supra.* In affirming that holding it was there said: "The proceeds of the col-

lection 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 De Queen, supra,* (184 Ark. 947, 43 S. W. (2d) 1078)."

We conclude therefore that the chancellor erred in refusing to allow the claim of the Valley State Bank as a preferred claim, and that decree is reversed, and the cause is remanded with directions to so allow and class it.

McHaney, J., dissents.

SOUTHWESTERN BELL TELEPHONE COMPANY *v.* BIDDLE.

4-2648

Opinion delivered October 17, 1932.

G. E. McCloud and *E. B. Downie,* for appellant.

H. B. Means, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court should have directed a verdict in its favor, it being undisputed that the line of poles was placed on the strip of land condemned by the Highway Department for changing the highway, which had authority under the statute, and granted it permission to erect the poles where they were placed, and that, having done so, they were not liable to the payment of any damages to appellee for their erection upon such right-of-way.

The statute provides, § 3989, Crawford & Moses' Digest, for construction and operation of telegraph and telephone, etc., lines "along and over the public highways

* * * and streets of the cities and towns of this State, and on and over the lands of private individuals * * * provided the ordinary use of such public highways, streets, etc., be not thereby obstructed, * * * and that just damages shall be paid to the owners of such lands, railroad and turnpikes by reason of the occupation of said lands, etc., * * * by said telegraph or telephone corporations."

The relocation of highway No. 67 running along in front of appellee's property was made pursuant to an order of the county court of Hot Spring County in 1930. The Constitution (art. 7, § 28, Constitution of 1874) and our statute (§ 5249, Crawford & Moses' Digest) gives the county courts exclusive authority to open new roads and to make such changes in old roads as they may deem necessary and proper. Our court has held that said statute authorizes telephone companies to construct and operate and maintain its lines along and over the public highway and streets of the cities and towns, provided "the ordinary use of such highways and streets be not obstructed by reason of the occupation by said telephone companies." *Ahrent* v. *Sprague,* 139 Ark. 416, 214 S. W. 68; *St. Louis, I. M. & S. Ry. Co.* v. *Batesville & Winerva Telephone Co.,* 80 Ark. 499, 97 S. W. 660.

The authority given by the said statute (§ 3989, Crawford & Moses' Digest) for telephone companies to construct, operate and maintain their lines over the public highways, etc., only gives them the free use of such highways, provided they be not obstructed thereby, so far as the State's interest and that of the public is concerned, expressly providing that "just damages shall be paid to the owners of such lands, * * * by reason of the occupation of said lands, * * * by said telegraph or telephone companies." The statute could not authorize the free use of appellee's land in any event in this instance by the telephone company, since the injury complained of was not for erection of the poles and lines upon an old highway, already long established, but upon appellee's lands just being taken for a change in the location of such highway. Article 2, § 22, Constitution of 1874.

It is not denied that appellee had no notice of the condemnation proceedings, and certainly the statute did not contemplate that the landowner in a proceeding for condemnation of his lands for public use should not be allowed damages for the value of it, nor would he be expected to be bound by the allowance made for damages of which he had no notice, nor does the statute contemplate that he should be held to look to the county alone for payment of damages for his land taken for such public use.

We also think that the erection of a telephone line upon the public highway along lands of adjoining owners, in which the public only has an easement for use as a highway, would not prevent the owner of the land from collecting damages for the new servitude to which his land is subjected, such use not having been in contemplation when the easement was taken or granted.

The testimony for determining the value of such lands and the damage thereto is largely a matter of opinion of the witnesses, who are familiar with the location of the lands and the use for which they are best suited, having weight only as the reason given by such witness for such opinion of value may tend to convince the jury. *Ft. Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W. 440. The evidence is sufficient to support the verdict for damages, and the appellee could not evict the telephone company from the premises, and was limited to a suit for damages, as his remedy, not having been compensated therefor under the provision of the statute, § 5249, Crawford & Moses' Digest.

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

McHaney, J., (dissenting). For nearly fifty years the act of March 31, 1885, now § 3989 of Crawford & Moses' Digest, has been the law in this State without amendment, and during all that time no person, except appellee, has conceived the idea that he might recover damages from a telephone or telegraph company for running a line of poles and wires along a street or public

highway in front of his adjacent land. At least the records and opinions of this court fail to disclose any such litigation. The majority opinion does not copy said section in full, and it is not clear from the part copied just what it means. The entire section reads as follows: "Any person or corporation organized by virtue of the laws of this State, or any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence the equivalent thereof, which may be hereafter invented or discovered, may construct, operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this State, or across and under the waters and over any lands or public works belonging to this State, and on and over the lands of private individuals, and upon, along, and parallel to any of the railroads or turnpikes of this State, and on and over the bridges, trestles or structures of said railroads; provided, the ordinary use of such public highways, streets, works, railroads, bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes, by reason of the occupation of said lands, railroads and turnpikes by said telegraph or telephone corporations. Act March 31, 1885."

It is a part of the chapter on Eminent Domain, and this section confers this power or right on such companies. It was enacted when the telephone business was in its infancy, and its purpose was to encourage the development of such business. The first right conferred was the right to build such lines over and along the public highways, and the streets of cities and towns of the State, and across or under the waters and over the lands or public works of the State, free of charge. Many thousands of miles of telephone and telegraph wires have been

constructed over and along public highways and streets of this State since March 31, 1885, and no adjacent property owner, or owner of property abutting on such streets or highways, nor the State, has received any compensation therefor, so far as I am advised. The remainder of said section confers the right or power to cross the lands of private interests for which "just damages shall be paid to the owners of such lands, railroads, turnpikes," etc. The only condition attached to the use of public property is that the ordinary use thereof be not thereby obstructed. This section makes no provision for the payment of "just damages" to any one for the use of streets, highways, or other public property, but only when such line crosses private property. This is conclusively shown by the two sections immediately following, sections 3990 and 3991. They read as follows:

"3990. In the event such telegraph or telephone companies should fail, upon application to such individuals, railroads, or turnpike companies, to secure such right-of-way, by consent, contract or agreement, then such telegraph or telephone corporations shall have the right to proceed to procure the condemnation of such property, lands, rights, privileges and easements in the manner prescribed by law for taking private property for right-of-way for railroads, as provided by sections 3992 to 3993, inclusive."

"3991. Wherever any such telegraph or telephone company shall desire to construct its lines on or along the lands of individuals, or on the right-of-way and structures of any railroads, or upon and along any turnpike, the said telegraph or telephone company may, by its agents, have the right to peacefully enter upon such lands, structures or right-of-way and survey, locate and lay out its said lines thereon, being liable, however, for any damage that may result by reason of such acts."

If these three sections, when read together and properly considered, fail to convince any one that such companies are given the free use of the State's highways, then certainly the decision of this court so holding should

do so. In *St. L., I. M. & S. R. Co.* v. *Batesville & Winerva Telephone Co.*, 80 Ark. 499, 97 S. W. 660, a case cited in the majority opinion, this language is used: "A telephone line is a public utility (Joyce on Electric Lines, § 275); and its public importance is recognized by clothing it with the power of eminent domain, and giving it *the free use of the State's highways.* Kirby's Digest, §§ 2934-2936, 2937, *et seq.*" These are the same sections of the digest now under consideration. This the opinion of the majority seems to hold in so far as the interest of the State or the public is concerned, but then it immediately knocks down the straw man it sets up by quoting and applying that part of § 3989 that "just damages shall be paid to the owners of such lands * * * by reason of the occupation of said lands, * * * by telegraph or telephone companies." Just what lands is intended by "such lands" and "said lands" unless it is the streets and highways, I do not know and cannot tell from the opinion. The opinion then states that "the statute could not authorize the free use of appellee's land in any event * * * since the injury complained of was not for the erection of poles and lines upon an old highway, already long established, but upon appellee's lands just being taken for a change in the location of such highway." Does the majority mean to hold that a telephone line might be built on an old highway without actionable damage to the abutting owner, but for such a line on a new highway such action would lie? Personally, I can see no reason in such a rule. The statute gives the free use of the State's highways to such companies whether new or old, and there can be no free use thereof if the abutting owners have a right of action for such use.

The telephone line in this case does not pass over appellee's land. It passes over what was his land until it was taken by Hot Spring County at the instance of the State Highway Department and condemned for use of one of the principal highways of the State,—a State and Federal highway. Appellee has either received or could have received full compensation for the land taken

and for damages to the remainder of the land not taken, if any, under the provisions of § 5249, Crawford & Moses' Digest, as construed by this court in *Sloan* v. *Lawrence County,* 134 Ark. 121, 203 S. W. 260, and the many subsequent decisions following it. In that case it was held that § 5249 is a valid statute, even though it provides "for the taking of private property by order of the county court for a public road, without notice to the interested landowner or a determination of the necessity therefor." First syllabus. It was further held, to quote another syllabus: "The power of eminent domain may be exercised by the sovereign State, without notice to the interested landowner: necessity for condemnation for strictly public use is a political question to be exercised by the lawmakers, and a hearing upon the question of necessity is not essential to the validity of the proceedings."

The fact therefore that appellee had no notice of the condemnation proceedings, conceding it to be a fact, is unimportant and not jurisdictional, as it is a taking by the sovereign State of Arkansas. He had a year in which to present his claim for damages to the county court and the right of appeal if not satisfied with the allowance made. In making his claim for damages he must make it for all damages he has sustained or will sustain by reason of the taking, not only for its primary use as a highway, but for such incidental uses as may be provided by law for which the State's highways may be utilized, such as their use by telephone and telegraph companies. In other words, when appellee's land was taken he was entitled to recover damages for all purposes for which the highway might lawfully be used. He could take one bite at the cherry, but no more.

The majority opinion also holds, if I understand it, that the erection of a telephone line along a public highway constitutes an additional servitude in the easement of the public for the highway, and that the abutting owner may collect "damages for the new servitude to which his land is subjected, such use not having been in contemplation when the easement was taken or granted." No cases

are cited in support of this statement. In *Campbell* v. *Southwestern Tel. & Tel. Co.*, 108 Ark. 569, 158 S. W. 1085, we said: "The question whether the railroad company had the right to grant a right-of-way to the telephone company does not arise, for the plaintiff's occupancy up to the edge of the roadbed was a permissive one, and she cannot claim damages for obstructions upon the land which the railroad company had the right to occupy. So long as the railroad company occupied any portion of its right-of-way, it had the exclusive use and right of control coextensive with the boundary described in its deed." So, in this case, the State's highway did not occupy the entire right-of-way over appellee's land, but it cannot seriously be contended that it did not have "the exclusive use and right of control coextensive with the boundary described" in its condemnation proceeding, and that appellee could not recover damages for obstructions upon the land which the State had the undoubted right to occupy seems necessarily to follow. There was therefore no additional servitude, or, if one, it was such as the State had the right to grant. There are many cases in other jurisdictions holding that a telephone line on a public highway is not an additional burden on the fee, several of which are cited in the brief of counsel for appellant. I will not undertake to cite them or comment on them. They are well-considered cases, but I think our own court has settled the principle in the Campbell case, *supra*. The case should be reversed and dismissed.

Mr. Justice SMITH joins in this dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BENNINGS.

4-2683

Opinion delivered October 17, 1932.

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

H. B. Means, for appellee.

MEHAFFY, J. This suit was brought by the appellee in the Hot Spring Circuit Court for damages for killing a mule belonging to appellee. He alleged that the value of the mule was $200. It was alleged that the mule was negligently killed by being struck by one of defendant's freight trains, and that payment had been demanded and refused. Defendant answered, denying that appellee owned the mule, and denying all allegations with reference to killing the mule, and its value.

Appellee testified in substance that on February 14, 1931, he found his mule dead, and that it had been dead for something like three or four hours. The mule was found about two miles from where appellee lived. The mule was struck inside of the railroad fence, and the signs showed that the mule was knocked toward the south, and the track at this point was not straight; that it was night when he found his mule, but that he went back the next day and made an examination and he could see where the mule had run down the track. The mule's tracks disappeared at the cattle guard.

Appellee bought the mule from Green & Meador, and paid $200 for it. It was worth what he paid for it, and it weighed 1,100 pounds. It was three years old when he bought it, and he had had it about three years. Appellee also testified that he had inquired about the value of mules, and mules like the one killed sold generally for about $200. The mule got out because the gate was left open. He did not see the mule killed. There was a deep

cut at the place where the mule was killed. The cut was shoulder deep. He saw the mule's tracks ten or fifteen yards from the crossing, running down by the end of the ties. There was a hole knocked on the mule's right hip, and one behind the shoulder. He based his idea of how the mule was struck by the tracks. The tracks were between the ties and the rail.

John Walters testified in substance that he knew appellee, and knew about his mule being killed in February, 1931; made an examination of the place where the mule was killed, and you could see this crossing 1,500 feet from it; the mule's tracks were along the end of the crossties, and he noticed them for a distance of 75 feet. The tracks were along the end of the ties, and between the ties in the corner, and the mule jumped the cattle guard, and the train struck him and threw him into a post and bent the post; saw the mule after it was killed, and it was hit on the right side, four ribs broken, a hole punched in behind the right shoulder, and also a hole somewhere around the root of his tail. Witness lived about 75 yards from the crossing. The cut there varies from eight to fifteen feet; saw the mule's tracks 75 yards from the crossing, and could see the tracks between the ties.

John Haynie testified in substance that he did not see the mule struck, but went out to the railroad and saw three mules, and one mule had a hole in its right side. It started to the house stumbling, and ran up to the yard fence and fell dead. The whistle did not sound and the bell was not ringing. He was not positive about the train sounding a warning for the crossing, but there was no stock-alarm whistle.

Tom Bell testified that he is engaged in buying and selling mules; was acquainted with their market value, and the reasonable market value of Benning's mule was $200.

The appellee was recalled and testified that he gave the railroad notice of the killing of the mule, and the claim agent came to see him, and the company had not

paid him within thirty days. He testified that he told the claim agent that he wanted $200 for his mule.

W. B. Haynie testified in substance that he lived in North Little Rock; was a locomotive fireman for the Missouri Pacific Railroad Company, and had been for 14 years. He was fireman on the freight train when the mule was killed at Wyandotte Crossing; saw the accident; train was running 35 miles an hour. There was a crossing whistle sounded; the cut was 200 yards from the crossing, and was between 70 and 90 feet wide; saw two mules as the freight train came along that day. The mules were in the right-of-way, about 100 yards north of the cattle guard. The right-of-way fence is about 30 feet from the track. When he saw the mules, there was no danger of their being hurt by the train, and the front end of the train did not hit the mule. The mule was struck by the 7th or 8th car behind the engine. Witness was looking back and saw it happen; was looking back because the mules were running, and they ran about 100 yards before getting to the cattle guard; they started running when the front end of the engine passed them. There was nothing witness could have done to have prevented the accident. The mule attempted to jump between the cattle guard apron and the crossing when he was struck by one of the box cars. Witness saw the mule 100 yards from the crossing, and about 25 feet from the fence. He saw the mule one-fourth of a mile away. He saw two mules, and the other one stayed up on the dump. There was nothing projecting out from the cars. There was no stock alarm sounded, but the whistle for the crossing was sounded.

M. T. Wilbanks testified that he had been working for the appellant for 24 years as section foreman; found the mule on February 15, 1931, near Mr. Haynie's gate; buried the mule, and there was a hole behind the mule's right shoulder.

There was a verdict and judgment for $195, and the case is here on appeal.

Appellant's first contention is that there is no evidence tending to show that the mule was killed through any negligence on the part of defendant company or its agents, servants or employees, but that the proof shows that the mule was struck by the seventh or eighth car of the train.

Appellee and his witnesses testified that they saw the tracks of the mule where it had run along between the ties, and the evidence on the part of appellee showed that it jumped the cattle guard, and was struck then.

Appellant's witness, the fireman, testified that he ran along by the side of the train, and was struck by the 7th or 8th car back of the engine. Of course, it was impossible for the mule to have run along beside the track and make his tracks between the ties as testified by appellee's witnesses.

The evidence as to the manner of the killing of the mule is in conflict. The jury had a right to believe the testimony of appellee's witnesses, and to believe that the mule was running in front of the train. No one testified about seeing the mule at the time it was injured but the fireman. Whether the testimony of appellee's witnesses or appellant's witness is true is a question of fact to be determined by the jury. Where the evidence is in conflict, the finding of fact by the jury is conclusive here, although we might believe that it was against the preponderance of the evidence.

Appellant calls attention to authorities holding that where an unimpeached witness testifies distinctly and positively to a fact, and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established. The rule invoked by appellant is well established, but we have already called attention to the fact that the testimony of the fireman is contradicted, and that circumstances are shown from which an inference against the fact testified to by the fireman can be drawn. The mule could not have been running along by the side of a freight train and made

tracks between the ties, as some of the witnesses testified. Our conclusion is that the evidence was sufficient to justify the finding of the jury.

It is next contended that the court erred in giving instruction No. 1 requested by appellee. That instruction reads as follows: "You are instructed that all railroad companies operating trains in the State are liable for all damages done to or stock killed which is caused by the operation of such trains in the State."

This instruction is practically a copy of § 8562 of Crawford & Moses' Digest, and this instruction should not have been given. We have reached the conclusion, however, that there was no prejudicial error in giving instruction 1 in this case.

It was immediately followed by instructions 2 and 3, which read as follows:

"No. 2. You are instructed that when stock is killed by the operations of a train the burden shall devolve on such railroad company to show that such stock was not negligently killed, and if it fails to discharge that burden then it is liable in damages."

"No. 3. You are instructed that, if you find from a preponderance of the evidence in this case that the plaintiff's mule was killed by the operation of one of the defendant's trains, it will be your duty to find a verdict for the plaintiff unless the defendant satisfies you that it was guilty of no negligence in the killing of said mule."

The court also gave several instructions at the request of the appellant, which told them in substance that there could be no recovery unless the appellant was guilty of negligence. The court also instructed the jury that they would have no right to ignore any part of the law, or to base their verdict on any certain part of the instructions, but should consider them all together as the law of the case.

This court has said: "There are, however, cases, as we conceive, not inconsistent with that rule, where we have held that the law of the case cannot be stated in one paragraph or instruction and, though the instructions

given may be apparently conflicting, if, from the language used or the relation which the instructions are made by the whole charge to bear toward each other, it is readily seen that they are to be read together without conflict and as a harmonious whole, and they can be so read, then it is our duty to so treat them." *St. L., I. M. & S. R. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375, 1199. This case has been followed many times by this court. The following are some of the cases approving the rules announced in *Ry. Co.* v. *Rogers, supra; St. L., I. M. & S. R. Co.* v. *Lamb,* 95 Ark. 209, 128 S. W. 1030; *Brinkley Car Works & Mfg. Co.* v. *Cooper,* 75 Ark. 325, 87 S. W. 645; *St. L., I. M. & S. R. Co.* v. *Cleere,* 76 Ark. 377, 88 S. W. 995; *Sou. Cotton Oil Co.* v. *Spotts,* 77 Ark. 458, 92 Ark. 249; *Arkadelphia Lbr. Co.* v. *Posey,* 74 Ark. 377, 85 S. W. 1127; *Pettus* v. *Kerr,* 87 Ark. 396, 112 S. W. 886; *Miller Rubber Co.* v. *King,* 147 Ark. 302, 227 S. W. 301.

This court recently said: "Counsel for defendant insists that these should be treated as separate instructions, and that number 5 is erroneous because it takes away from the jury the consideration of whether, under the facts, the danger was so obvious and patent that the fireman must have known and appreciated it. It will be observed that these two instructions follow each other; and, from the language used, it is apparent that they should be read together, and, when so read together, they harmonize with each other. We cannot see how the jury could have been misled when the two instructions were read and considered together. Each one supplements the other, and they were doubtless so understood by the jury as well as by the counsel for the respective parties in their arguments to the jury." *Ft. Smith-Subiaco & Rock Island Rd. Co.* v. *Moore,* 172 Ark. 353, 289 S. W. 6.

The law requires jurors to be persons of good character, of approved integrity, sound judgment, and reasonable information. No one of sound judgment and reasonable information could have been misled by the instructions in this case. They could not have mis-

understood the instructions. No average person on the jury could have been misled when they were told that they should not take one instruction alone, but they must consider them as a whole, and that they must be read and considered together.

We think there is no doubt that the jury understood from the instructions, when considered together, that they could not find for the plaintiff if the evidence showed the defendant was not guilty of negligence.

A verdict will not be set aside because an erroneous instruction is given, where it is immediately followed by other correct instructions, and where it is evident the jury could not have been misled.

There are some other questions discussed by appellant, but we have reached the conclusion that there was substantial evidence to support the verdict of the jury, and that there was no error except in giving instruction No. 1, and that, when the other instructions were given to the jury, and they were directed to consider them all together, they could not have been misled.

The judgment is affirmed.

SMITH, J., (dissenting). The instruction numbered 1, set out in the majority opinion, is substantially a copy of § 8562, Crawford & Moses' Digest, which declares that all railroads operated in this State shall be responsible for all damages to persons and property done or caused by the running of trains in this State. This statute has been construed as imposing only a *prima facie*—and not an absolute—liability, but the instruction numbered 1 does not so interpret it. This instruction, read by itself, not only authorizes, but requires, the jury to return a verdict for the plaintiffs. The majority do not defend instruction numbered 1 as a correct declaration of the law; they state it does not correctly declare the law if read by itself, but they say it should not be read by itself but should be read in conjunction with other instructions given and should be considered as qualified by them.

Our cases have not been harmonious on the effect of giving an instruction erroneously directing a verdict for

one party or the other, when followed by an instruction correctly declaring the law which does not direct a verdict for either party.

The case of *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676, recognized this discord in our cases and undertook to declare the correct rule to be hereafter followed, and it was there stated to be the view of the majority of the court that it was the settled law of this State that "separate and disconnected instructions, each complete and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole." This question, which was there definitely settled, has not been unsettled, and the giving of separate and disconnected instructions, each complete in itself and irreconcilable with another, may or may not now be erroneous.

I think it unfortunate to disturb what has been declared to be the settled law of this State in the Temple Cotton Oil Company case, *supra,* and I therefore dissent.

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

4-2675

Opinion delivered October 17, 1932.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Kenneth W. Coulter and *Shields M. Goodwin,* for appellee.

McHaney, J. On November 7, 1930, while riding in a car owned and operated by one Hanley, appellee suffered painful injuries in an automobile accident at Carlisle, Arkansas, caused by collision between Hanley's car and another car driven by one Halloway. Appellant had issued in the State of Ohio a policy of automobile liability insurance to Hanley which provided among other things the following: "II. (2) Bankruptcy or insolvency of the assured shall not relieve the company of any of its obligations hereunder. Any person or his legal representatives who shall obtain final judgment against the assured because of any such bodily injury or injury to or destruction of property and whose execution against the assured is returned unsatisfied because of such insolvency or bankruptcy, may proceed against the company under the terms of this policy to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto. Nothing in this policy shall give to any person or persons claiming damages against the assured any right of action against the company except as in this paragraph (2) provided."

"V. (B) In the event of accident written notice shall be given by or on behalf of the assured to the company or any of its authorized agents as soon as is reasonably possible thereafter, irrespective of whether or not any injury or damage is apparent at the time. Such

notice should contain information respecting the time, place, and circumstances of the accident, with the name and address of the injured and any available witnesses. If such information is not reasonably obtainable, particulars sufficient to identify the assured shall constitute notice. The assured shall keep the company advised respecting further developments in the nature of claims or suits when and as they come to his knowledge. The assured shall cooperate with the company and, upon the company's request, shall assist in effecting settlement, securing evidence, and the attendance of witnesses, but the assured shall not voluntarily make any payment, assume any obligation or incur any expense other than for immediate surgical relief, except at his own cost."

Thereafter suit was brought against Hanley by appellee, and a judgment recovered in the sum of $1,500 against him. Execution was issued on said judgment and returned unsatisfied, and this suit followed to recover the amount of said judgment and cost from appellant. A trial resulted in a verdict and judgment against appellant for the amount sued for.

The principal contention made by appellant for a reversal of the judgment against it is the refusal of the court to direct a verdict in its favor at its request. The following facts and section V (B) are relied upon to support this contention: The policy was written in Ohio where Hanley was a resident. Shortly after the accident Hanley reported same to appellant at its Ohio agency in a lengthy telegram, giving the names of a number of witnesses to the accident, in addition to the names of the occupants of the other car, four colored persons. He did not report the name of a woman passenger riding in the car with him and appellee, nor did he disclose such fact to appellant's investigator in Little Rock a few hours later when statements were taken from him and appellee, tending to exculpate him from any liability because of the accident. The statement submitted by Hanley to appellant's investigator, together

with a diagram of the position of the two cars, showed him to be on the left-hand or wrong side of the road. Later Hanley gave counsel for appellee a statement regarding the accident, but, as we view this later statement, it does not differ from that given appellant in any material degree, and we therefore do not set out these respective statements. When Hanley was sued in the former action, he promptly notified appellant, and it undertook the defense of his case and made some investigation in preparation for trial. Four days before the trial, May 15, 1931, Hanley called at appellant's office in Memphis and agreed to be present in Little Rock for the trial on the 19th, stating that he had to be in Jackson, Miss., to attend some kind of meeting in the interest of his employer, for whom he was a traveling salesman, and would leave there about 3 o'clock on the afternoon of the 18th and drive to Little Rock by the morning of the 19th. This he failed to do. On the morning of the 19th, when the case was called for trial, counsel for appellant, who were also representing Hanley up to that time, stated to the court they were not ready for trial because of the absence of their client Hanley, and orally moved the court for a continuance. The motion was resisted by appellee, and the court overruled same. Appellee announced ready for trial, whereupon counsel for Hanley, after having him called without response, asked leave to withdraw from the case, which was granted. A jury was impaneled and assessed appellee's damages at the sum of $1,500. No written motion for a continuance was filed in compliance with the statute.

On these facts appellant contends that the court should have directed a verdict in its favor because of Hanley's failure to cooperate with it in the defense of the suit as provided in section V (B) of the policy, the language being: "The assured shall cooperate with the company and, upon the company's request, shall assist in * * * securing evidence," etc. It is contended that his failure to attend the trial wherein he was the

nominal defendant and to testify therein, and his failure to disclose the name of the woman who was riding with them at the time, constituted a failure to cooperate with appellant in violation of the express provision of the policy requiring him to cooperate. We cannot agree with appellant in this contention. It is true that it was the duty of the assured to cooperate with the defendant by lending aid and such information as he possessed in preparing the case for trial and to attend the trial and testify as to the true facts and circumstances concerning the accident. Without his presence and aid the insurance company was seriously handicapped. But there is nothing in this record to show the reason for Hanley's absence from the trial. For aught we know, he may have been seriously ill or dead. We are therefore of the opinion that it was the duty of the insurance company in this action to go further than showing his mere absence from the trial in order to show lack of cooperation, and to show the reason for such absence. Appellant cites and relies upon numerous cases from other jurisdictions holding that it is the duty of the assured to attend the trial and to cooperate with the company in defending the action against him, but in practically all of them it is shown that the assured's absence was premeditated and wilful. Such was the case in *Schneider* v. *Autoist Mutual Ins. Co.*, 346 Ill. 347, 178 N. E. 466, where the assured refused to return to New York, where the original judgment was obtained, to testify in the case, giving as a reason that he had been arrested, thrown into jail without reason, and that he would not return under any circumstances. So also in *Coleman* v. *New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 357, 72 A. L. R. 1443, where an employee of the defendant refused to testify unless the policy was enlarged to cover any judgment that might be had against him, and so it was in nearly all of the cases cited by appellant that the absence of the defendant was wilful and deliberate. Here, however, the evidence fails to disclose any reason why Hanley was

absent. Only four days before the trial he stated his intention to be present at the trial and to cooperate. Prior to that time he had cooperated by furnishing appellant a statement of himself and appellee and giving it the names of a number of available witnesses. We cannot therefore say as a matter of law that his failure to attend the trial, in the absence of any proof or explanation as to why he so failed, establishes a breach of the contract in this regard. On the contrary, we think it a question for the jury, and that it was the duty of appellant in this trial to show that Hanley had no good reason to absent himself from the trial.

As to Hanley's failure to disclose the name of the woman riding in the car with them, we are unwilling to say, as a matter of law, that this was sufficient to breach the contract. The most we can say is that it was a circumstance to go to the jury for what it was worth as tending to show lack of cooperation. This failure, as well as his mere failure to attend the trial, constituted questions for the jury, and its finding is against appellant.

The court gave an instruction on its own motion as follows: "Now, if you find in this case that William Hanley cooperated with the insurance company in the defense of the case against him, which has been heretofore tried, then your verdict should be for the plaintiff. If you find in that case that William Hanley did not cooperate with the insurance company, and, in other words, that he failed to cooperate with the insurance company, which he was bound to do under the terms of his policy, then the insurance company had a right not to defend that case, and your verdict should be for the defendant. In other words, there was a mutual obligation under the terms of this policy. The policy provides the insurance company would pay the liability of William Hanley for any damage he may cause by his negligence that was the obligation of the insurance company. William Hanley in the terms of the policy agreed to cooperate with the insurance company in the establishment of all claims against William Hanley for which

the insurance company might be liable. Now, the question for you to decide is, did William Hanley cooperate with the insurance company in the defense of that suit heretofore tried against him? If he did, then your verdict should be for the plaintiff in this case. If he did not, your verdict should be for the defendant in this case."

Appellant argues that it is erroneous for the reason, as it says, that it fails to define what cooperation meant in the policy. We do not agree. It tells the jury Hanley's agreement was to cooperate with the appellant "in the establishment of all claims against William Hanley for which the insurance company might be liable." We do not think the jury could have misunderstood what the court meant by cooperating with appellant in the establishment of claims against him. The word "cooperate" is a simple word, and any one with sufficient intelligence to qualify as a juror in a civil action would know that it simply means to operate with or work together.

All of the instructions requested by appellant and refused by the court were peremptory in nature as admitted by appellant and were properly refused. We do not set them out and comment on them separately, as no useful purpose could be served thereby. The only issue in the case was whether Hanley cooperated with appellant in the suit by appellee against him, and we have already seen this was a question for the jury which the court submitted under an instruction as plain and simple as could be given.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* MCDADE.

4-2684

Opinion delivered October 17, 1932.

R. E. Wiley and *Richard M. Ryan,* for appellant.
John L. McClellan, for appellee.

McHaney, J. Appellee recovered a judgment against appellant in the sum of $700 for an injury received by being struck in the eye by a hot cinder thrown or blown from one of appellant's freight engines while appellee was a passenger sitting at an open window in one of appellant's passenger trains. Appellant denied all allegations of negligence and that appellee was hit with a hot cinder thrown through the window of the passenger coach. It pleaded the contributory negligence of appellee in sitting at an open window in said coach, and that its engines both freight and passenger were equipped with the latest and best known appliances to prevent the throwing of cinders.

For a reversal of the judgment against it, appellant first says that the court should have directed a verdict in its favor at its request, and this challenges the sufficiency of the evidence to support the verdict. It is true that witnesses on behalf of appellant testified that both engines were equipped with proper spark arresters and appliances of the latest and best known kind, and that said engines did not throw sparks and were skillfully operated. The engineer on the freight train testified that his engine was so equipped, and that it was standing still when the train on which appellee was riding passed the freight train at Donaldson. In this he was corroborated

by his fireman and similar testimony was given by the operators of the passenger train. A piece of screen wire was introduced in evidence of the kind used as spark arresters by appellant, and it was shown that the cinder introduced in evidence by appellee, as the cinder which struck him in the eye, was so large that it would not go through the piece of screening exhibited. While these witnesses so testified, and that the cinder exhibited could not have passed through the piece of wire netting exhibited, it does not necessarily follow that it was not thrown out or blown from the smoke stack of the locomotive as the spark arrester in it may have been defective, although of the same or a similar kind as that exhibited. Appellee testified positively that the cinder exhibited while very hot was thrown from the freight locomotive and struck him in the eye. If this is a fact, and the jury was the judge of this, it must have come from the smoke stack of the locomotive, and therefore must have come through the spark arrester. The fact that appellant's witnesses testified that the locomotive was equipped with the best known spark arrester, was in good condition, and that the engine was skillfully operated, is not conclusive of the issue. The rule in this court with reference to this matter is stated in the recent case of *Missouri Pacific Rd. Co.* v. *Trotter,* 184 Ark. 790, 43 S. W. (2d) 762, where it is said: "As a general rule, where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there are no circumstances shown from which an inference against the fact testified by the witness can be drawn, that testimony may not be arbitrarily rejected, and the fact will be taken as established. But there are exceptions to this rule: Where the witness is interested in the result of the suit, or where facts are shown which might bias his testimony, or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then such fact can not be said to be undisputed, and a case arises for determination by a jury.

Skillern v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243; *Mutual Life Ins. Co.* v. *Raymond,* 176 Ark. 879, 4 S. W. (2d) 536; *Casteel* v. *Yantis-Harper,* 183 Ark. 475, 36 S. W. (2d) 406."

Here appellant's evidence is contradicted, and there are circumstances shown from which an inference against the fact testified by the witnesses for appellant can be drawn. For instance, appellee testified the cinder was hot, and that it burnt his eye. A physician testified the eyeball was burned, another witness testified that on the next morning after the injury the eyeball was swollen and showed a little white spot and still another that the eye was blistered. We have examined the evidence carefully and find it sufficient to take the case to the jury. The court therefore correctly declined to give appellant's request for a directed verdict. Other errors are assigned and argued, but principally on the ground that the court should have directed a verdict for appellant, all of which we have examined and find them without merit.

It is finally insisted that the verdict is excessive. The proof shows that appellee has lost about four-fifths of the vision of one eye. Since the evidence was sufficient to take the question of appellant's liability to the jury, we do not think an allowance of $700 for such an injury is excessive. We find no error, and the judgment is affirmed.

BROTHERHOOD OF RAILROAD TRAINMEN *v.* LONG.

4-2674

Opinion delivered October 17, 1932.

McMillan & McMillan, for appellant.
McElhannon & Callaway, for appellee.

BUTLER, J. From an action by the beneficiaries named in an insurance certificate based on an application signed by Romie Long and issued by the appellant, a fraternal benefit society, resulting in a verdict and judgment in favor of the beneficiaries, comes this appeal.

The defense to the action is grounded upon the allegation that in the medical examination embracing the questions and answers included in and a part of the application, a false answer was made to a question, and

that this question and answer thereto constituted a warranty under the policy and that the answer, being false, avoided the policy. The question propounded and the answer thereto are as follows: "Q. Have you consulted a physician during the last five years? A. No."

In the body of the certificate, the application, constitution and by-laws of the appellant were referred to and were made a part of the contract of insurance. In the by-laws and in the application there is a stipulation to the effect that all statements and answers made in the application shall be (by the assured) adopted as his own, admitted to be material, full and complete, and in any case, if any untrue or incomplete answer shall be made in such application, then the certificate issued thereon and said contract shall be absolutely null and void. It was further stipulated in the application that any beneficiary's certificate based thereon shall be held to be a contract made in the State of Ohio and subject to its laws. These stipulations, which were a part of the contract of insurance, constituted the answer to the question a warranty both under the laws of the State of Ohio and of this jurisdiction. *Mutual Reserve Fund Life Ins. Assn.* v. *Farmer,* 65 Ark. 581, 47 S. W. 850; *Providence Life Assurance Society* v. *Reutlinger,* 58 Ark. 528, 25 S. W. 835; *Amer. Life & Accident Ass'n* v. *Walton,* 133 Ark. 348, 202 S. W. 20; *Ins. Co.* v. *Pyle,* 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; *Wills* v. *Nat. Life & Acc. Ins. Co.,* 28 Ohio App. 497, 162 N. E. 822.

The difficult question arising is, if the answer was false and the assured had in fact consulted a physician within the last five years, is the appellant estopped from setting this up as a defense? It is insisted that this is not a case in which estoppel or waiver applies, but that under the undisputed evidence a case is presented "where, with a full knowledge of all the facts as to the provision of the contract and as to the facts inquired about, Long gave an untrue answer to the question as to whether he had consulted a physician within the last five

years"; that to these facts an application of the principle announced in *Ins. Co.* v. *Reutlinger, supra,* and in *Mudge* v. *Supreme Court I. O. F.,* 149 Mich. 467, 112 N. W. 1130, 14 L. R. A. (N. S.) 279, 119 Am. St. Rep. 686, would render the contract void from its inception and make unavailing the plea of estoppel. As we understand the rule laid down in the Reutlinger case, it is merely to the effect that, if a false answer is knowingly made by the insured with the knowledge of the agent of the company, and the two collude to defraud the company by means of the false answer, the policy of insurance is void. In the Mudge case the inference to be drawn from the testimony was that the assured was as well informed of the nature of the question as was the agent. The question was, "Have you ever had the disease of insanity?" This question was answered in the negative, when in fact the insured had at one time been insane, and the examining physician was well aware of this fact. Therefore, both the insured and the physician knew that the answer was false, and thereby colluded to defraud the insurer.

In the case at bar we think a fair analysis of the testimony on the question of estoppel does not warrant the conclusion reached by the appellant, *i. e.,* that the applicant had full knowledge of the facts inquired about and gave an untrue answer, but rather that the medical examiner placed his own interpretation on the question and gave what he conceived to be a correct answer. The appellant introduced several physicians who testified that they had examined the insured in a hospital in Little Rock in June, 1927. Appellee then called the physician who had made the examination of the insured at the time of his application and who wrote the answers in the application. It developed that this physician and the insured both lived in the town of Gurdon, and that the medical examiner had been the physician of the insured for a period of time from five to ten years. This physician testified that the insured had never had any disease of a serious nature before the application for insurance was made; that he knew that the insured had gone to the

Missouri Pacific Hospital in June, 1927, and that he had treated him two days before he went there for a slight indisposition, describing the ailment and its result as "a bilious attack and a bad cold—he had got kind o' knocked out, as we call it."

Long was a brakeman in the employ of the Missouri Pacific Railroad Company, and as such was entitled to free treatment in the hospital of the company whenever he was indisposed. Employees of the railroad company made frequent use of the hospital advantages as they were transported to and from their homes to the hospital and there cared for without any cost to them. For this reason they would go to the hospital, even though troubled with only minor ailments. The physician who took the application was, and had been, employed by the appellant company for the purpose of examining applicants for insurance for eight or ten years. The blank applications would be sent to him for use as occasion required. He testified that he made the examination of Long in November, 1927, and that he, himself, wrote the answers to the questions that were contained in the application. Referring to the blank spaces left for the insertion of the answers to questions he was asked "Did you fill those in," and he answered, "Yes, sir—in answer to his question, or rather my questions." Witness was also asked the following question: "Just tell how you conducted the examination, doctor." To this question the appellant objected, and, after some colloquy between counsel and the court, the objection was sustained and the witness was not permitted to answer. The witness was then asked, "Doctor, in the application you were asked if he had consulted a physician and the answer is, no. You wrote that answer down?" The witness answered, "Yes, sir."

The physician further stated that at the time the application was taken to the best of his knowledge the applicant had not consulted a physician for anything serious within five years; that he believed the statement as written down by him was true. We think it may be

fairly deduced from this testimony and from the nature of the ailments of the applicant, for which he was treated by the physician before his visit to the hospital, that these were, as thought by the physician, only temporary in their nature, attendant merely with bodily discomfort and without any serious consequence such as would affect his general health or life expectancy; that this was known to the physician and also that the applicant had stayed about three or four days in the hospital some three or four months before the date of the application, and that he had gone there because of a bilious attack and a cold, and that with this knowledge the physician placed his own interpretation on the question and gave an answer based on that interpretation which he believed was true; that this was the answer of the physician himself and not that of the applicant. It will be remembered that the physician was asked to state how he conducted the examination of the applicant, and on objection of the appellant was not permitted to testify. This testimony should have been admitted, for it was not for the purpose of varying the answers, but to show specifically how and by whom the answers were in fact given, and, if not literally true, why a false answer was written. As the examining physician at that time was the witness of the appellee and the agent of the appellant at the time the application was made, it must be presumed that both knew the answer that would be given, and, since the appellant prevented this testimony by his objection, the inference is that it would have been unfavorable to it. *Miller* v. *Jones,* 32 Ark. 337.

In the state of the record we think the principles announced in the case of *Kandar* v. *Indemnity Co.,* 30 Ohio Circuit Court Decisions of 1909, p. 260, apply. It is there said: "If the agent of the company placed a construction upon it, making the answer given an honest one, is the company bound by it so as to be thereafter estopped from asserting as a defense to an action on the policy that a false representation had been made in this regard? We are not without authorities upon questions somewhat

analogous. We have found reference to a mass of litigation along the same lines in *Clemans* v. *Supreme Assembly,* 131 N. Y. 485, 30 N. E. 496, 16 L. R. A. 33. * * * If the insurer's agent after being informed fully as to the facts incorrectly states them in the application, the insurer is estopped to take advantage of the error to avoid liability on the policy. * * * If the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurer, without collusion or fraud on the part of the insured, the insurer is estopped to set up their error or falsity."

This seems to be the rule laid down by our own decisions. The case of *Dwelling House Ins. Co.* v. *Brodie,* 52 Ark. 11, 11 S. W. 1016, was an action based upon a policy of fire insurance, and one of the defenses was that one of the representations made by Brodie, which was by express agreement of the parties a warranty, was false. The question was, "Do all the stove pipes go directly into brick chimneys?" and the answer was, "Yes," while in truth the stove pipes did not go into brick chimneys, but ran directly through the roof. It was shown that the answers were not written by Brodie but by the agent of the insurance company and signed by Brodie. To the application was appended a statement to the effect that the applicant warranted each of the answers to the questions to be true. There was evidence that the agent personally inspected the property at the time of the application and knew the condition of the stove pipes. The court instructed the jury that the false statements vitiated the policy unless the agent of the company inspected the property and informed the applicant that the facts warranted the answer. In approving this instruction, the court quoted with approval from *Ins. Co.* v. *Wilkinson,* 13 Wall. 222, as follows: "They (the agents) not unfrequently mislead the insured by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the

requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers. The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval."

The following statement from the case of *Bedwell* v. *Northwestern Ins. Co.,* 24 N. Y. 302, was likewise quoted and indorsed by the court in the Brodie case: "Indeed, it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature) inserted in a policy, intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held to be a breach of such a clause, they are a breach *eo instanti* of the making of the contracts, and are so known to be by the company as well as the insured, and to allow the company to take the premium without taking the risk, would be to encourage a fraud." Concluding, this court said: "We therefore conclude that the appellant was estopped from taking advantage of the falsity of the answer appended to the question, 'Do all stove pipes go directly into brick chimneys?' if, at the time the policy sued on was issued, it, personally, or through its agent, knew or had notice of, the facts which the question was intended to elicit." The doctrine of that case has been reaffirmed in *People's Fire Ins. Co.* v. *Goyne,* 79 Ark. 322, 96 S. W. 365, 16 L. R. A. (N. S.) 1180 9 Ann. Cas. 373, and followed in *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; *Maloney* v. *Maryland Casualty Co.,* 113 Ark. 174, 167 S. W. 845; *Hutchins* v. *Globe Ins. Co.,* 126 Ark. 360, 190 S. W. 446; *Des Moines Life Ins. Co.* v. *Clay,* 89 Ark. 230, 116 S. W.

232; *American Nat. Ins. Co.* v. *Hale,* 172 Ark. 958, 291 S. W. 82.

In *Maloney* v. *Maryland Cas. Co., supra,* the court held that, where the answers to questions in an application for insurance were written by the agent of the insurer without consulting the insured, the principal is charged with the knowledge of the agent, and is estopped from denying what his own agent has assented to as true. *Hutchins* v. *Globe Ins. Co., supra,* was a suit on a life insurance policy where the defense was made that the insured had failed to state that he was afflicted with epilepsy at the time of his examination for insurance. There was some testimony that the examining physician for the insurance company had attended and treated the applicant for epilepsy and knew of his condition. In commenting upon this, the court said: "If, in fact, the doctor had this knowledge when he wrote down a false answer, his knowledge is imputed to the company, and it cannot now be heard to say there was a breach of the warranty."

It must be admitted that the representation with reference to the consultation with a physician was a warranty, but the power of the agent of the company remains the same, although the application contains a warranty, and may estop its principal, where said agent is authorized to ask the question and write the answer and puts his own construction upon the facts of which he has knowledge, and deduces therefrom an erroneous answer which he writes down, and the applicant has the right to rely upon the superior knowledge of the medical examiner where he is acting in good faith and does not knowingly make false answers as to facts upon which the medical examiner may base his conclusions. Here the medical examiner was a physician who had been practicing his profession for a long time, and of course he knew that any one who entered a hospital would be examined by the physicians in attendance there to the same extent as if the insured had told him in detail his entire experience during his stay in the hospital. Indeed,

there is no evidence to show that he did not, and it would be a grave mistake to suppose that the rule which would avoid the contract for a false warranty could be extended so as to hold the applicant responsible for the truth of an answer which was the result of a mistake in judgment or an error or blunder of the company's agent especially charged by the company with the preparation of the application. We have attentively examined the Arkansas and Ohio cases cited by counsel. As we interpret them, we find nothing which conflicts with the view we have expressed.

It is not contended that there was any collusion between the examining physician and the applicant, and therefore the court under the evidence did not err in submitting the question of estoppel and the instructions given fairly presented that issue to the jury. The court did not err in its refusal to give the instructions requested by appellant because they ignored the question of estoppel and were equivalent to a peremptory instruction to find for the defendant.

One of the assignments of error raised in the motion for a new trial, assignment of error No. 17, was that the instructions presented issues not raised by the pleadings, and this is argued briefly by appellant in its brief, wherein it is contended there was no written plea of waiver or estoppel nor any request made that the pleadings be amended to conform to the proof, and that objections were made to the evidence tending to establish estoppel, and exceptions saved to the overruling of the objections. An examination of the testimony of the examining physician, which was the only testimony offered on the question of estoppel, shows that there was no objection made to the evidence on the ground that it was not responsive to the pleadings. The only exception saved was to the overruling of an objection to a question asked the doctor if the applicant had ever consulted him or any other physician with reference to any serious illness, and the objection was not on the ground that there was no plea of estoppel, but that "it sought to

contradict the statement the man adopted as his own as the basis of the contract.'' As the evidence warranted the submission of the question, it was not an abuse of the court's discretion to treat the pleadings amended to conform to the proof and to submit the issue to the jury. *Anglin* v. *Marr Canning Co.,* 152 Ark. 1, 237 S. W. 440.

The appellant offered to introduce the physicians in attendance at the hospital for the purpose of disclosing the result of their examination of the insured with respect to his physical condition and the diseases with which he was afflicted in June before taking out the policy. The appellant insists that under the decisions of the Ohio courts an interpretation has been placed upon clauses in insurance policies, similar to the one in question, which operated to constitute a waiver of the right to claim privileged communications under the statute. *Wills* v. *Ins. Co., supra.* While the contract before us is by agreement of the parties to be construed as an Ohio contract, the laws of that State have no application except as to the construction of the contract, and the competency of the testimony and its admissibility are to be determined by the law of the forum. 5 R. C. L., p. 1044; *K. C. Sou. Ry. Co.* v. *Leslie,* 112 Ark. 305, 167 S. W. 83. Our statute, § 4149, Crawford & Moses' Digest, makes the information which a doctor or trained nurse obtains, acting in their professional capacities, which is necessary to enable them to prescribe as a physician or act as a trained nurse, privileged, and this statute was passed for the protection not only of themselves, but for their patients. A patient, however, may waive the privilege by calling the physician to testify or by a clause in the contract on which suit is brought, and if the privilege is waived by a clause in the contract that waiver binds any one who claims thereunder. In the case at bar, however, the contract did not contain any such clause, and the court properly refused to admit the testimony of the physicians. *Mutual Life Ins. Co.* v. *Owen,*

111 Ark. 554, 164 S. W. 720; *Wooten* v. *Wooten*, 176 Ark. 1174, 5 S. W. (2d) 340.

It follows that the judgment of the trial court is correct, and it is therefore affirmed.

HANSON *v.* LOUISIANA OIL REFINING CORPORATION.

4-2687

Opinion delivered October 17, 1932.

[redacted]

E. A. Upton, for appellant.

Blanchard, Goldstein, Walker & O'Quin and *Searcy & Searcy,* for appellee.

BUTLER, J. The Blewster Service Station, a domestic corporation, was engaged in retailing gasoline and oils in Texarkana, R. H. Hanson being its president, T. M. Blewster its vice president, and Stella Hanson its treasurer. Desiring to establish a line of credit with the Louisiana Oil Refining Corporation, appellants in their individual capacities, executed a contract on March 21, 1928, in the form of a letter addressed to the Oil Refining Corporation requesting sale and delivery to the Blewster Service Station, on the usual terms, such merchandise as might from time to time be selected (including gasoline and oil, and agreeing that the signers would become personally responsible for the payment of the purchase price not to exceed $1,000, whether evidenced by open account or otherwise. Acting upon this contract, the Oil Corporation sold and delivered a quantity of gasoline and oil to the Blewster Service Station to the amount of $2,100.48. Some payments were made and certain discounts allowed reducing the amount of the indebtedness claimed by the Oil Corporation to the sum of $1,420.78, and, this amount remaining unpaid, the Oil Corporation instituted this action against the appellants setting out the personal obligation entered into by them, alleging the sales and deliveries, the balance due, and exhibiting with its complaint an itemized account showing the debit and credit items and the balance, which was sworn to by the proper officers of the Oil Corporation.

The appellants filed an answer which was subsequently withdrawn and another answer filed in lieu thereof, in which the execution of the agreement to pay the account of the Blewster Service Station up to the amount of $1,000 was admitted and also the items charged in the statement of the account, but denied that, after allowing all credits, the balance remaining unpaid was

the sum of $1,420.78 and that the account showed all the credits to which the service station was entitled. They alleged that the credit items which should have been allowed and were not were two cents per gallon on gasoline and ten cents per gallon on oils allowed the purchaser as a trade discount; that, when said discounts were credited as they should be, nothing would remain due and unpaid on said account.

As a further defense to the action, appellants set up a certain contract executed on the third day of September, 1928, between the Blewster Service Station and the Oil Corporation which is as follows:

"LOUISIANA OIL REFINING CORPORATION.

"CONTRACT.

"State of Arkansas, County of Miller—

"This agreement to sell by and between Blewster Service Station Company, R. H. Hanson, president, and Louisiana Oil Refining Corporation, a Virginia corporation, authorized to and doing business in the State of Arkansas, with its principal office in the city of Shreveport, herein represented by..... whose authority is recognized and acknowledged, witnesseth:

"Blewster Service Station Company, R. H. Hanson, president, has agreed to and does hereby agree to sell the Louisiana Oil Refining Corporation, which has agreed to and does hereby agree to the following described property, for the consideration and on the terms and conditions herein expressed:

"Description of Property. All that parcel of land on which is situated the Blewster Service Station being more particularly described as follows:

"Examination of Title. This agreement is subject to examination of title by the attorneys for the Louisiana Oil Refining Corporation, whose opinion thereon shall be final.

"Consideration. Five thousand dollars ($5,000). All debts, rentals, bad checks, etc., owed to Louisiana Oil Refining Corporation to be deducted from purchase

price and balance to be payable in three yearly payments of equal parts.

"Thus done and signed in duplicate in the presence of the undersigned and competent witnesses on this 3d day of September, 1928.

"BLEWSTER SERVICE STATION CO.,
"By R. H. Hanson, Pres.
"LOUISIANA OIL REFINING CORPORATION,
"By W. Oden.

"Witnesses:
"H. B. Wren, Jr.
"Ford Land."

It was alleged that the above contract superseded the contract upon which suit was brought and was a novation of the indebtedness sued on; that the Oil Corporation arbitrarily breached the contract of September 3, 1928, thereby preventing the consummation of sale. This answer was not sworn to.

The case was submitted to the jury upon conflicting testimony as to the amount of credits that should be allowed upon the account. There was a finding in favor of the Oil Corporation, and verdict was rendered in its favor in the sum of $750. Judgment was entered in accordance with the verdict, from which is this appeal.

The court instructed the jury that the burden was upon the appellants to show the payments for which they claimed credit, and, further, that, if they should find from a preponderance of the evidence that the service station was entitled to credits other than those shown in the statement of account, the appellants would be entitled to the benefit of the same, and, if these credits equaled or were greater than the amount of the debit items, the verdict should be rendered for the appellants, otherwise for the appellee (plaintiff) in whatever amount the just credits were less than the amount of the debit items.

It is insisted by the appellants that these instructions wrongfully imposed the burden of proof upon them to prove the items of credit, whereas it in fact

devolved upon the appellee to establish both debit and credit items by a preponderance of evidence. The complaint with the verified itemized account made a *prima facie* case, and, since the correctness of the account was admitted, except for certain deductions by way of trade discounts claimed by the appellants, the burden was upon them to prove the right to such deductions, and the instructions complained of were proper declarations of the law. *Ferguson Lbr. Co.* v. *Logan-Long Co.,* 181 Ark. 1146, 26 S. W. (2d) 569.

The court refused to grant an instruction requested by the appellants to the effect that an arbitrary refusal on the part of the Oil Corporation to perform its contract of September 3d without fault on the part of the service station, when it was able and willing to perform the same, would exonerate the appellants from liability, regardless of the status of the account sued on. The court did not err in this regard. The contract alleged to have been breached was not between the appellants and the appellee, and for its breach no right of action would have accrued to them but to the service station. Nor was there any allegation or showing made that any damage would have resulted to the service station because of the alleged breach.

It is next insisted by the appellants that the contract of September 3, 1928, constituted a novation and superseded the credit contract, and that the court erred in refusing to so hold. The contract of September 3d, *supra,* is explicit in its terms and does not warrant the contention made. It is well settled that novation is the substitution by mutual consent of one debt for another, or a new debt for an old one, whereby the old debt is extinguished, and the intention to effect this must be positively declared. *Cockrill* v. *Johnson,* 28 Ark. 192; *Brewer* v. *Winston,* 46 Ark. 163; *Elkins* v. *Henry Vogt Machine Co.,* 125 Ark. 6, 187 S. W. 663.

It is next insisted that the court erred in its rulings in holding competent certain testimony offered over objections. On the question of the trade discounts claim-

ed, the district manager of the Oil Corporation testified that he had no authority to make such agreement. This testimony was admitted by the court as a circumstance tending to show whether in fact the district manager had made an agreement to allow discounts as claimed by the appellants. For this purpose such testimony was competent. For the same reason, the rules of the National Petroleum Institute showing the prices of the products were admissible, as was also the original contract between the Oil Corporation and the service station regulating the terms under which the latter might sell, as it was shown that the service station continued to sell under this contract after the Hansons became interested in the business and during the time the account sued on was made.

Again complaint is made that the appellee's attorney exhibited to Hanson a carbon copy of a letter which the Oil Corporation claimed to have written and mailed to Hanson, which Hanson denied receiving, and permitting said attorney to read an excerpt from said carbon copy, and ask Hanson if he did not remember receiving the letter containing that statement. To this question the witness answered, "No." The court instructed the jury that the carbon copy of the letter could not be considered as evidence, and it was not error to permit the question to be propounded.

The last assignment of error argued is that the verdict was contrary to the law and the evidence, in that the testimony on the part of the appellants tended to show that there was a balance of only $21.85 due the oil corporation after the trade discounts claimed had been deducted, and that the testimony on the part of the appellee tended to show that not less than $1,000 was due. Appellants therefore argued that the verdict was unsupported in any view of the testimony. Accepting the evidence of the appellee as true, as the jury must have done, it is clear that it was entitled to a judgment in the sum of $1,000, but the appellants are in no position to complain, as the verdict was more favorable to them

than was justified by the testimony. *Washa* v. *Harris,* 162 Ark. 186, 266 S. W. 944; *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. (2d) 49.

The judgment is affirmed.

OGDEN *v.* PULASKI COUNTY.

4-2708

Opinion delivered October 24, 1932.

Brickhouse & Brickhouse, for appellant.

Carl E. Bailey and *Fred A. Donham,* for appellee.

SMITH, J. Pulaski County entered into a contract for the construction of a county road with appellants, under which contract there was due the sum of $13,229.51. A claim therefor against the county was disallowed by the county court on August 31, 1931, for the reason that there were no county funds available for its payment. The circuit court so found upon an appeal from the disallowance order by the county court, and the judgment of the circuit court, from which is this appeal, recites that the claim was disallowed for the reason that the condition of the county's finances would not permit its payment, under amendment to the Constitution, No. 10, 184 Ark., page XXIX.

The provisions of this amendment No. 10 have been construed so frequently and so recently that it must now be treated as definitely settled that it is not within the power of a county court to allow any claim against the county, however just and meritorious it may be, when, by such allowance, the total revenue for the current fiscal

year, from all sources, will be exceeded. *Pulaski County* v. *Board of Trustees, ante* p. 61.

The case of *Burke* v. *Gulledge,* 184 Ark. 366, 42 S. W. (2d) 397, arose under very similar facts. In that case allowances were made against Phillips County on account of the construction cost of certain rural roads, in payment of which warrants were drawn on the "Special County Road Tax Fund." At the time the allowances were made, the county's expenditures had exceeded its revenues for the then current year. The "Special County Road Tax Fund," against which the warrants were drawn, was composed of revenues derived from several sources, the three-mill road tax being a part thereof, as was also the county's proportionate part of the "State Turnback Money," which last-named fund was derived by the county under the appropriations made pursuant to act 63 of the Acts of 1931 (Acts 1931, page 171). It was held, in this Burke case, *supra,* that the allowance of a claim against a county was void when, by such allowance, the total revenues for the current fiscal year, from all sources, were exceeded, and the judgment of the circuit court directing the payment of such a claim against the county was reversed.

It was pointed out, however, in the Burke case, *supra,* that it had been held in the case of *Anderson* v. *American State Bank,* 178 Ark. 652, 11 S. W. (2d) 444, that amendment No. 10 did not apply to funds paid over to the counties by the State pursuant to the act 63 of the Acts of 1931, as that fund was not county revenue within the meaning of the amendment. It was therefore held, in the Burke case, *supra,* that, while the demands there involved could not be allowed against the county and paid out of county funds, it might be allowed and paid out of the county turnback money derived under the act of 1931, as a gratuity from the State.

The present appeal may be disposed of, however, by holding, as we do hold, that the claim against the

county was properly disallowed by reason of the inhibition of amendment No. 10, above recited.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* BROWN.

4-2678

Opinion delivered October 24, 1932.

Thomas B. Pryor and *Daggett & Daggett,* for appellant.

Giles Dearing, for appellee.

SMITH, J. Three cases were consolidated and tried together, and from a verdict and judgment in favor of each plaintiff is this appeal.

Two of the plaintiffs were riding in a truck owned by the third plaintiff on the afternoon of July 4, 1931, at which time the truck was struck by an eastbound

passenger train of the defendant, and the suits were brought to recover the damages thus inflicted. No complaint is made that the verdicts returned were excessive, but it is insisted that certain errors were committed which call for the reversal of the judgments.

The first assignment of error is that the court erred in submitting to the jury the question whether there was a failure on the part of the operatives of the train to keep a lookout and in refusing to instruct the jury that the lookout statute was not involved.

The collision between the truck and the train occurred at a crossing inside the limits of the city of Wynne, and the operatives admit that the train was running about twenty-five miles per hour. The witnesses for the plaintiffs place the speed at a higher rate. Certain box cars were standing on a track running parallel to the one on which the train entered the city. These box cars were standing about 150 feet from the crossing, and certain flat cars were nearer the crossing. Plaintiff Brown testified that the tracks were straight and ran east and west, and that the highway ran north and south. There are two switch tracks on the south side of the main line, and one switch track on the north side of the main line. Plaintiff Seago, who was driving the truck, stopped it before crossing any of the tracks, which were all surface tracks and on a level with the highway. Plaintiff Brown further testified that box cars were standing both east and west of the crossing, and that there was "just a narrow space between for us to go through." Near the crossing was a signal light, but it was not working, and did not indicate the approach of the train. Will Jones, a pedestrian, crossed the tracks just as witness and Seago drove up to them, and no signal of any kind was given as they did so. The bell did not ring and the whistle was not sounded. The testimony of Seago, the driver of the truck, was to the same effect, and these witnesses were corroborated by a number of others.

The testimony on the part of the railroad company was to the effect that the crossing light was in working

order when it was inspected shortly after the collision, and that the bell was rung and the whistle was sounded as the train approached the crossing, and that the truck came upon the main-line track from behind the box cars so near the engine that the collision could not be averted.

Under the facts stated, it was not error to admit testimony as to the speed of the train, nor was it error to instruct upon the duty of the railroad company to keep a lookout, and the duty also to ring the bell or sound the whistle as the train approached the crossing.

In the recent case of *Missouri Pacific R. Co.* v. *Rogers,* 184 Ark. 725, 43 S. W. (2d) 757, we held, in effect, that, where no warning was given of the approach of a train to a crossing, the speed at which the train is moving is of material consideration on the question of negligence; that the lookout answers one purpose, the warning another, and the control of the speed yet another. That the requirement as to the lookout is primarily to enable the trainmen to control the movement of the train when they discover danger, while the warning with whistle or bell is to give the traveler notice to keep out of danger, and the control of the speed is designed to make both the lookout and the warning more effective.

The plaintiffs testified, as did also certain bystanders who saw the collision, that the trainmen gave no notice of the train's rapid approach by ringing the bell or blowing the whistle, as the law required, and as they would, no doubt, have done had a lookout been kept. These were at least questions for the jury, and there was no error in submitting them.

The court gave, over appellant's objection, an instruction, numbered 4, reading as follows: "If you find from the evidence in this case that the defendant had placed signal lights at the crossing where this accident occurred for the purpose of warning the traveling public at said crossing of the approach of its trains, that fact would not relieve the plaintiffs of the duty to look and listen for the approach of trains at said crossing,

but, if they were inoperative and not working at the time this plaintiff attempted to cross the said crossing, he might infer, from the fact that the said lights did not show that a train was coming, that no train was coming, and thereby be impliedly invited to cross said tracks."

Testimony was offered by the defendant railroad company to the effect that the crossing light was burning, which would have indicated to one who looked and observed it that a train was approaching; while the evidence of the plaintiffs was to the effect that the light was not burning, at least that no red light showed, as was usual when a train was approaching and the light burning, and that therefore the light gave no warning.

Upon this issue, the instruction was not erroneous, as it appears to conform to the law as declared in the case of *Bush* v. *Brewer,* 136 Ark. 246, 206 S. W. 322. See also,*Missouri Pacific R. R. Co.* v. *Havens,* 164 Ark. 108, 261 S. W. 31; *Missouri Pacific R. R. Co.* v. *Elvins,* 176 Ark. 737, 4 S. W. (2d) 528.

The instruction did not absolve plaintiffs from the duty to look and listen because the light was there, although it was not burning, but declared the law to be that, having looked and listened, the plaintiffs had the right to infer that no train was approaching, as the light did not show that there was danger.

The court gave numerous instructions defining the duties of both the plaintiffs and the operatives of the train. Accurate definitions of contributory negligence were given at the request of appellant, after which the court gave, on its own motion and over appellant's objection, an instruction reading as follows: "Contributory negligence on the part of the plaintiffs as mentioned in the preceding instructions means negligence that is equal to, or greater than, the negligence, if any, of the defendant company; and, if you find that the plaintiffs are guilty of contributory negligence, and that such negligence equals, or is greater than, the negligence, if any, of the defendant company, then your verdict in all three

cases shall be for the defendant. The burden of proving such contributory negligence is on the defendant company."

Read by itself, this instruction is not an accurate definition of contributory negligence, but it was not intended to be read by itself. When read in conjunction with the instructions to which it referred, it does not tell the jury that the contributory negligence of the plaintiffs could not be considered unless that negligence was equal to, or greater than, that of the defendant, but declared the law to be that, if the plaintiff's negligence was equal to or greater than that of the railroad company, the cause of action was defeated, although the railroad company was itself guilty of negligence. In other words, the instruction appears to have been given, not to define contributory negligence, as that had been done in other instructions to which reference was made, but to declare the law in regard to the effect of contributory negligence. We conclude therefore that the instruction, while not accurately phrased, was not erroneous and prejudicial. Section 8575, Crawford & Moses' Digest.

Upon the whole case we find no prejudicial error, and the judgment must therefore be affirmed, and it is so ordered.

TAYLOR *v.* ARKANSAS DEMOCRAT COMPANY.

4-2659

Opinion delivered October 24, 1932.

Sam Rorex, Nat Hughes and *McNalley & Sellers*, for appellant.

Carmichael & Hendricks, for appellee.

HUMPHREYS, J. The pleadings in this case are as follows: First, an intervention of appellee in the proceedings for the liquidation of the American Exchange Trust Company in the chancery court of Pulaski County, alleging its right to an offset, of $15,527.19, against a note for $20,000 it owed said bank on the day the bank ceased to do business; second, the answers of appellant banks denying the right of appellee to set off the bank's indebtedness to it against said note to the extent of their alleged respective interests therein, and their cross-complaint alleging a preference over appellee and the general creditors in the funds to be derived from said note, and in the cash funds of said bank; and, third, the answer of the Bank Commissioner denying the right of set-off by appellee, except the difference between the participation certificates and the $20,000 note, and the right of appellant banks to the preference claimed by them.

The cause was submitted upon the issues joined by the pleadings and an agreed statement of facts, from which the court found and decreed that the appellee was entitled to a set-off in the sum claimed against its note, and appellant banks were entitled to a preference *pro rata* in the excess paid by appellee in the settlement of its note, from which is this appeal.

The agreed statement of facts is as follows:

"The parties to this action agree that the following is a complete statement of undisputed facts upon which the issues of law are based, and, as such, submit same to the court:

"The American Exchange Trust Company held the note of the Arkansas Democrat Company in the sum of $20,000, which note was due February 6, 1931.

"On November 10, 1930, it sold to the First National Bank of Junction City, Arkansas, what was called a participating contract in the amount of $4,000, the form of which is as follows, to-wit:

" 'No..... $.....

" 'Certificate of Participation

" 'THE AMERICAN EXCHANGE TRUST COMPANY, Little Rock, Arkansas, has allotted to..... .....a participation of.....dollars in a loan for.....made to..... ..... secured by.....dated..... due .....with interest at.....per annum.

" 'In allotting participation to its customers and others, in loans made by it and in the handling of the same, including substitutions or withdrawals of collaterals, with or without reductions of the loans, the American Exchange Trust Company endeavors to exercise the same care that it exercises in the making and handling of loans for its own account, but it does not assume further responsibility. Such allotments and the handling of the loans, including substitutions and withdrawals of collateral, are for the account and risk of the participants.

" 'American Exchange Trust Company,

....

" 'Vice-Pres. " 'Asst. Secy.

" 'This certificate should be sent direct to the American Exchange Trust Company for collection a few days before maturity.'

"On November 14, 1930, it sold a similar contract to the People's Bank of Mammoth Spring, Arkansas, for $2,500, and on the same day sold a similar contract for $5,000 to the Calhoun County Bank, of Harrell, Arkansas.

"The only evidence of said transactions were the participating contracts. There was no indorsement on

said note, which remains in the hands of the American Exchange Trust Company, and was in its hands at the time it was taken over by the Bank Commissioner.

"At the time of said suspension the Arkansas Democrat Company had on deposit with the American Exchange Trust Company the sum of $15,127.89, and said bank was indebted to the Arkansas Democrat Company in the sum of $399.30, making a total amount due the Arkansas Democrat Company of $15,527.19. If the Arkansas Democrat had been allowed to offset its account against the bank, it would still owe the bank $4,472.81 on February 6, 1931, the date said note became due. On said date, the Arkansas Democrat tendered to the bank commissioner said amount of $4,472.81 and demanded its note. The bank commissioner refused to accept said tender and payment, and refused to surrender said note, but credited said note with $8,500, which was the amount of said note, less the amount of the participating contracts it had sold, and set off said sum against the above-mentioned claim of the Arkansas Democrat Company.

"The banks buying the participating contracts had deposits with the American Exchange Trust Company, and, in making these investments, ordered it to charge the amounts invested to their respective accounts.

"There was more than $300,000 in cash in the American Exchange Trust Company when it was taken over by the Bank Commissioner."

The undisputed facts reflect that the $20,000 note which appellee owed the American Exchange Trust Company had not been negotiated in the manner required by §§ 7796, 7797 and 7798 of Crawford & Moses' Digest, and that it was held intact by said bank when the Commissioner took charge of the assets of the bank for liquidation. Appellant banks having failed to acquire an interest in the $20,000 note in accordance with the provisions aforesaid of the Negotiable Instruments Act, were and are in no position to challenge appellee's right to offset the bank's indebtedness to it against its indebtedness to said bank. There is nothing in the agreed statement of

facts tending to show that appellee knew of, or consented to, an assignment of an interest in the $20,000 note it owed the bank by the execution of participation certificates therein to appellant banks; hence was not estopped to claim its right of set-off by an assignment of a part of the note in manner contrary to the Negotiable Instruments Act. In order to have deprived appellee of its right of set-off, the note must have been negotiated in accordance with the provisions of the Negotiable Instruments Act, or else appellee must have assented to or acquiesced in the issuance of certificates of participation by said bank.

Appellant banks, however, contend that, under and by virtue of the participation certificates in the $20,000 note that they acquired by purchase from the American Exchange Trust Company, they are entitled, in any event, to a preference *pro rata* in the amount owed by appellee upon its note after its claim against said bank has been deducted therefrom. The chancellor so found, and decrees upon the theory that the participation certificates created an express trust between appellant banks and the American Exchange Trust Company. Subdivision 5 of § 1 of act 107 of the Acts of 1927 provides for a preference in the assets of a defunct bank to beneficiaries of an express written trust. There are no words in the participation certificates evidencing an intention to create a trust. The *res* or subject-matter is not characterized as a trust fund, and the American Exchange Trust Company is not designated therein as a trustee. This court announced in the case of *Kansas City Life Insurance Co.* v. *Taylor,* 184 Ark. 772, 43 S. W. (2d) 372, that (quoting syllabus one): "To create an express trust, there must be some act on the part of the creator expressive of an intention to create a trust and to make a designated party a trustee."

The certificates are nothing more than evidences of indebtedness entitling appellant banks to participate in the funds of the bank as general creditors.

That part of the decree allowing appellee a set-off and declaring appellant banks general creditors is

affirmed, but that part awarding appellant banks the difference between the face of the note and the set-off is reversed, and the cause is remanded with directions to the chancellor to enter a decree in accordance with this opinion.

Mr. Justice KIRBY dissents.

Mr. Justice MCHANEY dissents as to modification.

GATES *v.* HUGHSON.

4-2686

Opinion delivered October 24, 1932.

Hal L. Norwood, Attorney General, *Walter L. Pope,* Assistant, *David A. Gates* and *George Vaughan,* for appellant.

KIRBY, J., (after stating the facts). The court has nothing to do with the policy of such legislation; its province being only to determine the controversies arising out of its enforcement and violation according to a fair construction thereof. It has long been the practice, both in our Federal and State governments, to impose excise taxes upon certain products or commodities by requiring the use of adhesive stamps or labels attached to each package of the commodity or products. The use of revenue stamps by the Federal government in connection with the sale of tobacco products dates back to 1868. Act July 20, 1868, c. 186, 15 U. S. Stat., at L. 125, U. S. R. S. (1878), § 3251.

The Federal statute imposes penalties and forfeitures for removing manufactured tobacco from the factory, except in proper packages duly stamped to indicate the payment of the tax. *Lilienthal's Tobacco* v. *U. S.*, 97 U. S. 237, 24 L. ed. 901; *U. S.* v. *Quantity of Tobacco,* Fed. Cases Nos. 16105 and 16106, (especially at p. 656 of 27 Fed. Cas.).

The absence of the required stamp on the package is *prima facie* evidence of nonpayment of the tax, the dealers and manufacturers being held liable for selling or offering for sale cigars, etc., not properly boxed and stamped. U. S. R. S. (1878) § 3373; *U. S.* v. *Edwards,* 25 Fed. Cas. 15025.

The statute alleged to have been violated by appellee in the sale of unstamped tobacco products is virtually in the language of the Federal statute, and provides: "Section 16. * * * The absence of the proper stamps from any container of any tobacco products shall be notice to all persons that the tax has not been paid and shall be *prima facie* evidence of the nonpayment of such tax." Act 152 of 1929, approved March 20, 1929, p. 767.

Our said act 152 of 1929 provides in § 4 thereof for the levy of an excise or privilege tax on certain tobacco products, specified in § 2 thereof, designating the amount of the levy upon cigars and cigarettes and requiring payment through the stamp tax system as prescribed therein.

Section 1 of said act 152 of 1929 provides: "The business of handling, receiving, selling or offering for sale and dealing in, through sale, barter or exchange, tobacco products, as defined in § 2 of this act, is hereby declared to be a privilege under the Constitution and laws of the State of Arkansas, and the purpose of this act is to impose certain licenses, fees and taxes on this business.

Sections 2 and 3 of said act 152 of 1929 define the terms used in the act and require the "retailer" of tobacco products to pay for a permit or license annually.

Section 6 of said act 152 of 1929 prescribes the restrictions for retail dealers in the conduct of their business: "(1). They shall not place in their stock or sell or otherwise dispose of any tobacco products to which proper stamps denoting the tax due thereon have not been affixed." This section (2) also prescribes the procedure that must be followed in the purchase of revenue stamps; and (3) the time and manner that said stamps must be affixed to the packages of tobacco products and for their cancellation.

The court read to the jury § 9 of the act, which provides the penalties for violations thereof, and, on its own motion, over plaintiff's several and specific objections, and over his objection to the charge as an entirety, gave the jury the following six additional instructions:

Instruction No. A-2: "So, if you find in this case that the defendant failed to comply with this statute, that is to say, had in her possession and sold or offered for sale packages of tobacco, cigars and cigarettes, and not having the stamps affixed thereto, (and the court will explain to you later what is meant by not having stamps affixed), then you will find for the plaintiff."

Instruction No. A-3: "If you find that she did not have packages of cigars, cigarettes and tobacco on which stamps were not affixed, then it would be your duty to find for the defendant."

Instruction No. A-4. "Now, gentlemen, the question arises, what is meant by packages of tobacco, cigars and

cigarettes not having stamps affixed? If you find in this case that the packages of cigarettes once had stamps affixed and were sold, and in the process of sale the defendant removed the stamps from the cigarettes intentionally to be preserved by her, then that would not be a compliance with the law which requires that stamps be affixed."

Instruction No. 5-A. "But if you find that the stamps were once affixed to the packages and these stamps, in the process of sale, or before, had been intentionally removed, or in any manner removed by the intention of the defendant, then she would be liable the same as though the stamps had never been affixed. In other words, it is a matter of intention. If the stamps were once put on the cigarettes, and she removed the stamps intentionally to preserve them, then she would be liable the same as though the stamps had never been put on the cigarettes; but, if these stamps were affixed, as required by law, and were removed by accident or in handling the cigarettes without any intention to preserve the stamps, then that would be a compliance with the law, and the defendant would not be liable for that."

Instruction No. A-60. "Now, gentlemen, if you find for the plaintiff, it will be your duty to find for the plaintiff for twenty-five dollars for each package of cigarettes and each box of cigars that you find which were held or sold without the stamps being affixed. If you find for the plaintiff, you will find for the plaintiff in the sum for as many packages of cigarettes and boxes of cigars as you find that the stamps were not affixed under the instructions the court has given you. If you find for the defendant, you will say, 'We, the jury, find for the defendant'."

The court refused to give appellant's requested instructions Nos. 5 and 6 as follows:

"5. You are instructed that, even though you may find that some or all of the packages did at one time have the stamps affixed, if the stamps were removed before delivery to a purchaser without the stamps being

affixed and accompanying the packages, you will find for the plaintiff."

"6. As to the one carton sold to Mr. Gay, as testified to by him and by Miss Hughson, in which she and he testified that she removed the stamps before delivery, you are instructed to find for the plaintiff in the sum of $25 for each package in the carton."

It is urged that the court erred in refusing to give the requested instructions for appellant, and in giving the six instructions objected to for appellee, telling the jury it was really "a matter of intention," that the law would not be violated unless the stamps, that had been affixed to the packages of tobacco and cigarettes, had been intentionally removed to be preserved and used again, etc. That, if the stamps had been affixed, as required by law, and were removed by accident or in handling the cigarettes, without any intention to preserve the stamps, it would amount to a compliance with the law, and there would be no liability on the part of the defendant.

The court erred in giving the said instructions, and also in refusing to give the two requested instructions 5 and 6 for appellant.

The language of the statute is plain, unambiguous, and its meaning clear, and the court erred in refusing the instructions as requested by appellant. Instruction No. 6 was in effect a direction to find for the plaintiff on the carton of cigarettes sold to Mr. Gay, who testified, as did also the clerk, that said stamps were removed from the carton before its delivery upon the sale. Both the parties to the sale testified that they had been removed, although from one witness' testimony it appeared that they were removed for preservation and use again, and the other stated that said stamps had been taken off and thrown into the waste basket. It could have made no difference for what purpose they were removed, since it is undisputed that said stamps were removed from the package of cigarettes before its delivery upon the sale, thus constituting a violation of the act.

If the stamps are not affixed and kept on the packages of cigarettes and tobacco, and canceled in accordance with the requirements of the law, it amounts to a violation thereof, for which the penalty is denounced and recoverable.

The correctness of this construction is confirmed by the provisions in the law for a refund for the amount of taxes paid upon stamped products not sold or disposed of, etc. Section 13, act 152 of 1929.

The absence of the proper revenue stamp from any container of any tobacco products would create the natural and reasonable inference that the tax had not been paid and the stamps affixed thereto in accordance with the requirements of the act, and the statute also expressly makes such showing *prima facie* evidence of the nonpayment of the tax, necessarily casting the burden of proof upon the defendant.

The court erred in refusing to give the said requested instructions on the part of the plaintiff and appellant, and in giving, over his objections, the said erroneous instructions requested on behalf of defendant, and also in refusing to direct a verdict as to one carton of cigarettes sold in accordance with requested instruction No. 6.

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

CRILL *v.* TRITES.

4-2688

Opinion delivered October 24, 1932.

G. W. Botts, for appellant.

Ray S. Gibson and *J. W. Burnett,* for appellee.

MEHAFFY, J., W. L. Trites is a farmer living at Gillette, Arkansas County. He owned real estate and personal property, most of which was incumbered. On December 28, 1926, Trites and his wife executed a deed to some property in the town of Gillette to their children, whose ages were 5, 7 and 9 years. On December 6, 1927, W. L. Trites filed his petition in bankruptcy. The appellant, H. E. Crill, was appointed receiver by the referee in bankruptcy, and was directed to bring suit in the Arkansas Chancery Court to cancel said deed, as being made without consideration, and for the purpose on the part of Trites to hinder and delay his creditors in the collection of the debt. Suit was filed in the chancery court of Arkansas County by the appellant, and the complaint alleged that Trites and his wife had executed said deed on December 28, 1926, and that said children were 9, 7 and 5 years of age, respectively; that said deed was made without consideration and for the purpose, on the part of W. L. Trites, to place said property beyond the reach of his creditors, and thus hinder and delay them in the collection of their debts; that said W. L. Trites was at the time of the execution of the deed insolvent, and that the deed was executed to defraud his creditors, and he asked for a cancellation of the deed. Answer was filed by appellees, in which they denied that the deed was executed for the purpose of hindering, defeating and

defrauding the creditors of W. L. Trites; denied that W. L. Trites was insolvent at the time of the execution of said deed, and alleged that said deed was executed nearly a year before he filed his petition in bankruptcy. He further alleged that he had severe financial reverses in 1927, and that the association failed to make settlement in full for his rice, and that these reverses made it necessary for him to file his petition in bankruptcy. An amendment to the answer was afterwards filed, in which was set forth in detail the value of the property Trites owned at the time of the execution of the deed, which was thought to be worth $15,000; that he owed his creditors at the time of the execution of the deed $8,000, and that he retained sufficient property to pay his creditors outside the property conveyed to his children; that the reverses of 1927 made it impossible for him to meet his obligations, and that this led to his filing his petition in bankruptcy. He owed, at the time he executed the deed, W. J. DeVore approximately $4,000. DeVore testified in substance that he had tried to collect from Trites and had endeavored to get Trites to give him security, which Trites refused to do; that the suit by DeVore against Trites was brought before the deed was executed to the children, but judgment was obtained after the date of the deed. He testified that at the time the deed was executed Trites was involved financially, and that these conditions finally led to his insolvency and bankruptcy. The debt of $4,000 to DeVore was secured by chattel mortgage, but none of the property was ever turned over to DeVore on the debt, and no part of the $4,000 had been paid. The debt to DeVore was originally $5,500, but had been reduced by payment to $4,000. He testified that Trites was insolvent, and he based his statement upon the fact that everything Trites had was mortgaged. He stated that Trites delayed the suit brought by DeVore against him as long as possible, and threatened bankruptcy if the suit were pushed. The petition in bankruptcy showed the total claims against Trites to be approximately $14,000. That he had never received anything on his judgment.

The appellant, H. E. Crill, testified about his appointment as a receiver and bringing the suit under directions of the referee in bankruptcy; that the secured claims in the petition for bankruptcy were more than $13,000, and that the value of the securities was placed at $9,875; that the total amount of his indebtedness shown by his petition in bankruptcy was $14,394.04. That his total assets listed was $5,357.25. Witness stated that all he had ever received as receiver for the bankrupt was $265.54; that no personal property came into his possession; that Trites, in his petition for bankruptcy, claimed his exemptions of $500, and that this was allowed without contest.

The undisputed evidence shows that, in the spring of 1927, Trites had 8 head of mules and a horse, all good stock, worth about $1,000, and that he had all the farming implements and equipment that he needed as a rice farmer, and was well equipped to run a rice farm. The undisputed evidence also showed that the flood of 1927 destroyed his oat crop, that his stock died, and that values went down, and that these things caused him to become insolvent and made it necessary to file his petition in bankruptcy. Trites filed a list of the property which he owned, together with its value, the aggregate value being $15,764.45. This property he owned at the time he executed the deed. There is no controversy about his owning this property or about its value. 160 acres of land was listed as of the value of $6,400. Two or three other witnesses, in addition to Trites, testified that it was worth $6,400. He also introduced a list showing his indebtedness at the time of the execution of the deed, which amounted to $5,955. The judgment of DeVore, added to this, would make the aggregate $9,955, showing that his assets at the time the deed was made exceeded his liabilities by $5,809. The evidence of Trites was corroborated by disinterested witnesses who testified as to the property owned by him and its value, and that he was solvent. The appellant's witnesses, DeVore and the receiver, testified that he was insolvent at the time the

deed was executed. The evidence shows there was no concealment about the deed; it was placed on record shortly after it was executed, and it was executed nearly a year before the petition was filed in bankruptcy.

If the deed by Trites to his children was made with the intention to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers, such deed would be void. Crawford & Moses' Digest, §§ 4874, 4878.

The questions here are, was Trites insolvent at the time the deed was made? And was it made with a fraudulent intent? A voluntary transfer of property to near relatives is presumptively fraudulent as to existing creditors, and, if the debtor is insolvent at the time, it necessarily hinders, delays and defrauds his existing creditors, and such conveyances to near relatives by a debtor who at the time is embarrassed, are looked upon with suspicion and scrutinized with care. *Fluke* v. *Sharum,* 118 Ark. 229, 176 S. W. 684; *Wilks* v. *Vaughan,* 73 Ark. 174, 83 S. W. 913; *Mente & Co., Inc.,* v. *Westbrook,* 181 Ark. 96, 24 S. W. (2d) 976.

The law as to fraudulent conveyances is well settled by the decisions of this court. It would serve no purpose to review all the decisions here. All of our decisions are to the effect that courts should carefully scrutinize all cases of alleged fraud against creditors where transfers have been made to members of the debtor's family. A gift of property to one's child by one indebted at the time is presumptively fraudulent as to existing creditors. and, when it is shown that a gift of property was made by the father to child, that the father was largely indebted at the time, the burden of proof is on the father to show that his intentions were innocent, and that he had at the time ample means to pay all his debts. On the other hand, however, if the evidence shows that one had ample means to pay all his debts, the conveyance to his child of property of small value, together with other facts tending to show good faith, would be sufficient to

justify the conclusion that the transfer was not fraudulent. *Mente & Co., Inc.,* v. *Westbrook, supra.*

The value of the property conveyed to the children in this instance was small, nobody fixing its value above $500. It is not only shown by the evidence that there was a disastrous flood in 1927, but this is a matter of common knowledge. The undisputed proof in this case shows that the appellee lost his stock, his oat crop and other property, and, but for these disasters and reverses, the value of his property would have been considerably more than his indebtedness. As to whether the conveyance in this case was fraudulent, and as to whether the debtor at the time had ample property out of which appellant could have made his money, are questions of fact, and the chancellor's decisions or findings on questions of fact are conclusive here, unless contrary to the clear preponderance of the testimony. *Mente & Co., Inc.,* v. *Westbrook, supra; Pattison Orchard Co.* v. *S. W. Ark. Utilities Corp.,* 179 Ark. 1029, 18 S. W. (2d) 1028; *Sternberg* v. *Blaine,* 179 Ark. 448, 17 S. W. (2d) 286; *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. (2d) 282; *Jenkins* v. *Jenkins,* 81 Ark. 68, 98 S. W. 685; *Claypool* v. *Johnston,* 91 Ark. 549, 121 S. W. 941.

We have carefully considered all the evidence in the case, and have reached the conclusion that the finding of the chancellor is not against the preponderance of the evidence, and the decree is therefore affirmed.

JONES *v.* JONES.

4-2697

Opinion delivered October 24, 1932.

John J. DuLaney, for appellant.

Jones & Jones, for appellee.

MEHAFFY, J. Wm. G. Jordan, a soldier in the United States Army, received a certificate of insurance on his life for $10,000, issued by the United States through the Bureau of War Risk Insurance in 1917. His mother, Mrs. Margaret Jordan, was the sole beneficiary. He died on June 22, 1919, and after his death the United States Government, under the terms of the policy, paid $57.50 per month to his mother, the beneficiary, until her death, on March 30, 1920. The soldier, Wm. G. Jordan, died intestate, and his mother died intestate. When Jordan, the soldier, died, he left surviving him, his mother, one brother and two sisters, Charlie J., and Mrs. Mollie Waldo and Mrs. Hortense Starks. After the death of Mrs. Jordan, the beneficiary, the government paid $19.16 per month to each of the three next of kin, Charlie Jordan, Mrs. Mollie Waldo and Mrs. Hortense Starks. This amount was paid to each of them until the death of Mrs. Mollie Waldo, one of the sisters, on June 7, 1931. The government still continues to pay $19.16 each to Charlie Jordan and Mrs. Hortense Starks and recognizes its obligation to continue such payments until each has received a one-third of the balance due on said policy of insurance. After the death of the beneficiary, the government awarded one-third interest in the balance due on said policy to each of the three heirs named above. Upon the death of Mrs. Waldo, her interest, which was represented during her lifetime by the monthly payments above mentioned, was commuted, its present value found to be $1,611. The government is willing to pay said sum to Lon T. Jones, of Ashdown, Arkansas, the administrator of the estate of said Wm. G. Jordan, deceased. Mrs. Bertie Jones, the appellee and sole heir at law of her deceased mother, Mrs. Mollie Waldo, claims the full sum of $1,611, and filed her claim with the administrator. The administrator disallowed the claim, and then appellee

filed the claim in probate court on March 1, 1932. The probate court found that Mrs. Bertie Jones was entitled to the entire sum of $1,611, less cost of administration. An appeal was taken by the administrator to the circuit court, where appellee was allowed the entire sum less cost of administration. The administrator, the appellant here, filed motion for new trial, which was overruled, and an appeal granted to this court.

The contention of appellant is that, when the $1,611 was paid to the administrator of the estate of Jordan, the deceased soldier, each of the heirs, the two sisters and brother, is entitled to one-third of the amount. The contention of appellee is that she is entitled to the full amount of $1,611.

Both parties filed briefs citing many authorities. We do not deem it necessary to review these authorities, because we are of opinion that the act of Congress, as amended and as construed by recent decisions of the Supreme Court of the United States, settles the question in favor of appellee.

While the certificate of insurance was issued in 1917, it provided that it should be subject in all respects to the provisions of the act of 1917 (40 Stat. 398) of any amendments thereto and of all regulations thereunder now in force or hereafter adopted, all of which, together with the application for the insurance and the terms and conditions published under authority of the act, shall constitute the contract.

The Supreme Court of the United States has expressly held not only that Congress had a right to amend the law, but had the right to make the later acts retroactive so as to take effect as of October 6, 1917. *White* v. *U. S.*, 270 U. S. 175, 46 S. Ct. 274.

The act of December 24, 1919 (41 Stat. 376), provided: "That, if any person to whom such yearly, renewable term insurance has been awarded dies, or his rights are otherwise terminated after the death of the insured, but before all of the 240 monthly payments have been paid, then the monthly payments payable and ap-

plicable shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the State of residence of insured be entitled to his personal property in case of his intestacy."

In compliance with the law, the $57.50 was paid to the mother, who was the beneficiary, and at her death was paid to the two sisters and brother, one-third to each. They were the persons who, under the laws of the State of Arkansas, the residence of the insured, would be entitled to his personal property, and these payments to the sisters and brother continued until the death of Mrs. Waldo, one of the sisters, on June 7, 1931.

The act of Congress of 1925, (§ 14, 43 Stat. 1310, 38 USCA § 514) provides: "If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the 240 installments, or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment under existing awards; provided, that all awards of yearly renewable term insurance which are in course of payment on the date of the approval of this act shall continue until the death of the person receiving such payments, or until he forfeits the same under the provisions of this act. When any person to whom such insurance now awarded dies, or forfeits his rights to such insurance, then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments of the insurance so awarded to such person."

The Supreme Court recently said, in discussing this act: "All installments, whether accruing before or after the death of beneficiary named in certificate of insurance, as a result become assets of the estate of the insured upon the instant of his death, to be distributed to the heirs of the insured, in accordance with the intestacy laws

of the State of his residence, such heirs to be determined as of the date of his death and not as of the date of the death of the beneficiary." *Singleton* v. *Cheek,* 284 U. S. 493, 52 S. Ct. 257.

Under the act and the decisions of the Supreme Court above referred to, we are of opinion that all installments after the death of the beneficiary become assets of the estate of the insured, to be distributed to the heirs of the insured, in accordance with the intestacy laws of this State. The heirs of the insured at the time of his death were the two sisters and brother, and upon the death of the mother, the beneficiary, the entire amount provided for in the certificate became assets of the estate of the insured, to be distributed to these heirs, and, as we have said, these heirs were at that time the two sisters and brother, each of them being entitled to one-third of the amount upon the death of the beneficiary. If either of the distributees, under the law, thereafter died, the share of the one who died would descend to his or her heirs.

We find no error, and the judgment is affirmed.

ALMAN *v.* COFFMAN.

4-2689

Opinion delivered October 24, 1932.

Owens & Ehrman, for appellant.

Frauenthal, Sherrill & Johnson, for appellee.

McHaney, J. Appellant correctly states the case as follows: "This is a suit for specific performance of a contract to purchase a lot in the city of Little Rock. The appellee agreed to sell the lot to the appellant, and the appellant agreed to purchase upon being furnished with an abstract showing good and merchantable title in the appellee. The abstract which was submitted showed that the appellee was claiming title through the Arkansas Baptist College, which in turn secured the lot under the will of one Julia Little, deceased. The only point involved in the litigation is the correct construction to be given to that will. The chancellor held that the Arkansas Baptist College, and through it the appellee, had a good and merchantable title. He decreed a specific performance of the contract. The appellant excepted, and has brought this appeal."

The will of Julia Little, deceased, was executed on the twelfth day of March, 1900, and the second, third and fourth paragraphs of the will are as follows: "(2) After the payment of my said debts and funeral expenses, I give to Thomas Preston, the son of George and Carrie Preston, of Little Rock, Arkansas, an education in the Arkansas Baptist College, the same being situated in the city of Little Rock, Arkansas. (3) And for the education of the said Thomas Preston, I give and devise to the trustees of the Arkansas Baptist College all the rents and profits and such other personal property owned by me (after the payment of my just debts and funeral expenses) and so much of my real estate as when sold by leave of the court of probate will be sufficient, in addition to the said personal estate herein given, to educate the said Thomas Preston in the Arkansas Baptist College, provided that the said Thomas Preston is under the age of 21 years and shall conduct himself properly and consistent [with] discipline of the said Arkansas Baptist College. (4) After the education of the said Thomas Preston, or his default herein, all the rest and residue of my property, real, personal and mixed, wheresoever situated, which I now own or hereafter may acquire and of which I

shall die seized or possessed, I give, devise and bequeath to the cause of education, to the Arkansas Baptist College, upon the condition that the said Arkansas Baptist College shall not cease to exist. But, in case the said Arkansas Baptist College shall cease to exist, then in that case all of my said estate above described shall become the property of Charlie, Thomas and Tennie, the heirs of George and Carrie Preston, of Little Rock, Arkansas, share and share alike, absolutely and in fee simple."

It is contended by appellant that the language in the fourth paragraph, that "I give, devise and bequeath to the cause of education, to the Arkansas Baptist College, upon the condition that the said Arkansas Baptist College shall not cease to exist," and making further provision for the disposition of the property in the event said college should cease to exist, constitutes a conditional conveyance. In other words, appellant contends that the testator, Julia Little, intended by the language used that the college should have her property only so long as it continued to exist, and, when it ceased to exist, it was then to go to the individuals named. We cannot agree with appellant in this contention. On the contrary, we are of the opinion, construing the will as a whole, the language used clearly shows the intention of the testator is to give to Thomas Preston an education in the Arkansas Baptist College; and, second, after he had been educated or defaulted in same, to give all her property, including the property involved, in fee simple in the event the college was in existence at the date of her death. Thomas Preston defaulted in the matter of an education, and died in 1917, unmarried and without issue. Julia Little died in the year 1915. The college was in existence at the time of her death and still is, and it would be unreasonable to presume that she intended to tie up the fee to the property indefinitely. The law favors the early vesting of estates, and if a will by one susceptible construction would vest an estate, and by another construction the estate would be contingent, the former construction should be adopted. *Wallace* v. *Wallace,* 179 Ark.

30, 13 S. W. (2d) 810; *Hurst* v. *Hildebrandt,* 178 Ark. 337, 10 S. W. (2d) 491. But here we do not think the intention of the testator doubtful, and clearly that it was her intention to convey her property to the Arkansas Baptist College, if it were still in existence at the time of her death.

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

HOWE *v.* HATLEY.

4-2694

Opinion delivered October 24, 1932.

Arthur G. Frankel, A. P. Patton, W. M. Hall, A. J. Cole, N. A. McDaniel and *Lamb & Adams,* for appellants.

W. A. Jackson, W. J. Schoonover and *Walter L. Pope,* for appellee.

MCHANEY, J. This litigation arose out of an automobile accident which occurred in the city of Benton in Saline County on March 20, 1931. Appellant Howe is a resident of that city, and is the owner of a truck driven

by his employee, one Cabe, which collided with a car owned and driven by appellant Belford at the intersection of Main and Conway streets in said city. Belford is a citizen of Randolph County.

Mrs. Hatley, the wife of appellee, an invited guest in appellant's car, was instantly killed as a result of said collision. Appellee brought this action against both appellants, charging that their joint and concurrent negligence caused the death of his wife. Howe denied any negligence on the part of Cabe, pleaded contributory negligence of Mrs. Hatley and that the accident was caused by the negligence of appellant Belford.

Belford denied any concurrent negligence or any negligence on his part, alleged that the accident was caused wholly by the negligence of the driver of Howe's truck, and filed a cross-complaint against Howe seeking to recover damages for personal injuries sustained by him as a result of the wreck.

Trial resulted in a verdict and judgment against both appellants in the sum of $10,000.

The first assignment of error made by appellant Belford, that the court committed reversible error in telling the jury, in effect, that there could be no recovery against Howe unless there was also a recovery against Belford, must be sustained. The court gave an instruction number 30 on its own motion reading as follows: "You are further instructed that under the law in this case you will have to find that both the driver of the truck, Fletcher Cabe, and the defendant Belford, were negligent before you could find a verdict in favor of the plaintiff, and if either one of them were not negligent, you should find for the defendants." This instruction was objected to by appellant Belford only. It was an erroneous instruction and prejudicial to appellant Belford. While it is true that the complaint charged the joint and concurrent negligence of the drivers of both cars, under well-settled principles of law, there were three possibilities of recovery in the case: first, if both were negligent, there

might be a recovery against both; second, if Belford was negligent and the driver of the Howe truck was not, a recovery could be had against Belford alone; and third, if the driver of the Howe truck were negligent and Belford was not, there could be a recovery against Howe only, provided he "failed to object before the judgment to its proceeding against him." Section 1178, Crawford & Moses' Digest. The judgment of the court recites that, "after the introduction of all the evidence in the case on the part of the plaintiff and the defendant, F. E. Belford, the defendant J. E. Howe filed his motion objecting to the jurisdiction of this court, under § 1178 of Crawford & Moses' Digest, which motion is by the court overruled, thereupon defendant excepted and asked that his exceptions be noted of record." The court correctly overruled this motion, as it had jurisdiction of both the subject-matter and the parties at that stage of the proceeding. Had there been a verdict against Howe alone, he could have again objected to its proceeding against him at any time prior to the judgment. *Stiewel* v. *Borman,* 63 Ark. 30, 37 S. W. 404; *Wood* v. *Stewart,* 81 Ark. 41, 98 S. W. 711; *Seelbinder* v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325.

Prior to giving instruction number 30, the court gave instruction number 16 at Howe's request reading as follows: "Defendant Howe's No. 1—Given: You are instructed, in so far as the defendant, J. E. Howe, is concerned, that the burden is on the plaintiff, J. R. Hatley, in this case to prove by a preponderance or greater weight of evidence that the accident resulting in the damages complained of was attributable to the negligence of Fletcher Cabe, who at the time of the alleged accident was driving the truck of the defendant Howe, and if he has failed to show this by a preponderance of the evidence, then you are told that it is your duty and you are instructed to return a verdict for the said defendant, J. E. Howe, in this action." The court also gave at the request of appellant Howe instruction

number 17 which is along the same line as number 16 and relating solely to the liability of Howe.

The court also gave its instructions number 21 and 26 at the request of appellant Belford, relating to his liability alone, which provided in substance that if he were not negligent they could not find against him. The latter part of 26 provides: "If you find that the defendant, Belford, acted as an ordinary prudent person would have acted under the same or similar circumstances, then your verdict would be for the defendant, F. E. Belford." These individual instructions were entirely proper, but they are in irreconcilable conflict with instruction number 30, given by the court on its own motion. The court first tells the jury, in effect, they can find only against the defendant that is negligent. It then tells the jury that it has to find against both of them to find against either of them. It is said that this is not prejudicial because it is more favorable to appellant Belford than he is entitled to have given. We cannot agree with appellee in this regard. While it is a fact that one of the defendants was a non-resident and there could be no judgment against him over his objections unless there was also a judgment against his co-defendant who was a resident of the county, still it was not the duty of the court to so instruct the jury and was therefore prejudicial to the resident defendant. The evidence of negligence on the part of appellant Belford, if any at all, is very meager, and it might have been possible that the jury would not have returned any verdict against him at all if they had not been told that in order to find against Howe they must also find against Belford. It is also contended that Belford invited this error on the part of the court by requesting an instruction of similar import, which was given by the court as number 23. We cannot agree with this contention, however, as this instruction was in response to appellee's theory of joint and concurrent negligence.

Other assignments of error are argued in the briefs of appellants, but, since the case must be reversed for the error indicated, we think it unnecessary to discuss them. Appellant Howe did not object to the erroneous instruction nor has he assigned any such error in his motion for a new trial. But, since there can be no judgment against him, over his timely objection, unless there is also a judgment against Belford, we reverse and remand the case for a new trial as to both appellants.

RURAL SPECIAL SCHOOL DISTRICT No. 19 *v.* SPECIAL SCHOOL DISTRICT No. 37.

4-2690

Opinion delivered October 24, 1932.

Wade Kitchens and *W. H. Kitchens, Jr.*, for appellee.

Marsh, McKay & Marlin and *McKay & Smith*, for appellee.

BUTLER, J. The undisputed facts are as follows: Appellant school district filed a petition, under § 55 of act 169 of the Acts of 1931, signed by a majority of the qualified electors of the district, requesting that it be dissolved and the territory embraced therein annexed to

appellee school district. In accordance with said § 55, the board of directors of appellee school district filed its written consent to the consolidation with the county board of education. Thereafter, and before the county board of education entered its final order, a number of the signers of the petition first mentioned filed a written demand that their names be stricken from the petition. With the names of the patrons stricken off as requested, there remained less than a majority of the qualified electors on the petition first filed.

There was a stipulation in the agreed statement of facts that "no notice was published in any newspaper published in Columbia County, Arkansas, which was filed by the county school superintendent, or otherwise, or by orders of the board of education giving notice as to the time and place that the board of education would hear and determine the petition, or that it was published once a week for two weeks."

The county board refused to entertain the request of the electors that their names be stricken from the petition first filed and entered an order dissolving appellant district and consolidating it with the appellee district as prayed in the first petition. On appeal to the circuit court, that order was upheld, and to review this action comes this appeal.

Section 55, *supra,* is as follows: "The county board of education may dissolve any school district and annex the territory thereof to any district, when petitioned to do so by a majority of the qualified electors of the district to be dissolved, and the board of directors of the district to which the territory is to be annexed. Provided further, that no district shall be attached to another district without the consent of the board of directors of the district to which the dissolved district is to be annexed."

Section 48 of that act, which the appellant contends is the section regulating the procedure, is as follows: "When a petition is filed for the formation of a new

school district and the dissolution of other districts, or for the annexation of territory to any district, purporting to be signed by a majority of the qualified electors in each district affected, notice thereof shall be given by publication in a newspaper having *bona fide* circulation in the county, to be given by the county superintendent on order of the county board of education, and published once a week for two weeks, giving the date of the hearing of such petition. At such hearing the county board of education shall consider whether the petition is signed by the requisite number of electors, provided that, for the purpose of determining whether said petition contains a majority of the qualified electors of each district, a majority shall be determined as of the date said petition is considered by said county board of education, and if it finds that it is, it may grant the prayer of the petition if it deems it best for the interests of the inhabitants of the territory affected, provided that any elector signing said petition may have his name stricken from said petition, upon written demand, at any time prior to the final action of said county board upon said petition. Appeals may be taken to the circuit court from the findings of the board on the ground that the requisite number of electors have not signed the petition, or because the notices herein required were not given. The findings of the county board of education otherwise will be conclusive provided this section shall not apply to suits now pending or on appeal from the county board."

It was and is the insistence of the appellee that § 55 is entirely independent and in no way connected with the procedure provided by § 48. It is a familiar rule of statutory construction that any section of a statute shall be interpreted in the light of the entire act. Act No. 169 was a comprehensive statute enacted for the purpose of providing for a complete system for the organization and administration of the public common schools. Section 55 of that act authorized the county board of education to dissolve any school district and

annex its territory to another district upon petition of the majority of the qualified electors of the district to be dissolved, with the consent of the board of directors of the district to which the dissolved district was to be annexed. Section 48 prescribes the procedure where a new district is sought to be established and a district is to be dissolved, or, where territory is sought to be annexed to any district, notice is required, and the manner in which it is to be given is provided for. Provision is made that any elector signing a petition for the purpose first mentioned in the section may have his name stricken from said petition upon written demand at any time prior to the final action of the board upon said petition. That section also provides "that appeals may be taken to the circuit court from the finding of the county board." It gives the board the discretion to grant or withhold any order petitioned for named in the section, as it deems best for the interest of the inhabitants of the territory affected and prescribes that the question of a majority shall be determined as of the date said petition is considered by the board.

We are of the opinion that, when all of these provisions are considered, it is clear that the power of the county board is fixed by § 55 with respect to the dissolution of school districts and the annexation of territory to any other school district, and the procedure is given by § 48 preceding. Therefore, the notice provided by the last-named section was a prerequisite, and any petitioner was entitled to have his name stricken from the petition upon written demand made before the final action of the board. Since it appears that with the names deleted from the original petition there would be less than a majority and the notice was not given as required, the action of the board in granting the prayer of the petition first filed was, and is, void, and the trial court erred in not so finding.

The judgment is therefore reversed, and the cause remanded with directions to enter an order in conformity with this opinion.

DRAINAGE DISTRICT No. 7 *v.* HAVERSTICK.

4-2700

Opinion delivered October 24, 1932.

Chas. D. Frierson, for appellant.

C. T. Carpenter, for appellee.

BUTLER, J. This is an action for damages to lands of the appellee occasioned by the construction of Drainage District No. 7 in Poinsett County. There was a verdict and judgment for the appellee in the trial court, from which judgment is this appeal.

Drainage District No. 7 was created for the purpose of reclaiming a large territory of swamp lands. The general description of the district may be found in the cases of *Sharp* v. *Drainage District No. 7,* 164 Ark. 306, 261 S. W. 923; *Keith* v. *Drainage District No. 7,* 181 Ark. 30, 24 S. W. (2d) 875, and *Hogge* v. *Drainage Dist. No. 7,* 181 Ark. 564, 26 S. W. (2d) 887. In the course of the construction of the district, a floodway was dug and leveed leading from the drainage district to a point on the St. Francis River practically opposite the lands of the appellee in Crittenden County. The St. Francis River and Little River were closed by dams and levees so constructed that with these dams a large territory was inclosed, and the waters which were accustomed to drain down the St. Francis and Little Rivers were diverted from a natural flow, and, with a great amount of other waters from an area above draining into the rivers, were impounded and in times of high water flowed through the floodway with such violence and in such volume as to overflow the banks of the St. Francis River, flooding the lands of the appellee and destroying its value for agricultural purposes. From the point where the St. Francis River was dammed on the southern boundary of the district to the appellee's land, following the meanderings of the stream, is an estimated distance of forty miles, while the floodway which leaves the district at a short point west of the dam is approximately nine or ten miles in length. The flow of the water is therefore greatly accelerated, resulting in a volume of water on appellee's land in a given space of time much greater than that it received before the construction of the improvement, with the result that the lands were overflowed and their agricultural value destroyed.

Among the assignments of error is that the court erred in refusing to grant instructions Nos. 4 and 5 asked by the appellant. These instructions are as follows:

"No. 4. If you find from the evidence that the flow of water is accelerated through the floodway and the height of the waters increased thereby at or near the lands of the plaintiff, but further find that said floodway, although it takes flood waters from the St. Francis River, puts the same back into the river at a lower point, then said drainage district is not liable for damage due to the floodway."

"No. 5. If you find from the evidence that the flow of water is accelerated through the floodway and the height of the waters increased thereby at or near the lands of plaintiff, but further find that said floodway, levees and dam or any one of them, if they divert water from the St. Francis River, put same back into the same river at a lower point and before it reached the land of plaintiff, then your verdict should be for the defendant."

In support of the correctness of these requested instructions, appellant relies upon the case of *Board of Drainage Commrs.* v. *Board,* 130 Miss. 764, 95 So. 75, 28 A. L. R. 1250.

The case of *Baird* v. *Drainage Dist. No. 7,* 181 Ark. 1145, 26 S. W. (2d) 892, was a case almost identical with the instant case and involved the question of injury to the fractional northwest quarter of section 5-15-6. This land adjoins the lands of appellee, and the damage to it arose from the same causes as the damage to appellee's lands. The facts in that case are not set out in the opinion nor a review of the cases upon which the drainage district relied, but its chief reliance was the principle announced in the Mississippi case, *supra,* from which extensive quotations were made. The court in that case adopted the view expressed in the case of *Mizelle* v. *McGowan,* 129 N. C. 93, 39 S. E. 729, 85 Am. St. Rep. 705, which announced the rule that the right to drain into a natural water course is not limited to the natural capacity of the stream. It was admitted, however, that the rule of the North Carolina court was against the weight of authority, and that the majority of the courts and the text-writers held that the right of the

upper owner to drain into the water course is qualified to the extent that the flow must not be increased beyond the capacity of the stream. We think it unnecessary to announce our adherence to either of the conflicting rules, because, as we see it, neither is applicable to the facts of this record. The Mississippi case was a case where, as is said in the opinion, "the water is discharged at different points and in separate quantities, not by one person nor any one body, but by many landowners acting separately and independently in the exercise of their right to drain into the natural water course of the water-shed," and in that state of case the court said: "It is true the appellees are entitled to the benefit of the rule that water should flow as it is wont to flow, but we think with this exception or qualification that it may be increased by a riparian owner who, in the reasonable exercise of his right of drainage, discharges into the stream in excess of its capacity."

In the case at bar the drainage district concentrated the surface waters of a large territory and diverted them by dams and levees from their natural flow and through an artificial channel accelerated the flow of the surface waters of the Little and St. Francis rivers, discharging it in one body into the river further down at a point practically opposite the lands of the appellee. This, therefore, is not a case, as was the Mississippi case, where upper owners drain surface waters into the water course, but where such water courses were diverted and the waters draining into them not allowed to follow the natural flow of the streams.

The instructions refused were in effect peremptory instructions, as there is no dispute but that the waters diverted by the levees and dam into the floodway finally reached again the stream of the St. Francis River at a lower point. These instructions also ignore the diversion of the waters from their natural flow, which fact is undisputed and is the basis of the cause of action.

Complaint is also made of the court's refusal to give instruction No. 9, as follows: "If you find that the defendant drainage district has not diverted the course of any stream but has simply so drawn its levee lines and constructed its ditches as to protect as much land within the district as possible and that the damage, if any, to plaintiff results solely from the placing of levee lines and ditches in such way as to protect the lands of the district, then for such damage the plaintiff cannot recover."

It is insisted that whether there was an impounding and diversion is a matter of argument, since the engineer witnesses for the appellant maintained "that the structures constituted a placing of levee lines and ditches in a manner best adapted to the protection of the lands of the drainage district as a whole." But, regardless of the opinion of these witnesses, the undisputed fact remains that the St. Francis and Little rivers were dammed and their waters diverted from a natural flow into the floodway, and thus precipitated in increased volume upon the lands of the appellee. There was therefore no question for the jury regarding the diversion of the course of any stream, and the requested instruction would have improperly submitted that issue to the jury.

The appellant requested the following instruction: "You are instructed that there was a mortgage upon the lands at the time of the bringing of the suit and also at the time of the damage complained of; and the mortgagee is not a party to the suit, and there can be no recovery for lack of complete title in plaintiff at the time of alleged injury, and your verdict will therefore be for the defendant." The appellee's lands were mortgaged, and the appellant insists that the mortgagee was a proper party and should have been joined as a plaintiff; that it knew nothing about the title until appellee, himself, in his testimony disclosed the existence of a mortgage, and that the court erred in its refusal to grant the instruction requested. Of course, at the beginning of this suit

the appellant could have discovered the existence of the mortgage and the condition of the title, had it made any investigation, and the lands being in Crittenden County would not constitute such an obstacle as would prevent an investigation of the title. The mortgagee, while a proper party, was not an indispensable one, and, by failing to raise that question by motion, demurrer or answer, it must be deemed to have waived same. *Less* v. *English,* 75 Ark. 288, 87 S. W. 447. The general demurrer interposed did not reach the defect of want of proper parties (*Love* v. *Cahn,* 93 Ark. 215, 124 S. W. 259) and the instruction raised the objection for the first time and was properly refused. Crawford & Moses' Dig., §§ 1189, 1190.

Complaint is also made that no instruction detailing defendant's theory except on the amount of damages was given. A sufficient answer to this is that defendant's theory has been all along that its liability for damage falls within the rule announced in *City Oil Works* v. *Helena Imp. Dist. No. 1,* 149 Ark. 285, 232 S. W. 28, that where a landowner's property is left outside of a levee he is entitled to no damages because of the failure to protect his land or because the levee as constructed may prevent water from flowing off of his land as it otherwise would or may deepen the water in an overflow of the land between the embankment and the river. In cases arising out of injuries occasioned by the construction of the appellant district we have repeatedly held that the principle contended for had no application because the damage in those cases and in the instant case was caused, not by the erection of levees to prevent streams from overflowing and for the purpose of confining waters within the bed of the stream, but because there was an obstruction of the flow of the waters in the stream and a diversion of them by dams and levees. *Sharp* v. *Drainage Dist. No. 7; Keith* v. *Drainage Dist. No. 7; Hogge* v. *Drainage Dist. No. 7, supra.*

We have discussed the assignments of error not as presented in appellant's brief, but as we view them according to their importance, and we now come to a consideration of what appears to us to be the main ground relied upon by the appellant for a reversal. Appellant contends that the complaint and evidence show that the suit is barred by the statute of limitation, and that the court should have directed a verdict for the appellant as requested in its instruction No. 1, and that, if it was not entitled to a directed verdict, it was entitled to have the question of limitation submitted to the jury by its request for instructions No. 10 (a) and No. 10 (b), which were to the effect that, if the jury should find that the damage complained of occurred more than one year before the institution of the suit, its verdict should be for the defendant.

In *Hogge* v. *Drainage Dist. No. 7, supra,* we held that on the question of limitation, § 3942 of Crawford & Moses' Digest applies. This section is as follows: "All actions for the recovery of damages against any levee or drainage district for the appropriation of land, or the construction or maintenance of either levees or drains, shall be instituted within one year after the construction of such levees or drains, and not thereafter; provided, that any person, persons, or corporations, who may have any existing claims against any levee or drainage district, suffered on account of appropriation of land, for the purpose of constructing either a levee, ditch, canal, or drain, or on account of the construction or maintenance of either a levee, ditch, canal or drain, shall bring their action within six months after the passage of this act, and not thereafter." The action in the case at bar must have been begun within one year after the construction of the district. The original complaint was filed on June 5, 1924, and it is insisted that the complaint on its face showed that the action was barred. The allegation depended upon is as follows:

"That the main waterway of defendant district was completed and opened into the St. Francis River early in the year 1923, and at and since that time such vast amounts of water were, through said waterway, discharged into the St. Francis River; that said river has been caused to overflow its banks and to entirely submerge the lands of this plaintiff and to keep them submerged during the latter part of the winter season, all of the spring season and far up into the summer season of each year, preventing the raising of crops of any kind, except a few unprofitable late crops, rendering said lands unfit and worthless for agricultural purposes, or for any other purpose whatever, and resulting in a permanent damage to the lands of this plaintiff in the sum of the value of said lands, all said damage being caused by the construction of the improvements herein described."

Several amendments to the original complaint were filed, the last one according to its recitals being filed in compliance with the ruling of the court, and, after reciting that several former amendments to the original complaints had been filed, it concludes paragraph I with the prayer that "this be treated as his complaint in chief containing all the allegations constituting his cause of action." This, therefore, was not only an amendment to the complaint, but a substituted complaint, and it was to this that the answer was filed. In this complaint the allegation in the original complaint quoted, *supra,* was omitted, and the complaint therefore contained no reference to the date on which the structures were completed, nor did the original complaint, except as to the main waterway of defendant district (the floodway). It will be observed that the point from which the statute begins to run is from the "construction of the improvement" and not from the date of the damage, so that, although the damage might have fully accrued in January, 1923, the one year statute of limitation would not begin to run from that date, but from the date of the construction of

the improvement. We are of the opinion that the term used in the statute (Crawford & Moses' Dig., § 3942) "after the construction of such levees or drains, and not thereafter," means the completion or finishing of the levees or drains, and the statute would begin to run from the completion of the work. This interpretation is warranted by the cases cited by the appellant. In *Board of Directors of St. Francis Lev. Dist.* v. *Barton*, 92 Ark. 406, 123 S. W. 382, the statute was held to run from the date when the levee was finished at that point. In *Davis* v. *Dunn*, 157 Ark. 125, 247 S. W. 793, it was held that, where the injury is permanent and the structure is permanent, the statute of limitation begins to run from the time of the completion of the structure. In *St. L. I. M. & S. R. Co.* v. *Morris*, 35 Ark. 626, it was held that the statute began to run as soon as the company had finished its work about the embankment, trestles and ditches.

It therefore remains to be ascertained from the evidence in the instant case the dates when some essential and substantial part of the work of the district remained uncompleted, and to which the injuries complained of might be referable. The testimony on this question is undisputed, and was elicited from the engineer witnesses of the appellant. The floodway was opened in January, 1923, the last 300 feet of which was excavated with dynamite, and it is not shown when the levees on the east side of the floodway were completed, but, as is shown by the plat which was introduced by both parties, the levees run on either side of the floodway to the St. Francis River and on the right bank of the same down to the appellee's land in section 6, township 9, range 6, in Crittenden County. This floodway was but a part of the drainage district. Other essential portions of it were the levees inclosing the storage basin or reservoir and the dam across the St. Francis River. The uncontradicted evidence is that immediately upon the opening of the floodway great damage resulted to the lands of the appellee, and that the levees on the western side of the storage

basin and all the way down the west side of the floodway were finished in January, 1923, but that the dam was not put in the river until the winter of 1924 or the early part of 1925, and that the lock and dam was completed in January, 1925. This is in the testimony given by O. M. Fairley, a member of the firm of Pride & Fairley, the engineers for the appellant district, and this testimony stands uncontradicted. The dam was an essential part of the structure. It was not completed until after the original complaint was filed, and therefore, according to the uncontradicted testimony, the appellant district had not been completed within a year before the filing of the complaint, and the court correctly overruled the demurrer to the complaint and refused to submit the question of limitation to the jury.

There remains to be considered the question as to the excessiveness of the verdict which was $20,000. The damages awarded are large, but we cannot say that they are excessive. The uncontradicted testimony is to the effect that the lands of appellee were very fertile, producing from three-fourths to a bale and a half of cotton per acre according to the season and sixty bushels of corn per acre; that the lands in the tract, exclusive of waste land, amounted to 565 acres, ten acres of which was cleared when purchased by the appellee; that the purchase price for the property, exclusive of the waste land, was between twenty-three and twenty-four dollars per acre, of which sum appellee paid $5,000 in cash and from his earnings and money borrowed he spent $20,875 in clearing, fencing and otherwise improving the property. At the beginning of the year 1923 he had subdued and improved 255 acres, which made 265 acres including the ten in cultivation when he bought it. Of the 300 remaining acres half was deadened preparatory to cultivation. The lowest estimate of value placed by any of the witnesses for this property was $100 an acre for the land in cultivation and $35 an acre for the remainder. A majority of the witnesses placed the value of the cultivated land at $125

an acre. Six witnesses, including the appellee, testified as to the value of the lands. One did not testify as to the value of the uncultivated land, but two of five witnesses placed the value of the uncultivated land at $50 per acre, two at $40 per acre, and one at from $35 to $40 an acre. This testimony was not contradicted. So, while the verdict is large, it is supported not only by substantial testimony but by all the evidence. The testimony also is undisputed that this land had this value for agricultural purposes, and that this was the sole purpose to which it was adapted and that the value had been completely destroyed. It follows from the views we have expressed that the judgment of the trial court is correct, and it is therefore affirmed.

SMITH, J., dissents.

MORROW *v.* STRAIT.

4-2845

Opinion delivered October 31, 1932.

Williams & Williams, for appellant.

W. P. Strait, for appellee.

SMITH, J. Appellant Morrow and appellee Strait were opposing candidates for the nomination of the Democratic party for the office of Prosecuting Attorney in the Fifth Judicial Circuit in the State-wide primary election held August 9, 1932. This circuit is composed of four counties, and the vote of each, as certified after a

canvass thereof by the respective Democratic county central committees, was as follows:

For appellant Morrow:			
Conway County	532		
Pope County	1815		
Yell County	887		
Johnson County	2059		
Total		5293	
For appellee Strait:			
Conway County	3016		
Pope County	2373		
Yell County	2349		
Johnson County	519		
Total		8257	
Majority for appellee			2964

Appellant brought suit in the Johnson Circuit Court to contest the nomination of his opponent, and has challenged the vote cast in both Pope and Conway counties.

Certain grounds of contest are alleged in the complaint which are not abstracted in the brief, but the grounds relied upon and abstracted by contestant are: (a) That persons were permitted to vote whose poll tax was paid later than the last Saturday before the first Monday in July, 1932; and (b) "Because there was no certified authenticated sworn list of qualified electors filed with the clerk of Conway County (and also Pope County) by the collector, as provided by law, and that the purported list was not filed by the collector with the clerk within the time provided by law, and that no legal election was held in said Conway County (nor Pope County), Arkansas."

The court overruled a motion to dismiss the complaint, which motion was filed upon the ground that the supporting affidavit required by § 3772, Crawford & Moses' Digest, was made only by citizens of Johnson County, where the suit was filed, whereas the elections

complained of were held in Conway and Pope counties. It was also insisted, as ground to dismiss the suit, that it should have been brought in the Pulaski Circuit Court, and that no other court had jurisdiction.

Section 3772, Crawford & Moses' Digest, reads as follows: "A right of action is hereby conferred on any candidate to contest the certification of nomination or the certification of vote as made by the county central committee. The action shall be brought in the circuit court. If for the office of representative or a county or township office, in the circuit court of the county; and if for a circuit or district office, within any county in the circuit or district wherein any of the wrongful acts occurred; and if for United States senator or a State office, in the Pulaski Circuit Court. The complaint shall be supported by the affidavit of at least ten reputable citizens, and shall be filed within ten days of the certification complained of, if the complaint is against the certification in one county, and within twenty days if against the certification in more than one county. The complaint shall be answered within ten days."

The office of prosecuting attorney is a State office. *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380; *Speer* v. *Wood,* 128 Ark. 186, 193 S. W. 785; *Dobbs* v. *Holland,* 140 Ark. 405, 215 S. W. 709, 742. See also *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183. But the prosecuting attorney is not a State officer within the meaning of § 3772, Crawford & Moses' Digest, *supra.* The prosecuting attorney is a State officer whose functions are performed in a subdivision of the State, whereas the State officer to which the statute quoted refers is one elected by the people of the entire State, and not in some political subdivision thereof.

The case of *Lanier* v. *Norfleet,* 156 Ark. 216, 245 S. W. 498, involved a contest over the nomination for State senator, a State officer elected by a particular subdivision of the State. We there entertained jurisdiction of a contest for the nomination for this office in a county other than Pulaski.

We are of the opinion also that the supporting affidavit made by citizens of Johnson County alone suffices to meet the requirements of § 3772, Crawford & Moses' Digest. These affiants are citizens of the judicial circuit within which the election was held, and the statute does not require residence in the ward, or city, or county the vote of which is challenged.

We are of the opinion also that the Pulaski Circuit Court had no jurisdiction over this contest, but that the suit was one which could have been brought in any county within that circuit, and was properly brought in Johnson County, one of the counties comprising the Fifth Judicial Circuit.

We are of the opinion therefore that the motion to dismiss was properly overruled.

After the motion to dismiss had been overruled, a demurrer to the complaint was filed and sustained, and, the contestant declining to plead further, the cause was dismissed, and this appeal is from that order.

The demurrer raised the two questions first stated, and these we proceed to discuss.

The first is, whether persons whose poll taxes were not paid prior to the first Monday in July, but which were paid on or before the third Monday of that month, had paid within the time required by law to become eligible to vote in the ensuing August primary election.

Section 3741, Crawford & Moses' Digest, provides that "The 'time for collecting taxes,' as this term is employed in the Constitution in connection with the payment of poll taxes, is hereby defined to be the period between the first Monday in January and the Saturday next preceding the first Monday in July, on which last-named date the collector is required by law to make his final settlement with the county court."

Another section of Crawford & Moses' Digest—§ 3740—provides that on the first Monday in July of each year the collector shall file with the county clerk a list of the names of all persons who had paid poll taxes. In other words, poll taxes might be paid up to and on the

Saturday preceding the first Monday in July, and on the first Monday the collector was required to file a list of the persons who had so paid, thus imposing a very difficult, if not impossible, task.

Under this state of the law, the General Assembly, at its 1931 session, passed act 152, Acts 1931, page 406, which was entitled: "An act to amend § 3740 of Crawford & Moses' Digest, extending the time from the 1st to the 3d Monday in July, in which time the collector shall file with the county clerk a list of names of persons paying poll tax, and the time from the 1st day of July to the 1st day of August for the county clerk to record same."

The title to this act indicates an intention to extend the time, not for paying taxes, but for certifying the list of those who had paid. But the body of the act does not conform to that expression of the legislative intent. This act reads in part as follows: "Section 3740. On the third Monday in July of each year the collector shall file with the county clerk a list containing the correct names, alphabetically arranged (according to political or voting townships, and according to color) of all persons who have up to and including that date paid the poll tax assessed against them respectively. * * *"

The law is that the title of an act is not controlling in its construction, although the title may be considered in determining its meaning when the meaning is otherwise in doubt. The language of the act of 1931, above quoted, is too plain to require reference to its title as an aid to its interpretation. *Westbrook* v. *McDonald,* 184 Ark. 746, 43 S. W. (2d) 356, 44 S. W. (2d) 331.

The language of the act of 1931, above quoted, says so plainly—that we cannot hold otherwise—that the collector's certificate shall include the names of all persons "who have up to and including that date paid the poll tax assessed against them respectively." The date referred to is, of course, the third Monday in July, this being the only date to which reference is made.

This construction of the act, which we think its unambiguous language requires, renders it in conflict with

the portion of § 3741, Crawford & Moses' Digest, hereinabove quoted, and possibly also of certain other sections of the statute, but, even so, we must give effect to the last expression of the legislative will, and the prior laws must be conformed to harmonize with that expression. This rule of statutory construction is so well settled that no citation of authority is necessary.

It may be said, in this connection, that act 152 of the Acts of 1931 contains no reference to the time within which persons may assess for taxes, so the law in that respect remains unchanged. It was held in the case of *Cain* v. *CarlLee,* 168 Ark. 64, 269 S. W. 57, that a poll tax receipt did not qualify one to vote who had not been assessed as required by law.

Section 3738, Crawford & Moses' Digest, makes provision for the assessment of omitted names, but one must be assessed in the manner required by law before the collector is authorized to issue him a poll tax receipt which entitles the taxpayer to vote. The collector could not therefore issue a poll tax receipt which would qualify one to vote who had not been assessed prior to the Saturday preceding the first Monday in July, as no provision was made for extending the time for assessing, the only provision being for the payment of taxes by persons already assessed.

The court was correct therefore in holding that the allegation in the complaint, that a voter had not paid his poll tax prior to the third Monday in July, did not state a fact rendering the taxpayer ineligible to vote, and was therefore demurrable on that count.

The court was also correct in its holding in regard to the allegation as to the failure of the collector to file an authenticated list of the voters in both Conway and Pope counties, as required by § 3740, Crawford & Moses' Digest.

The official returns of the election are *prima facie* correct, and the burden of showing that they are not correct rests upon the person who alleges that fact. *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. (2d) 631.

The official list of voters, which § 3740, Crawford & Moses' Digest, as amended by the act of 1931, *supra,* requires the collector and county clerk to prepare, is not evidence of an elector's right to vote unless the list has been authenticated by the affidavit of the collector in person. The list of voters which the county clerk is required by § 3740, Crawford & Moses' Digest, to have printed can be made only from a list verified by the affidavit of the collector and thereafter filed with the county clerk. But it must be first authenticated by the affidavit of the collector, and the county clerk has no authority to copy the printed list unless and until it is so authenticated. *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. (2d) 319.

Therefore, any list of voters, not based upon an authenticated list filed with the county clerk by the collector, furnishes no evidence of the possession of a poll tax receipt, although the list has been certified by the clerk. *Brown* v. *Nisler,* 179 Ark. 178, 15 S. W. (2d) 314.

Recognizing the power of a careless or corrupt collector to cause great confusion and to disfranchise electors in cases of contests, it was said, in the case of *Cain* v. *CarlLee, supra,* that "The whole proceeding is statutory, and the statute must be substantially followed in all proceedings, even to the trial of the contest provided by the statute. There is a presumption that the election was conducted according to law, and that the candidate legally entitled thereto received a certificate of election, and the presumption cannot be overcome by mere charges of fraud or illegalities in the conduct of the election. If the Legislature thinks that the collectors are not performing the duties required of them by statute in the premises in addition to the remedy by mandamus which now exists, it might by appropriate penalties amend the statute so as to punish the offender, even to the extent of removing him from office if he failed to comply with the statute."

But we have never held, on the one hand, that an election was illegal and void where the collector had not filed with the county clerk an authenticated list of

the names of the persons who had paid their poll tax. Nor have we held, on the other hand, that there could be no contest of an election where the authenticated list had not been filed by the collector. We held to the contrary in the case of *Darmer* v. *White,* 182 Ark. 638, 32 S. W. (2d) 625.

Section 3777, Crawford & Moses' Digest, makes provision whereby qualified electors may vote, although their names do not appear on the list of voters prepared and published pursuant to § 3740, Crawford & Moses' Digest.

In the case of *Tucker* v. *Meroney, supra,* the facts were that the collector had not filed with the county clerk a list of poll taxpayers duly authenticated by his affidavit as required by § 3740, Crawford & Moses' Digest. The record in that case also showed that 36 votes were cast in the manner provided by § 3777, Crawford & Moses' Digest, of which number the contestant had received 26. Upon this state of the record, the contestant contended that he was entitled to be certified as the nominee, but, in overruling that contention, it was there said: "These returns may be impeached by any competent evidence showing that they are not true. In *Brown* v. *Nisler,* 179 Ark. 178, 15 S. W. (2d) 314, it was held that the requirement of § 3777 of Crawford & Moses' Digest that no person offering to vote in a primary election shall be allowed to vote unless his name appears in the printed list of poll tax payers, required by § 3740, or unless he exhibits a poll tax receipt, or establishes that he has attained his majority since the last assessing time, is mandatory, and that its provisions must be substantially complied with. Bearing in mind that the official returns are *quasi* records and stand with all the force of presumptive regularity as held in the cases cited above until overcome by competent evidence, it will be readily seen that the contestant has not made out his case. All the ballots cast by the voters and returned by the proper officers are presumptively legal, and their verity is not impeached by showing that contestant received a majority of the votes cast by persons who had become of age since the last

assessing time. In order to succeed, he must prove that he received a majority of all the legal ballots cast at the election."

The complaint does not therefore state facts sufficient, even when considered upon demurrer, to throw the entire vote of Pope and Conway counties into the discard. Electors may have been eligible whose names were not included in the list provided for by § 3740, Crawford & Moses' Digest.

We therefore conclude that the complaint did not state a cause of action, and the demurrer was therefore properly sustained, and the judgment of the court below is affirmed.

CONNELLEY *v.* VESTER.

4-2857

Opinion delivered October 31, 1932.

Rhyne & Shaw and *Cochran & Arnett*, for appellant.

W. L. Kincannon, B. F. Donathan and *G. L. Grant*, for appellee.

KIRBY, J., (after stating the facts). Appellants insist that they appeal only from the judgment of the circuit court overruling their demurrers, and denying their motions to dismiss the complaints because of the lack of jurisdiction of the court to hear and determine the contests, since it was shown no legal list of the qualified electors had been furnished the officials for use in holding the primary election as the law required, nor had any special list of the voters been made by the judges and clerks of those voting whose names did not appear upon a legal list of voters.

The court erroneously held that the printed list furnished the officials holding the primary election was a substantial compliance with the law relating thereto, but, if no official list had been furnished, or even if no list had been furnished at all for use by the officials in the conduct of the election, it would not have invalidated such

election, otherwise regularly held, nor destroyed the jurisdiction of the court to hear and determine contests arising out of such election. *Morrow* v. *Strait, ante* p. 384.

The court's latest pronouncement on the subject appears in *Morrow* v. *Strait, supra,* wherein it is held that the official returns of the election are *prima facie* correct, are *quasi* records standing with all the force of presumptive regularity until overcome by competent evidence, and the burden of showing that they are not correct rests upon the person who alleges that fact, as was held in *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. (2d) 631.

In *Morrow* v. *Strait, supra,* it was further said:

"The official list of voters, which § 3740, Crawford & Moses' Digest, as amended by the act of 1921, *supra,* requires the collector and county clerk to prepare, is not evidence of an elector's right to vote unless the list has been authenticated by the affidavit of the collector in person. The list of voters which the county clerk is required by § 3740, Crawford & Moses' Digest, to have printed can be made only from a list verified by the affidavit of the collector and thereafter filed with the county clerk. But it must be first authenticated by the affidavit of the collector, and the county clerk has no authority to copy the printed list unless and until it is so authenticated. *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. (2d) 319.

"Therefore any list of voters, not based upon an authenticated list filed with the county clerk by the collector, furnishes no evidence of the possession of a poll tax receipt, although the list has been certified by the clerk."

The court did not err in overruling the motion to dismiss the complaint, and, since the official returns of the election are *quasi* records and stand with all the force of presumptive regularity until overcome by competent evidence, all the ballots cast by the voters and returned by the proper officials are presumptively regular, in order to succeed, the contestant must prove that he received a majority of all the legal ballots cast at the election, and the court's action in declaring the appellee

regularly nominated is not here for review, not being appealed from.

The judgment is accordingly affirmed.

McMahen *v.* Missouri Pacific Railroad Company.

4-2698

Opinion delivered October 31, 1932.

Crumpton & Crumpton and *Jones & Jones,* for appellant.

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

Humphreys, J. The sole question presented on this appeal is whether the trial court erred in instructing a verdict for appellee upon the ground that appellant had not established by any substantial testimony that he was engaged in interstate commerce at the time he claimed he was injured. By so instructing the jury, the trial court eliminated all issues joined on liability, assumed risk, contributory negligence, etc., holding that the Miller County Circuit Court had no jurisdiction to try and determine the cause under the Federal Employers' Liability Act, upon which act appellant sought to recover.

The testimony, viewed in its most favorable light to appellant, showed that he received the injury complained of while engaged in inspecting and repairing a switch engine, numbered 516, constantly theretofore used, and was thereafter to be used, indiscriminately in making and breaking up trains and in placing cars employed in interstate and intrastate commerce in the yard owned by ap-

pellee; that said engine was removed into the roundhouse situated in the yard for the federal monthly routine inspection, and for such repairs as the inspection might disclose to be necessary under order of the United States Government; that the engine needed only the removal of the main throttle and draw-bar for inspection and the tightening of nuts, binders, etc., and the packing of valves, which would require about a day to do after beginning the inspection; that the engine was in the roundhouse three days altogether, and was returned to the switch yard for its accustomed use after being inspected and repaired; that a report of the inspection and repairs made was mailed to the Interstate Commerce Commission; that the injury complained of was received while the engine was being inspected and repaired.

We do not think driving the engine out of the yard into the roundhouse for its federal monthly routine inspection and for necessary repairs disclosed by said inspection, which were of a minor nature, under order of the United States Government, changed its character as an interstate instrumentality, especially in the light of the fact that it was to be and was returned to its accustomed use as soon as inspected and repaired.

It was not a road engine removed from an interstate haul indefinitely or for any considerable length of time for repairs, nor was it a disabled, broken-down engine which was to all intents and purposes out of commission.

The facts stated above differentiate the instant case from the cases of *Minneapolis & St. Louis Railroad Company* v. *Winters*, 242 U. S. 253, 37 S. Ct. 170, and *Hines, Director General*, v. *Industrial Accident Commission*, 184 Cal. 1, 192 Pac. 859, 14 A. L. R. 720, relied upon by appellee for an affirmance of the judgment.

The judgment of dismissal is reversed, and the cause is remanded for a new trial of the case upon its merits under the Federal Employers' Liability Act.

MISSOURI PACIFIC RAILROAD COMPANY *v.* DAVIS.

4-2664

Opinion delivered October 31, 1932.

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

J. H. Lookadoo, for appellee.

MEHAFFY, J. This action was begun by appellees who alleged in their complaint that they were the owners of a home, consisting of two lots with residence thereon, in Gurdon, Arkansas, and that they were occupying this as their home. The property is near the railroad tracks, switch yards and roundhouse of appellant. In 1927-1928 appellant constructed and equipped a coal chute, it being so constructed that it could serve four different engines at the same time. It was equipped with a carrier to carry coal about 80 feet in height and in operating it made great noise and carrying the coal to such height caused a continuous sifting of coal dust in the air which settled upon appellee's property and other adjacent property. It was alleged that the coal dust damaged appellees' property, including their furniture and other parts of their home. That said coal chute constituted a continuous nuisance to the peace, comfort and enjoyment of the occupants of said property; that the peace and

comfort of appellees' family was continuously disturbed and interfered with by employees of appellant carelessly and negligently operating appellant's trains in the switch yard and roundhouse, causing loud, continuous and prolonged whistling and noises which were not proper or necessary to the operation of the trains; that the operation and handling of the coal chute constituted a continuous nuisance and appellees asked that it be abated. They also asked judgment against the appellant for the sum of $3,000 damages to their property. The complaint was filed on July 30, 1931.

Appellant filed answer denying all the material allegations of plaintiffs' complaint, and alleging that the coal chute was completed and in operation more than three years before the suit was filed; that, if appellees' property was damaged by the erection and operation of the coal chute, the damage was an original damage inflicted upon the property by the erection of the coal chute; that the coal chute is a permanent structure and had been in continuous operation since completed; that it was a necessary instrumentality for the use of appellant in the operation of its business as a common carrier; that, if any cause of action accrued for damages to the property occupied by appellees, it accrued more than three years before the suit was filed, and that the cause of action is barred by the statute of limitations. It was further alleged in the answer that appellees acquired the property on March 30, 1931, several years after the coal chute had been constructed and completed and placed in operation; that the damage, if any, occurred long before appellees acquired the property.

The evidence showed that the property was located about two hundred feet from the coal chute; that it had been damaged by the operation of the coal chute since appellees purchased the property; that when the coal is dumped, it caused a great deal of dust to rise, and, if the wind is blowing in the direction of the property, most of it goes on the property. The coal is elevated about 80

feet by an electric motor. When the engines are run under the coal chute, they drop the coal down through a space of several feet and when it hits the tender the engine can hardly be seen and the coal dust drifts over and settles in the house and on the furniture. Appellees' evidence further showed that the engines made unnecessary noise; they would stand there and pop off and make loud blasts; they were always bumping cars around; the bumping can be heard a half mile. Some nights occupants of the house do not get an hour's rest. Appellee testified that when he bought the property it appeared to be all right. Appellee did not know about the cinders and dust at the time he bought the property. Appellee estimated the difference between the value of his property before it was damaged and afterwards at between $2,500 and $3,000. The undisputed evidence shows that the coal chute was completed and the first test made May 29, 1928, and that it has been in constant use since that date. It therefore appears from the evidence that the suit was not brought within three years after the completion of the coal chute. The jury returned a verdict against the appellant for $750, and the case is here on appeal.

The appellees did not allege in their complaint that there was any negligence either in the construction or operation of the coal chute. If it had been negligently constructed or negligently operated and such negligence caused injury to appellees' property, they would be entitled to recover, no matter when the coal chute was erected, but the structure is such that damage would necessarily result and also the certainty, nature and extent of the damage could be reasonably estimated and ascertained, and the damage was therefore original. In such cases there can be but a single recovery, and the statute of limitations against such cause of action is set in motion upon the completion of the obstruction.

We said in a recent case, speaking of a permanent structure: "If it is of such a construction as that dam-

age must necessarily result, and the certainty, nature and extent of this damage may be reasonably established and ascertained at the time of its construction, then the damage is original, and there can be but a single recovery, and the statute of limitations against such cause of action is set in motion upon the completion of the obstruction. If it is known merely that damage is probable, or that, even though some damage is certain, the nature and extent of that damage cannot be reasonably known and fairly estimated, but would be only speculative and conjectural, then the statute of limitations is not set in motion until the injury occurs, and there may be as many successive recoveries as there are injuries." *Brown* v. *Ark. Central Power Co.,* 174 Ark. 177, 294 S. W. 709. *C. R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127.

There can be no question but that the construction of this coal chute was a permanent structure and that it was apparent as soon as it began to be operated that the damage appellee complained of would occur.

Appellee, however, testified that, soon after he bought the property, he talked with the claim agent of appellant about the damage to his property, and the claim agent told him that he would get a settlement without suit; that the claim agent asked him not to file suit, and that he would get a settlement without it, and that was the reason he did not file suit sooner. Even if the statement alleged to have been made by the claim agent could be said to amount to a promise to pay and that this was the reason of the delay in bringing the suit, it is not shown by appellees that it was made before the action was barred.

"A debtor has frequently been held to be estopped from relying on the statute as a defense where, by acts of a fraudulent character, he has misled the creditor and induced him to refrain from bringing suit within the statutory period. And if a defendant intentionally or negligently misleads a plaintiff by his misrepresenta-

tions and causes him to delay suing until the statutory bar has fallen, the defendant will be estopped from pleading the statute of limitations. And the prevailing view seems to be that the doctrine of estoppel applied where the creditor before the debt is barred is lulled into security by the oral promises of the debtor that he will not avail himself of the statute of limitations, and suit is delayed by reason thereof." *Baker-Matthews Mfg. Co.* v. *Grayling Lbr. Co.*, 134 Ark. 351, 203 S. W. 1021; *Goldsmith* v. *First National Bank of Ashdown,* 169 Ark. 1162, 278 S. W. 22; 17 R. C. L. 884.

It appears therefore that the promise by the debtor must be made before the action is barred by the statute of limitations. When a debtor is misled by the creditor before the claim is barred, and the creditor relies on the promises of the debtor, and because of said promises does not bring suit until the claim is barred by the statute, then the debtor is estopped from pleading the statute. The facts however in the present case do not show that the promises and statements of the claim agent were made before the action was barred. In fact, it is pretty clear from the evidence that it was made afterwards. The claim would have been barred in three years after May 29, 1928, and two or three other persons claiming damages because of the construction and operation of the coal chute made statements as to their claims. These statements were all made on June 8, 1931. This of course was after the cause of action was barred. If the claim agent saw appellee at the same time he saw the other persons who had claims, it was after his cause of action was barred. As the appellees did not allege negligence either in the construction or operation of the coal chute, their cause of action was barred when suit was begun.

It is contended by appellant that appellees could not maintain an action having purchased the property after the erection of the coal chute. They could not recover for any damage which occurred prior to the time they purchased it, but, if they had brought their suit within

the time allowed by statute, they would have been entitled to recover for the damage done after they purchased it.

Appellant calls attention to several authorities to sustain its contention, but all these authorities hold that the purchaser cannot recover damages for injuries occurring prior to his purchase, but he can recover for injuries which occurred after his purchase. 29 Cyc. 1258; 48 C. J. 737.

The appellees did allege in their complaint that the appellant negligently and carelessly operated its engines, and that they were disturbed and damaged thereby. We do not think the evidence is sufficient to show liability against the appellant in this respect. Of course, if the appellant operated its coal chute negligently or in any other way negligently caused damage to appellees, it would be liable. The appellees offered some evidence that the appellant should have used a spray, but there was no allegation of negligence in the complaint.

Having reached the conclusion that appellees' cause of action is barred by the statute of limitations, the judgment is reversed, and the cause dismissed.

McHaney and Butler, JJ., concur.

Gregory *v.* Consolidated Utilities, Inc.

4-2710

Opinion delivered October 31, 1932.

Baker & Gautney, for appellant.

Wilson, Kyser, Armstrong & Allen and *Coleman & Riddick,* for appellee.

MEHAFFY, J. The appellant, H. M. Gregory, owned or controlled all of the shares of the capital stock of the Gregory Bus Lines, a Tennessee corporation. The bus line at the time of the contract between Gregory and others owed debts amounting approximately to $150,000. On May 1, 1928, O. P. Garnett asked Gregory if he would sell all the stock of the Gregory Bus Lines and at what price. Gregory agreed to sell for $400,000, and thereafter wrote the following letter:

"Memphis, Tennessee, May 8, 1928.

"Mr. O. P. Garnett, Memphis, Tennessee.

"Dear Sir:

"Confirming our conversation of today:

"I will undertake to procure and deliver to you all the stock of the Gregory Bus Line for the sum of $300,000.

"I will guarantee the debts of the company not to exceed $100,000.

"This sale is to be consummated on the following basis:

"It is understood that I am to have as my own property cash on hand, notes receivable, and accounts receivable, as of date of transfer.

"If you organize a company to take over the Gregory Bus Lines, with a bond issue, preferred stock, or Class A stock issue, not to exceed $500,000 with a guaranteed dividend of 6 per cent., I will invest of this purchase

money the sum of $100,000 in such stock; or if you should desire to increase that stock so as to have sufficient funds to purchase the Smith Bus Lines, Oliver Brothers Bus Company and the Schofield Bus Company, I will still be willing to invest $100,000 provided the bond issue of preferred stock issue should not exceed $800,000.

"Of the purchase price, there shall be paid $35,000 in cash; and the balance at any time within ninety days, provided that the debts of the company be liquidated by you as they become due.

"This proposition holds good until noon, May 14, 1928. "Yours truly,

"H. M. Gregory."

After receiving this letter, Garnett undertook to raise the $35,000, which was to be paid cash and secured the subscription of $32,275. Wils Davis thereafter agreed to subscribe $6,000, making a total subscription of $38,-275. Checks for the subscription were delivered to Garnett. There was thereafter some correspondence between Garnett and Gregory, and Garnett and his associates organized in Arkansas a corporation, the Consolidated Utilities, Inc. Thereafter, on May 19, 1928, the parties prepared and executed a contract which is as follows:

"This contract, made this 19th day of May, 1928, by H. M. Gregory for himself and as trustee for the use and benefit of himself and all other stockholders of the Gregory Bus Lines, a corporation, hereinafter called the seller, and Consolidated Utilities, Inc., a corporation organized and existing under the laws of the State of Arkansas, hereinafter called the buyer, witnesseth as follows:

"1. H. M. Gregory agrees to sell and transfer to the Consolidated Utilities, Inc., all the stock of the Gregory Bus Lines for $300,000.

"2. The stock was to be placed in the hands of W. W. Hughes, trust officer of the Union & Planters' Bank & Trust Company of Memphis, to be held by him as security for the payment of the purchase price.

"3. Gregory guaranteed that the debts of the Gregory Bus Lines did not exceed $100,000.

"4. The Consolidated Utilities, Inc., agrees to pay the debts of the Gregory Bus Lines up to $100,000.

"5. The consideration for the stock was to be paid as follows: $35,000 in cash; $165,000 on November 19, 1928, to be evidenced by a note of the Consolidated Utilities, Inc., to Gregory for that amount; and the remainder, $100,000, was to be paid in the capital stock of the Consolidated Utilities, 7,500 shares of Class A and 3,750 shares of Class B stock.

"6. Until the note for $165,000 was paid, no funds of the Gregory Bus Lines were to be applied other than to pay operating expenses—the remainder to go in liquidation of the note.

"7. The Consolidated was to take over the assets and operation of the Bus Line at 11:59 P. M., May 19, 1928. All division of receipts, cost of operation and closing of the corporation by Gregory, and the beginning of operation by the Consolidated, to be figured as of that date and hour.

"8. Gregory was to retain as his own property all cash on hand, and notes and accounts receivable, as of the date and hour mentioned above.

"9. In witness whereof, the seller has hereunto affixed his signature, and the buyer has caused its corporate name to be signed hereto, and its seal affixed, by its duly authorized officers on this the 19th day of May, 1928.

"H. M. Gregory, Seller,
"Consolidated Utilities, Incorporated,
"By W. B. Bayless, President,
"J. T. Morgan, Secretary."

On July 12, another contract was entered into, and then on November 19, 1928, still another contract. The parties then on February 1, 1929, entered into another contract. It is not important to set out all contracts here. The supplemental contracts entered into by the parties made provision for the payments and manage-

ment, operation and control of the bus lines, and it was agreed that the Consolidated Utilities, Inc., should pay Gregory $200,000, $35,000 to be paid cash and $165,000 to be paid later, and the Consolidated Company was to pay $100,000 of the indebtedness of the Gregory Bus Lines, and Gregory was to pay the balance. The remaining $100,000 was to be paid in the capital stock of the Consolidated Utilities. There are numerous other provisions in the contract, but it would serve no useful purpose to set them out here.

A proceeding was instituted in the United States District Court at Memphis by the Seiberling Tire Company against the Gregory Bus Lines and a receiver was appointed, who took charge of the property and sold same for $205,000. There was also a suit tried in the State chancery court in Tennessee.

The appellant then began this suit in the Crittenden Chancery Court against the Consolidated Utilities, Inc., and numerous individuals. His complaint consists of eighteen typewritten pages, and it is entirely too lengthy to set out in full. However he alleged in his complaint the indebtedness due to him from the Consolidated Utilities, Inc., and the individuals named as defendants, and alleged fraud and deceit on the part of the individuals in inducing him to make the contract and that they fraudulently violated the terms of the contract. The appellees filed answer denying the material allegations of the complaint. The chancery court heard the evidence and entered a decree in favor of the appellant against the Consolidated Utilities, Inc., for $88,000, and found in favor of the individual defendants. The Consolidated Utilities, Inc., did not appeal, but H. M. Gregory has appealed to this court and seeks a reversal of the chancellor's finding in favor of the individuals. The chancellor considered all the evidence including the records in the two suits in Memphis, Tennessee, the testimony of the numerous witnesses and documentary evidence. It would make this opinion entirely too long to set out the evidence. The evidence was conflicting, and there

was substantial evidence to support appellant's claim and also substantial evidence contradicting the evidence of appellant's witnesses. Counsel on both sides have filed extensive briefs citing many authorities on the question of fraud and deceit, but it would be impossible to review them all here.

It is well established that fraud and deceit and fraudulent representations and promises made by a party and relied on by another who is injured or damaged thereby, give rise to a cause of action by the party injured, and one who deprives another of any right by such practices is liable therefor. Any false representations and deceit by promoters of a corporation which induce another to purchase stock, or to enter into any sort of contract to his disadvantage, make the promoters liable to the party deceived. There must however be a false statement, and it must be relied on by the other party.

"Fraud involves the idea of intentional deception, and exists where there is a misrepresentation made with intent to deceive, or with actual knowledge of its falsity. But, while a fraudulent intent is an essential ingredient of actual fraud, and hence must be generally shown in order to maintain an action of deceit, an actual wrongful or fraudulent purpose or intent is not always essential. Moreover, the law affords remedies for the consequence of innocent misrepresentations. Where an act is originally tainted with a fraudulent intent the subsequent abandonment of the intent is ineffectual as against an innocent person who is injured by the act. Actual fraud is the foundation, or, as it is often said, the gist or gravamen of the action of deceit. Proof of a mere naked falsehood or representation is not enough even though the complaining party relied on it and sustained damages, but, in addition thereto, the false statement must have been knowingly or intentionally made. Moreover, the misrepresentation must have been made with the intention of deceiving the complaining party." 12 R. C. L. 323-324.

Therefore, if the individual appellees by false and fraudulent representations or deceit, made to Gregory and relied on by him, caused him to enter into the contract or injured or damaged him in any way, they were liable to him for the injury thus done. Whether or not there has been a fraud in any case is usually a question of fact. Fraud is a question of law only when the facts are undisputed, and but one reasonable conclusion can be reached from the evidence or where there is an entire failure to sustain the issue. 12 R. C. L. p. 444.

One who alleges fraud must prove it by a preponderance of the evidence. Of course, it may be established by circumstantial evidence as well as direct. In fact, it is generally difficult to prove fraud by direct evidence, but, whether the evidence is direct or circumstantial, the burden is upon the party alleging fraud to prove it by a preponderance of the evidence. 27 C. J. pp. 52 and 62.

The evidence in this case is entirely too lengthy to set it forth in this opinion. We have already said that it was in conflict, and that there was substantial evidence offered by both parties. The chancellor found against the Consolidated Utilities, Inc., and in favor of the individuals. We have carefully considered the entire evidence and have reached the conclusion that the findings of the chancellor are not against the preponderance of the evidence, and this court will not reverse the chancery court unless we can say that the findings of fact by the chancellor are against the preponderance of the evidence. *Kelly Trust Co.* v. *Paving Imp. Dist.,* 185 Ark. 397, 47 S. W. (2d) 569; *Greer* v. *Stilwell,* 184 Ark. 1102, 44 S. W. (2d) 1082; *Smith-Arkansas Traveler Co.* v. *General Tire & Rubber Co.,* 182 Ark. 818, 33 S. W. (2d) 712; *Mente & Co., Inc.,* v. *Westbrook,* 181 Ark. 96, 24 S. W. (2d) 976; *Love* v. *Couch,* 181 Ark. 994, 28 S. W. (2d) 1067.

We find no error, and the decree is affirmed.

BENNETT *v.* MILLER.

4-2711

Opinion delivered October 31, 1932.

Lamb & Adams, for appellant.

McHANEY, J. At the annual school election in Trumann Consolidated School District No. 2, Poinsett County, Arkansas, held May 16, 1931, no person qualified as a candidate for school director, and no names appeared on the ballot sent out for use in the election by the board of education. The ballots sent out to be used in the election were provided with blank spaces for the insertion of the names of the persons for whom an elector wished to vote for directors. Appellants and appellees were candidates at said election for directors. Appellants prepared or caused to be prepared stickers or pasters with their names printed thereon which they caused to be distributed to voters at the polls on election day and 700 of the electors took said stickers, pasted them on the official ballot and thereby voted for the appellants. Appellants received a majority of the votes polled at the election, their vote ranging from 614 for McMahan to 757 for Sullens; whereas the votes for appellees ranged from 81 for Smith to 326 for Miller. The judges of election certified that appellants had therefore been elected. Thereafter appellees filed a petition with the county board of education as provided by § 30 of act 169 of 1931, seeking to have thrown out all ballots on which stickers appeared as illegal, and that the county board recount the legal ballots and the result declared by the county board. The county board, on its own mo-

tion, dismissed the petition for contest, and the appellees appealed to the circuit court. There the case was tried on a stipulation substantially as above set out, where the cause was dismissed as to appellees Miller, Watkins and Smith on their motion. The court held that all ballots on which stickers were pasted were void, should not be counted, and, after casting them out appellees Pennington, Houston and Clark were elected.

There is no allegation of fraud in this election. The electors were neither misled or coerced into voting for any particular candidates. On the contrary they freely expressed their choice of candidates. Mr. Miller, originally a contestant, was one of the judges of election. He made no complaint as to the form of ballot or that stickers were used by some of the electors in voting. We think it makes no difference how the electors placed the names of the persons they desired to vote for on the ballots, in the absence of fraud. They might have been written with pen and ink, pencil, typewritten, or by stickers and the result would be the same, as in either case it expressed the wish of the individual elector. We find no directions in the statutes regulating school elections prescribing exactly how the elector shall put on the ballot the name of the person for whom he wishes to vote. Section 3803, Crawford & Moses' Digest, relating to elections generally, provides that the elector shall scratch off the names of all candidates except those for whom he wishes to vote, "and write the name of any person for whom he may wish to vote whose name is not printed * * * on the ballot at all." We do not think the word "write" is there used in a technical sense, but that such name might be placed on the ballot in any convenient way, such as the use of a rubber stamp or a sticker as was done in this case. As said by this court in *Ashby* v. *Patrick,* 181 Ark. 859, 28 S. W. (2d) 55: "If the ballot voted on was such as not to mislead the electors but to give them an opportunity to express their will, it was sufficient." So here the ballot did not have the names of any persons who were candidates for directors.

It was left to the electors to vote for whom they pleased by "writing" their names on the ballots. If they chose to use stickers with the names of the persons they desired to vote for printed thereon we can see no valid objection thereto, and there is no provision of statute violated.

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

WILSON *v.* WILSON.

4-2715

Opinion delivered November 7, 1932.

R. L. Derryberry and *J. Loyd Shouse,* for appellant.

Shinn & Henley, for appellee.

SMITH, J. On June 14, 1929, appellant, B. O. Wilson, was granted a divorce from appellee. The decree recited that the parties had agreed upon the alimony to be paid and upon the division of their property. Pursuant to this settlement of the property rights made by the parties, it was decreed that the wife, the defendant, be given the household goods, and that she be paid "the sum of $60 per month, the same to be paid the first day of each and every month until further orders of the chancery court * * *,"

and that she "is to release and relinquish all her right, title and interest in and to any property, both personal and real, that the plaintiff has or holds." The $60 was to be paid appellee for the support of herself and her two minor children, a son and a daughter. The daughter is now 19 years old, and is married. The son, who is younger, is in school.

Appellant paid the $60 each month until and including the month of August, 1930. Appellee made demand for the September payment on August 27, 1930, at which time appellant called her attention to the changed condition of affairs, and suggested that he pay her only $40 per month from that date, on account of the marriage of their daughter. Appellee objected to the reduction, but appellant told her he would pay $40 or nothing, and would apply to the court to reduce the payments to that amount. Appellee then accepted the $40 and gave appellant a receipt for that amount as payment in full of the alimony due for September, and similar payments were made for the next succeeding eight or nine months. During all this time appellee protested to appellant against the reduction, and consulted an attorney, who advised her to wait awhile, as appellant might later pay the balance to avoid litigation. When appellant definitely declined to pay the $60, appellee caused a writ of garnishment to be issued, which tied up appellant's wages. Appellant thereupon filed a motion to dismiss the garnishment, and for the modification of the decree awarding alimony. After hearing testimony, the court declined to quash the garnishment or to modify the decree, and this appeal is from that action.

Counsel for appellant contend that there was an accord and satisfaction, which bars appellee from claiming more than the $40 paid her, and cite cases holding that, where a check was tendered in full payment of a disputed claim, and was accepted by the payee with knowledge thereof, it becomes an accord and satisfaction. But we are of opinion that this principle does not control here. There was no disputed claim. The parties

had agreed upon the sum to be paid monthly, and that agreement had been made a part of the decree of divorce, and this decree was then, and is even yet, in full force and effect. Appellant had the right to ask the court to modify the decree, and this he did, but to no effect. The decree imposed, and still imposes, the continuing duty on appellant to pay $60 each month. The court had the power to find, as it did find, that this order had not been, and should not be, modified, but was at all times, and is yet, in full force and effect. There was therefore no accord and satisfaction of the decree.

We affirm also the action of the court in refusing to reduce the amount of future payments. The testimony does show that appellant's salary has been reduced, and that he has less income than he had when the divorce decree was rendered, and that the daughter, the oldest child, is married, as is also appellant himself; indeed, appellant married ten days after obtaining his divorce.

The chancellor had the power to modify the decree as to the amount of alimony to be paid; but we cannot say that his finding as to the reasonableness of the alimony is contrary to a clear preponderance of the evidence. *Holmes* v. *Holmes, ante* p. 251.

The oldest child is married, and appellee resides with her and pays half of the housekeeping expenses, as her son also resides with his sister. This son is still in school with an increased expense for his support as he has grown older, and appellee appears to be having as much trouble living on her alimony as appellant and his present wife have living on his income, less the alimony.

The decree from which is this appeal appears to accord with principles of equity, and it is therefore affirmed.

JOSEPH *v.* RIFFEL.

4-2716

Opinion delivered November 7, 1932.

Longstreth & Longstreth, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the circuit court of Pulaski County, Third Division, to recover damages for an injury received in falling from the first floor of the cold storage plant owned by appellee, to the sub-basement floor through an open elevator shaft, on account of the alleged negligence of appellee in leaving the shaft open, unguarded, unlighted, and in darkness, and without danger sign; and by using the elevator platform as part of the floor of an unguarded and commonly used walkway; and by not informing appellant that the elevator would be used at the time the injury occurred by others than himself.

Appellee filed an answer, denying the material allegations of the complaint, and interposing the additional defenses of contributory negligence and assumed risk by appellant.

The cause was submitted upon the issues joined and the testimony adduced by the parties, at the conclusion of which the court instructed a verdict against appellant, and, in keeping with the verdict, rendered a judgment dismissing appellant's complaint, from which is this appeal.

The facts are undisputed and are, in substance, as follows:

Appellant was, and is one, of the owners and the manager of the Mallard Provision Company. It leased space from appellee in the cold storage plant owned by appellee to store its products on the fourth floor and a room on the top or eighth floor to manufacture specialties and sausage. One of the elevators in the building was six by eight feet, and ran from the bottom to the top of the building through openings that fit it, and was operated by any of the employees of appellee or its tenants, or their employees, indiscriminately. A stairway also led from floor to floor of the building. The main entrance doors of the building opened at seven o'clock A. M. and closed at six o'clock P. M., but there was a side entrance for the admission of tenants and their employees at an earlier hour. The floor openings, or wells, through which this, as well as other elevators in the building, was operated had no railings, guards, lights or danger signs on or about them. When the elevators were not being pulled up and down by some one authorized to use them, they were at a standstill or on a level with the corridor floor, and were used as a part of the walkway for the time being. The construction of the building and conveniences therein were the same on the date appellant's company leased the space in the building as when he received his injury. It was provided in the lease that appellee should furnish "gas, water, light and power for the use of appellant" and to "furnish elevator service to cooler and sausage-making room and all facilities * * * to be available at all times." Appellant's company leased the space on October 31, 1930, and entered into possession thereof January 12, 1931. On February 11, 1931, appellant, together with his employees, entered the build-

ing through the side entrance at an early hour, and, after assigning his employees to their duties in the storage and sausage departments, he entered an elevator on the fourth floor and let himself down to the first floor, where he left the elevator in place and walked out to the platform on the outside of the building for a few moments. During his absence, some one moved the elevator to the fifth floor. Upon his return, thinking that the elevator was where he left it, he stepped into the opening or elevator well without looking, and fell down the shaft twenty-four feet onto the concrete floor of the sub-basement and injured himself. The accident occurred at 6:40 o'clock A. M., just about daylight. There were no lights in the corridor, and appellant made no effort to turn the lights on in the elevator when letting himself down a few moments before the injury.

As between a landlord and tenant, the general rule is that, "in the absence of statute or agreement, the landlord is under no legal obligation to light common passageways for the benefit of tenants." 36 C. J., § 891, p. 214. In § 893 of the same work, it is stated: "On the analogy of a lack of duty on the part of the landlord to light common passageways, it has been held that a landlord is not liable for injury received by tenant through the failure of the landlord to supply rails or guards when the condition was the same at the time of letting."

There is no law requiring that elevator openings in a commercial cold storage plant, constructed for the use of its officers and employees and its tenants and their employees, or to carry commodities from one floor to another, must have rails or guards around them or danger signals upon them, or that the corridors in cold storage plants must have lights in them; and there is nothing in the written lease so requiring. The record is silent as to the necessity for any of these things in the construction or operation of cold storage plants. We cannot indulge the presumption that the shafts or wells in which the elevators were lifted and lowered from floor to floor were improperly constructed because they had no railings

around them or guards or signals upon them, considering the uses for which they were intended, nor can we presume that it constituted negligence to use the elevators as a part of the walkway when on a level with the corridor floors, nor can we presume a necessity for lights in the corridors. Neither the law nor the provisions of the contract made such requirements. Since negligence was not shown on the part of appellee, it is unnecessary to allude to the defenses of contributory negligence or the assumption of the risk by appellant.

The judgment is affirmed.

CAPITAL CITY CASKET COMPANY *v.* SZURGOT.

4-2645

Opinion delivered October 3, 1932.

Buzbee, Pugh & Harrison, for appellant.

Sam T. & Tom Poe, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Pulaski County, Second Division, to recover damages for an injury received in the discharge of her duties as a seamstress through the alleged negligence of appellant in furnishing her an improperly constructed folding chair to occupy in operating a sewing machine.

Appellant filed an answer denying the allegation of negligence and, by way of affirmative defense, alleging the assumption of the risk in the use of the chair by appellee.

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

At the conclusion of the introduction of the testimony, appellant requested the court to instruct a verdict in its favor, and the refusal of the court to do so is the sole ground urged by appellant for a reversal of the judgment.

The record reflects that appellant manufactures coffins, and in connection therewith maintains a sewing room to make inside finishings for them; that the sewing room was equipped with three sewing machines and three folding chairs; that on the day appellee was injured the forewoman and herself were the only two employees at work in the room; that appellee had been in appellant's employment for about six weeks; that she was directed by the forewoman to change the thread on one of the ordinary machines, and in doing so the chair she sat in slipped from under her, causing her to fall to the floor and permanently disabling her.

The record reflects a dispute in the testimony as to whether a defect in the construction of the chair or the manner in which she sat down in it caused it to slip and result in appellee's fall and injury. Mrs. Hogan testified, in substance, that the chair occupied by appellee and which slipped from under her was unequally balanced on account of the front legs being straight up and down or constructed at a more acute angle than the front legs of the other two chairs in the room. The chairs, themselves, were introduced for examination by the jury in order that they might determine whether the particular chair in question was defectively constructed. Appellee testified, in substance, that she sat down in the chair in the ordinary way, and that when she moved forward the chair slipped from under her, causing her to fall and injure herself; that the manner in which she sat down in the chair did not cause it to slip out from under her.

It is argued that a folding chair is a simple instrument or tool like a hoe or spade, and that an employer or master is relieved under the law from an inspection

thereof to ascertain whether there are any observable defects in its construction before placing same in the hands of employees for use. We do not think that the folding chair is so simple in its construction that the principles applicable to simple tools should govern the instant case. The testimony detailed above tended to show that there was a discoverable structural defect in the chair, which caused it to slip and result in an injury to appellee, which brings the case within the general rule announced in the cases of *St. Louis Stave & Lumber Company* v. *Sawyer,* 90 Ark. 473, 119 S. W. 830, and *International Harvester Company of America* v. *Hawkins,* 180 Ark. 1056, 24 S. W. (2d) 340, to the effect that a duty rests upon the master or employer to use ordinary care to furnish an employee with reasonably suitable and safe instruments with which to perform his or her duties.

The testimony also tends to show that the defect in the chair was observable by inspection. It is only defects that are patent of which employees must take notice, and the risk of which they assume in the course of their employment. The duty of inspection for structural defects in the chair did not rest upon appellee; hence she did not assume the risk of using same.

No error appearing, the judgment is affirmed.

FORT SMITH *v.* BRUCE.

Crim. 3822

Opinion delivered October 31, 1932.

Geo. W. Dodd, for appellant.

A. M. Dobbs, for appellee.

HUMPHREYS, J. Appellee was convicted in the municipal court of Fort Smith for failing to pay an occupation tax provided by ordinance and appealed to the circuit court, where the cause was submitted to the court, sitting as a jury, upon the following agreed statement of facts:

"It is agreed that the defendant, W. H. Bruce, is conducting a plumbing business, and would, if not exempted by the facts and law hereinafter set up, be subject to pay a privilege tax under the ordinances of the city of Fort Smith.

"The defendant pleads as a defense that he, being a resident of the Fort Smith District of Sebastian County, has been granted a certificate by the county judge certifying that he is entitled to the privileges and exemptions provided by Crawford & Moses' Digest, § 9842, which certificate is attached hereto and made a part of this statement of facts, and plaintiff admits the genuineness of said certificate, and the same is unrevoked.

"It is admitted that defendant is an ex-United States soldier of the World War, and has a certificate of disability showing him to be a disabled soldier, a copy of which is hereto attached and made a part of this statement.

"It is admitted that defendant is drawing compensation under the provisions of the laws of the United States relating to veterans of the World War in the sum of $50 per month, and is a married man with a wife and

two children, and has no property or business except the plumbing business from which to provide a living for himself and family.

"The certificate of disability issued by the United States Veteran's Bureau states, 'That because of defendant's disability, asthma bronchial, severe with emphysema, right, which was caused by military service, his rating of permanent partial 50 per cent. will be continued.'

"The certificate of the county judge is as follows: "To Whom It May Concern:

"The bearer of this permit, Wallace H. Bruce, Jr., is a regularly discharged member of the United States Marine Corps, and, under § 9842 of Crawford & Moses' Digest of the laws of Arkansas, is entitled to engage in what is known as 'hawking and peddling,' as is prescribed by this section.

"Therefore, the said Wallace H. Bruce, Jr., is on this day given a permit to engage in any business not in violation of said section, without paying a license therefor.

"July 2, 1931.

(Signed) "S. A. Lynch,

"County Judge, Sebastian County, Arkansas."

The circuit court found that appellee was not drawing a pension within the meaning of said section of the Digest, but was drawing compensation, and was exempt from the payment of the tax under § 9842 of Crawford & Moses' Digest, and returned a judgment of acquittal, from which is this appeal.

The decisive question presented by this appeal is whether appellee is receiving a monthly pension of more than $8 within the meaning of § 9842 of Crawford & Moses' Digest. That section exempts an ex-United States soldier, as well as certain others, from paying privilege or occupation taxes who do not draw a pension in excess of $8 per month. There is nothing in the context of the section indicating that the word "pension" was used in any other than its ordinary sense or meaning.

"Pension" is defined in Webster's International Dictionary as "a stated allowance or stipend made in consideration of past services or of the surrender of rights or emoluments to one retired from service; esp., a regular stipend paid by a government to retired public officers, disabled soldiers," etc.

"Pension" is defined in Black's Law Dictionary as "a stated allowance out of the public treasury granted by the government to an individual or to his representatives for his valuable services to his country or in compensation for loss or damage sustained by him in the public service."

The agreed statement of facts reflects that appellant is receiving $50 per month, or more than $8 per month, from the United States Government on account of disabilities caused by his military service; so, the amount received by him is a pension within the definitions quoted above, and in the sense the word "pension" was used in the statute. The trial court erred in ruling that the monthly stipend received by appellee was compensation and not a pension. The stipend was not founded in contract and cannot therefore be regarded as compensation, but was a gratuity or bounty allowed him on account of disabilities received in military service.

Appellee also insists that the certificate issued to him by the county judge of Sebastian County conclusively shows that he is exempt from the payment of the license fee imposed by the ordinance. The certificate of the county judge was made pursuant to the provisions of § 9842 of Crawford & Moses' Digest, which states that the certificate shall "be sufficient proof of the indigency or disability, and of the service of said soldier or sailor in the Confederate, or United States Army or Navy." The certificate does not state the amount of pension the applicant draws, so could not be conclusive proof that he comes within the exemption.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

NELSON *v.* PARRISH.

4-2843

Opinion delivered October 31, 1932.

Roy Nelson, J. J. Mardis and *Harrison, Smith & Taylor,* for appellant.

I. M. Greer, A. B. Caplinger and *June P. Wooten,* for appellee.

HUMPHREYS, J. On August 31, 1932, appellant brought suit in the circuit court of Poinsett County contesting the certificate of nomination of appellee by the Democratic party for the office of senator for the 29th senatorial district, composed of the counties of Poinsett, Mississippi and Jackson, alleging that the entire vote of Poinsett County was void because there was no certified list of voters prepared according to law, and that more than 2,236 people were permitted to vote without having purchased a poll tax receipt, and whose names did not appear upon any kind of list, and that no poll tax receipts or certified copies thereof were attached to the ballots, and no separate list kept by judges and clerks as required by law; and also alleging that there were certain illegal votes cast in Mississippi and Jackson counties, and that, if the illegal votes in the several counties were cast out, the result would be changed, so that appellant would receive a plurality of all legal votes cast in the district.

Appellant offered to amend his complaint so as to set out the names of the voters in Mississippi and Jack-

son counties that he alleged voted illegally, which request was refused by the court.

Several motions and special demurrers were filed by appellee, which it is unnecessary to set out or refer to in this opinion as the trial court sustained the general demurrer to the complaint, and dismissed it on the sole ground that the contest should have been filed within ten days after appellee was certified as the nominee of the Democratic party.

The trial court was in error in thus construing § 3772 of Crawford & Moses' Digest, specifying the time in which contests in primary elections must be commenced. Said section provides, in part, that: "The complaint * * * shall be filed within ten days of the certification complained of, if the complaint is against the certification in one county, and within twenty days if against the certification in more than one county." The contest in the instant case is against the total vote of the entire district, composed of three counties, and not against the total vote cast in one county. The purport and gist of the complaint was to change the total vote in the entire district so that the contestant might receive a plurality of the entire vote in senatorial district 29, composed of three counties. Under the rule of liberal construction applied to the primary election laws in this State, set out in the case of *Logan* v. *Russell,* 136 Ark. 217, 206 S. W. 131, the correct interpretation is to allow a contestant for an office in a district composed of more than one county 20 days from the date of certification in which to file his complaint.

The trial court should have permitted appellant to amend his complaint. *Wilson* v. *Cardwell, ante* p. 261.

On account of the errors indicated, the judgment is reversed, and the cause is remanded with directions to allow the requested amendment, and to proceed with the trial of the cause upon its merits.

DIERKS LUMBER & COAL COMPANY *v.* TOLLERSON.

4-2712

Opinion delivered October 31, 1932.

Abe Collins and *Lake, Lake & Carlton,* for appellant.

Feazel & Steel and *Tom W. Campbell,* for appellee.

BUTLER, J. The record and briefs in this case are voluminous, but the essential facts may be briefly stated as follows:

The appellee, W. A. Tollerson, had been in the employ of the appellant and an associated company for several years. He was engaged in laying tracks on log roads and spurs thereof and taking up the same when they had served their purpose and locating them in other places. He had been promoted from time to time until, at

the time of his injury which was the occasion of this suit, he was foreman of the steel gang and acting as conductor on the work train which transported his crew and material. On May 3, 1929, he was in charge of a work train consisting of a locomotive, a caboose attached thereto, and four flat cars attached to the caboose. It was the appellee's intention to proceed from the main log road on to a spur for the purpose of taking up this spur and removing the same. When his train reached the spur, it was backed on to it, the four flat cars being first, the caboose next, and the locomotive last. In this order the train was backed along the spur track. The locomotive was in charge of an engineer and a fireman. The steel gang was in the caboose, or immediately outside of it on its vestibule or approach, except one of them named Davis, who was stationed on the last flat car from the engine and the appellee who was on the third flat car from the caboose and next to the end flat car on which Davis was riding. While they were occupying these positions, the train continued backing along the spur track until it had gone some distance from the main line when Davis discovered a fallen tree lying on the track. He signaled to the appellee to attract his attention. The appellee also saw the tree and in turn attempted to signal the engineer and fireman to warn them of the obstruction ahead in order that the train might be stopped. The expected response to these signals was not made, and the train continued to be backed at the same rate of speed at which it had been moving until the last flat car came in contact with the tree and was derailed. Just before this occurred, Davis and the appellee sprang from the cars on which they were riding to the ground. The appellee's foot was badly injured, and it was for this injury that he brought suit, recovering the judgment that is here on appeal.

It is the theory of the appellee that he was occupying a proper place on the train, and that it was the duty of the engineer and fireman to keep a lookout in the direction in which the train was moving for such signals

as might be given; that they failed in this duty, and because of such failure the signals given were not seen or obeyed, and that this was negligence on their part and the proximate cause of the injury suffered.

The appellant, on the contrary, insists that the appellee wrongfully took the position he was occupying at the time of his injury, and that his signals given from this place could not be seen by the engineer and fireman, because the caboose between the locomotive and flat cars, being wider than the cab in which they were riding, obstructed their view; that the place provided for the appellee and where it was his duty to be was in a cupola on the caboose. This cupola was provided with windows and an automatic air brake to enable one occupying the cupola in case of emergency to slow down and stop the train himself. Appellant maintained that, if the appellee had been occupying this position, as they claimed it was his duty to do, his signals might have been observed by the operatives on the locomotives, and, if they had not been seen, the appellee himself could have prevented the accident by an application of the automatic air brake; that because he was occupying the position on the flat car was the proximate and sole cause of his injury.

The evidence was in sharp conflict; that on behalf of the appellant tending to sustain its contention, and that on behalf of the appellee tending to show, as claimed by him, that he was occupying a proper place on the train in accordance with instructions of his superiors, and that the engineer and fireman could have seen his signals in time to stop the train, had they been keeping a proper lookout. The jury are the sole judges of the credibility of the witnesses and the weight to be given their testimony, and, the testimony adduced by the appellee being accepted as true, we are bound by the verdict of the jury, since on appeal the evidence tending to sustain the contention of the appellee must be viewed by us in its most favorable light. These rules are so well settled that we deem the citation of authorities unnecessary. There was sufficient evidence to sustain the ver-

dict, and the judgment of the court in accordance therewith must therefore be affirmed, unless some substantial error appears in the conduct of the trial. Because of the fact that it is difficult in the confusion and hurry of trial to prevent errors from occurring, it is a rule of universal application that errors complained of must be substantial and prejudicial to the rights of the party complaining; else they will be disregarded.

In this case numerous assignments of error are made because of the admission of incompetent testimony, all of which we do not set out and review in detail as to do so would unduly lengthen this opinion. We have examined the evidence said to be incompetent and have concluded that, if this is indeed true, no prejudice resulted thereby. The most serious contention made is relative to the action of the court in permitting the appellee to introduce a book of rules and to read to the jury rule No. 102 as follows: "When cars are pushed by an engine (except when shifting or making up trains in yards), a flagman must take a conspicuous position on the front of the leading car and signal the engine man in case of need"; also, in permitting the appellee to testify that such a book containing that rule was given him for his guidance by the railroad master of the Choctaw Lumber Company during the time he worked for that company from 1920 to 1923 as steel gang foreman. It is clear that, if this testimony had stood alone, it would have been incompetent. Before its introduction, however, J. M. Campbell was called to testify on behalf of the appellee and stated that he was the superintendent of the logging department for the appellant company and the Choctaw Lumber Company, and that he had held this position for both these companies for about twenty years; that the appellee worked in his department for the Choctaw Lumber Company during 1922 and 1923, and that the rules of the two companies governing the operation of the steel gang on the spur tracks were practically the same. Witnesses for the appellant testified that this book of rules and the specific rule read to the jury governed the

operation of trains on the tracks of two railroad companies which were separate and distinct corporations from the appellant, and that these rules had no application to the operation of log trains on the spur tracks of the appellant, and that no such book of rules was ever given to the appellee for his guidance. This testimony did not render the admission of the book of rules incompetent, but simply raised a question of fact as to whether or not such a book had been given the appellee for his guidance, and that such rule applied to the conduct of employees of appellant.

It will be noticed that the rule read to the jury prescribes the position to be taken by one who should signal the engine man, and that this position is on the front of the leading car. Before the introduction of these rules, the appellee had testified without objection that he had been directed by his foreman to "ride out on one of these cars when the work train was backing out on the spur and there to watch for obstructions and see that the track was clear;" and, further, that at the time of, and just preceding, the accident appellee was keeping the position on the flat car as it was his custom to do and in accordance with orders he had received.

It appears that the facts sought to be established by the introduction of the book of rules had already been put in evidence by the testimony of the appellee without objection, and, if the introduction of the rule was erroneous, it was not prejudicial, because other evidence admitted tended to prove the same fact sought to be established by the introduction of the rule. *Maxey* v. *State,* 76 Ark. 276, 88 S. W. 1009; *Thurston* v. *Payne,* 148 Ark. 456, 230 S. W. 561; *Chancellor* v. *Stephens,* 136 Ark. 175, 206 S. W. 145; *Ark. P. & L. Co.* v. *Orr,* 175 Ark. 246, 298 S. W. 1029.

It is urged that the testimony of Campbell above referred to was incompetent because it related to rules in effect ten years before the time at which he testified. When his testimony however is considered in its entirety, it is manifest that he was testifying about rules in effect

ten years before, and also that the same rules were in effect at the time of the accident in question. Therefore his testimony was not incompetent, although it may have been irrelevant, since the rules under which the appellee was working, according to his testimony, were the directions given him by his foreman.

The appellee was permitted to testify over the objection of the appellant that he had been fired by Hulse, appellant's claim agent, because he would not agree to a settlement of his damages. The reason assigned for the incompetency of this testimony was that it tended to arouse the prejudice of the jury and could have no bearing on the real question in issue. We agree with learned counsel that this evidence was incompetent, but it appears, when the amount of the verdict is considered in connection with the testimony relative to the injury of the appellee, that such verdict was amply justified, as the evidence might have warranted the assessment of a larger sum. The verdict does not appear to have been the result of passion or prejudice and the testimony complained of, while incompetent, was not prejudicial. *St. L. I. M. & S. R. Co.* v. *Brown,* 100 Ark. 107, 140 S. W. 279.

Objections were made and exceptions saved to the admission of other testimony which we have examined and find without merit.

The court gave a number of instructions at the request of the appellant, and the appellee and refused to give certain instructions requested by the appellant. Exceptions were saved to the giving of each of the instructions requested and given on behalf of the appellee and to the action of the court in refusing to give certain other instructions requested by the appellant.

Instruction No. 1, given at the request of the appellee, was long and involved, and submitted to the jury many questions about which there was no dispute, but we are of the opinion that the instruction on the whole was a correct declaration of law, and the error consisted in submitting to the jury questions which in fact were undis-

puted, and the instruction therefore was more favorable to the appellant than to the appellee. Specific objection was made to this instruction that it ignored the question of the duty of appellee to exercise due care for his own safety. This might be a valid objection were this suit not one against a corporation. Contributory negligence is no longer a defense in an action against a corporation (§ 7145, Crawford & Moses' Digest), and the jury might well find for the appellee, although it might appear that he was guilty of negligence contributing to his injury. Instruction No. 1 simply presented the theory of the appellee under the allegations of his complaint, and the theory of the appellant was also given in instructions requested by it.

There was no error committed by the court in overruling and refusing to grant other instructions requested. as they were fully covered by instructions given.

The instruction on the measure of damages of which appellant complains is one that has been frequently approved by this court, and we find it unnecessary to set it out. After a careful examination of all the instructions given and refused, we are of the opinion that the court gave the law to the jury in instructions as favorable to the appellant as it was entitled to.

Finding no substantial error in the rulings of the trial court, and, the verdict of the jury being supported by substantial testimony, both as to liability and the amount of damage, the judgment below should be and is affirmed.

HOLT *v.* MANUEL.

4-2693

Opinion delivered October 31, 1932.

Vincent M. Miles, for appellant.

James B. McDonough, for appellee.

BUTLER, J. On May 5, 1930, Dr. Charles S. Holt entered into a contract with the duly authorized agent of the appellees for the purchase of a lot with the building situated thereon in the city of Fort Smith, for the sum of $35,000. The property was incumbered by a mortgage which the purchaser was to assume, the balance of the purchase price to be paid in cash with a deposit made at the time of the execution of the contract of $1,000 with Eugene Henderson, agent of the sellers, which sum was to be held by him until the consummation of the sale or to

be returned if the sellers failed to carry out the contract. In the contract was the following stipulation: "Seller to furnish a warranty deed and abstract showing good merchantable title and property free of incumbrances except as above specified. Purchaser's attorney shall have at least ten days in which to examine the title prior to closing." The abstract of title was promptly furnished by the sellers, which was examined by the attorney of the purchaser within the ten days, who gave it as his opinion that the title was defective. After conferring with another attorney who advised that the opinion of the examining attorney should be accepted, the purchaser immediately notified the agent of the sellers that he would not take the property and complete the purchase. Suit was instituted by the sellers in the chancery court in order to remove the objections made by the attorney who examined the title. This suit proceeded to judgment, after which the attorney pronounced the title good, and, the purchaser still continuing to refuse to complete the purchase, an action was instituted against him for specific performance of his contract.

Several questions were raised in the court below which are argued here, but which we think it unnecessary to consider because it is our opinion that the title tendered by the sellers was a merchantable one, and that the decree for specific performance is correct, regardless of the grounds upon which the chancellor based his conclusion. There is a unanimity of opinion as to what constitutes a merchantable title, but courts having that question before them have given various definitions of what is deemed to be such. In all of these, however, in the final analysis a merchantable title is held to be one which imports such ownership as enables and insures to the owner the peaceable control and use of the property as against every one else. It imports something more than a title which might ultimately prove impervious to assault. This court has approved the following definition of a merchantable title: "A marketable title is one that is free from reasonable doubt. There is reasonable doubt when

there is uncertainty as to some defects appearing in the course of its deduction, and the doubt must be such as affects the value of the land or that will interfere with its sale." *Griffith* v. *Maxwell*, 63 Ark. 548, 39 S. W. 852. And in *Fenner* v. *Reeher*, 148 Ark. 553, 230 S. W. 581, we quoted with approval the following: "The court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings; or, as it is usually expressed, it will not compel him to buy a lawsuit." To the same effect is the holding of the court in a number of subsequent cases which were approved and restated in *Crow Creek Gravel & Sand Co.* v. *Dooley*, 182 Ark. 1009, 33 S. W. (2d) 369.

There was a large estate embracing the parcel of land in controversy left in trust by the will of the ancestor to the appellees and others. Suit was instituted in the chancery court of Sebastian County for the purpose of terminating the trust and vesting the title freed from it in the devisees in the will and their descendants, and for partition. One of the original devisees, Edward T. Hurley, had died before the institution of the suit, leaving a widow, Mrs. Lena Hurley, and two children, Edward Thomas Hurley and Hilda Jean Hurley, both of whom were minors under the age of fourteen years at the time of the institution of the suit and the owners of an undivided interest in the estate, and who are still minors. In that suit a decree was rendered terminating the trust, decreeing partition, and appointing commissioners who allotted to the minors a certain portion of the estate and the lot in question to the appellees. The alleged defect in that title was because, as it is claimed, the minor heirs were not properly served with process in that case as appeared from an examination of the original papers and decree. The examining attorney, in his letter to the appellant disapproving the title, said: "The decree shown at sheet A-2 (referring to the abstract) recites that there was proper service of summons on these two minor de-

fendants. But, upon examining the return of service of said summons, I find that that recital is not correct. The sheriff's return of service indorsed on the summons fails to show that the summons was served on the minors in the manner prescribed by the statute. The question raised may be a close question of law. But, in the absence of proper service on the minors, I do not think that the proceedings in said suit and the partition of the property pursuant to said proceedings are binding upon said minor defendants."

The return upon which the attorney based his opinion is as follows:

"State of Arkansas,

"County of Sebastian.

"I have this 2d day of September, 1922, duly served the within summons by delivering a true copy thereof to each of the within named, C. L. Hurley, Annie Hurley, Harold Hurley, Mary Hurley Magruder, Edna Hurley, Mrs. Lena Hurley, widow of Edward T. Hurley, Hilda Jean Hurley and Thomas Edward Hurley, in the Fort Smith District.

"Blake Harper, Sheriff.

"By A. J. Berry, Deputy."

Indorsed: "Returned and filed this 12th day of September A. D., 1922.

"S. A. Lynch, Clerk.

"By Claude Hoffman, D. C."

The important question in this case is this: Is the state of the record in the decree ordering partition, and which is a link in appellee's chain of title, sufficient to create a reasonable doubt as to the sufficiency of the title? It is not sufficient to create a reasonable doubt that the owner might be exposed merely to idle litigation, but it must be a reasonable apprehension that the purchaser taking the title might be subjected to litigation of a substantial nature from which his title might be placed in jeopardy. In determining whether or not reasonable doubt exists, it appears to be the general rule that the opinion of an attorney that the title to property is bad is

not sufficient to raise such a doubt, although, as in the instant case, the attorney may be one of admitted standing and ability. Such opinion that the title is invalid, if erroneous, will not justify the purchaser in receding from his contract. *LeRoy* v. *Hornwood,* 119 Ark. 418, 178 S. W. 427; *Lone Rock Bank* v. *Pipkin,* 169 Ark. 491, 276 S. W. 588; *Tudor* v. *Bank of Lincoln,* 184 Ark. 1110, 44 S. W. (2d) 1091; *Montgomery* v. *Pacific Coast, etc.,* 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122; *Buchan* v. *G. A. L. Co.,* 180 Ia. 911, 164 N. W. 119, L. R. A. 1918 A., 84; *Brackenridge* v. *Claridge,* 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593. If it should appear to the court, upon general and familiar principles of law, that the title is valid, then the doubt as to the title would be unfounded, and there could be no basis for any reasonable apprehension that the purchaser would be subjected to substantial litigation.

The record of the proceedings in the suit for partition show that on November 11, 1922, the following order was made and entered: "Upon due service on the minor defendants herein, Mrs. Lena Hurley is by the court appointed guardian *ad litem* for the said defendants, and now, on this day, files her answer as such guardian." The answer made specific denial of all the material allegations of the complaint.

The decree adjudging that the trust be terminated and decreeing partition as prayed was made and entered on November 15, 1922, and contains the following recital: "The court finds that the allegations of the bill of complaint are true, and finds that actual service was had on the minors, Hilda Jean Hurley and Edward T. Hurley, by delivering to each of them and to Lena Hurley, their mother and guardian, a copy of the summons herein. The court further finds that thereafter an attorney and guardian *ad litem* was appointed in this cause for said minors, and an answer was filed by said attorney for said minors as required by law."

The method of service on infant defendants is prescribed by § 1153 of Crawford & Moses' Digest, which

provides that, where the minor defendant is under the age of fourteen years, service must be upon him and upon his father or guardian, or, if neither of these can be found, then upon his mother, etc.

It is a familiar law that the recitals and judgment of a court of superior jurisdiction as to service will be conclusive unless it is in conflict with other official evidence in the record. The complaint affirmatively showed that Edward T. Hurley, the father of the minors, was dead, and that Mrs. Lena Hurley was their mother, and in that state of case the law required that a copy of summons be served upon each of them and their mother. There is nothing in the return of the sheriff to indicate that this law was not complied with. On the contrary, the fact is evident that actual service was had on the minors by delivering to each of them a copy of the summons and a copy to their mother, Mrs. Lena Hurley. It is true, the return does not state in so many words that Edward T. Hurley and Hilda Jean Hurley were minors or that Lena Hurley was their mother, but, as a matter of fact, they were minors, and Lena Hurley was their mother, and therefore service was had in substantial compliance with the law, although the officer failed to describe with particularity its method. The return of the sheriff does not contradict the recitals in the decree, but supports and confirms them. We have held that a literal compliance with the statute is unnecessary if there is a substantial compliance, *Huggins* v. *Dabbs,* 57 Ark. 628, 22 S. W. 563. And in *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704, which was a suit by heirs to vacate a decree rendered when they were minors on the ground that they had not been served with summons, the complaint was dismissed, although the decree recited the appointment of a guardian *ad litem* after service of process on them and that the guardian answered. In that case the court held that this recital in the record raised a conclusive presumption of service. Counsel for the appellees have cited a number of cases which support the view we have taken, but which we deem it unnecessary to notice, as in our opinion the above case

is controlling, and that on well-settled principles of law there could have been no reasonable doubt as to the validity of the title, and that the judgment of the trial court decreeing specific performance of the contract is affirmed.

Eugene Henderson was a party to the proceeding in the court below, and the court awarded him judgment in the sum of $1,000 against the appellees as his fee for procuring the purchaser, and from that judgment the appellees were granted a cross-appeal. It is admitted by the appellees that Henderson is entitled to the $1,000 as his fee, but it is contended he would not be entitled to judgment against them unless specific performance should be awarded. Henderson has already in his possession the amount of his fee, and, since he will not be required to return the money to the appellant, the question as to him is unimportant, and the judgment in his favor will also be affirmed.

COLLINS *v.* JONES.

BURROW *v.* WATSON.

4-2871

Opinion delivered November 7, 1932.

G. C. Carter, June P. Clayton and *Vincent M. Miles,* for appellants.

T. A. Pettigrew, J. D. Benson, Patterson & Patterson and *Cochran, Arnett & Woolsey,* for appellees.

SMITH, J. In the judgment from which this appeal comes appellee, Jones, was declared to have been legally nominated, at the Democratic primary election held in Franklin County on August 9, 1932, for the office of county treasurer, and appellee, Watson, was declared to be the nominee of the Democratic party at the same election for the office of county judge. Contests for the nominations for these offices were consolidated and tried together.

The decision of the contests turned upon the validity of certain assessments and payments of poll taxes. The court declared his view of the law upon the subject, and appointed canvassers to tabulate and certify the vote in

accordance with this view. The effect of this ruling was to throw out enough votes to leave contestants with a majority of the votes which the court found had been legally cast.

The legality of the votes which were thrown out as having been illegally cast depends upon the construction to be given our election and revenue laws relating to the assessment and payment of poll taxes, and we proceed to discuss such parts of these statutes as are here involved.

The General Assembly, at its 1909 session, passed act 320, entitled, "An act to enforce the provisions of Amendment No. 9 of the Constitution of Arkansas." Acts 1909, page 942. The amendment, referred to as Amendment No. 9, was the amendment requiring the payment of a poll tax to qualify one to vote. This act of 1909 has been amended in particulars not important here to consider. But § 1 of this act of 1909 appears as § 3738, Crawford & Moses' Digest, and it was decided in the case of *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. (2d) 631, that the section is unrepealed and is existing law. Of that section, more presently.

This Amendment No. 9 was superseded by an amendment known as the Equal Suffrage Amendment, adopted at the 1920 General Election, which appears at page XXVIII of 184 Ark. as Amendment No. 8. The declared purpose of this last amendment was "to confer suffrage equally upon both men and women, without regard to sex."

In the case of *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74, it became necessary to decide whether a female must pay poll tax to be eligible to vote, and it was there held that she was subject to the Poll Tax Amendment. This conclusion was held to fall within the principle that, when a privilege is extended to one class of citizens, upon certain conditions, and subsequently thereto a like privilege is conferred upon another class, the conditions attached to the exercise of such privilege by the former class necessarily attach, in like manner, to the subsequent

class. The laws of this State in relation to the assessment and payment of poll taxes may therefore be said to apply alike to men and women.

It is not only settled that the law applies alike to both men and women in regard to the assessment and payment of poll taxes as a qualification to vote, but it has also been several times decided that neither a man nor a woman can become an elector without being assessed as required by law (unless they have come of age since the assessment was due), although he or she possesses a poll tax issued by the collector of taxes.

The case of *Cain* v. *CarlLee,* 168 Ark 64, 269 S. W. 57, (which was decided February 23, 1925) involved the eligibility of certain persons who possessed poll tax receipts and who had voted thereon, but whose poll taxes had not been assessed in the manner required by law. We there held that the assessment of the voter in the manner required by law was essential to qualify the voter, and that the payment of a poll tax alone did not suffice. We there said, after reciting the provisions of § 3738, Crawford & Moses' Digest, that there were two reasons why this was true, the first being to protect the public revenue, and the second to prevent frauds in elections. See also *Craig* v. *Sims,* 160 Ark. 269, 255 S. W. 1.

In the case of *Taaffe* v. *Sanderson, supra,* where it was first held that women were subject to the Poll Tax Amendment, the facts were that certain women were assessed only by having the word "Mrs." written after the names of their husbands on the tax books. We there held, after reciting the provisions of § 3738, Crawford & Moses' Digest, in regard to assessment of persons whose names had been omitted from the original assessment rolls, that this method of issuing poll tax receipts did not conform to the requirements of the law, and did not qualify the holders of such receipts to vote. In so deciding, we cited both the CarlLee and the Craig cases, *supra,* as having held that the collector can issue a valid poll tax receipt only to a person whose name has been placed upon the tax book in the manner provided by law.

The view was expressed in the dissenting opinion in the case of *Taaffe* v. *Sanderson, supra,* that the women were qualified electors, not because they had been properly assessed for the payment of a poll tax, but because they were not required to pay a poll tax at all.

It having therefore been definitely decided that an assessment made in the manner provided by law must precede the issuance of a poll tax receipt, it becomes necessary to inquire how this assessment is made.

Act 172 of the Acts of 1929 is a comprehensive act of forty sections, dealing with assessments of both real estate and personal property as well as the assessment of poll taxes.

Section 3 of this act requires the assessor to appraise and assess all the personal property of his county between the first Monday in January and the third Monday in August of each year.

Section 7 of this act requires the assessor to maintain an office at the county seat of the county between the first Monday in January and the 10th day of April of each year to assess property and for the purpose of assessing such persons as are liable to pay the per capita or poll tax. It is further provided by this section that "* * * all male residents of the county who shall have attained the age of 21 years, and all female inhabitants who shall have attained the age of 21 years, and who wish to exercise their franchise to vote, shall, at such time and place, report to the assessor, in person or by agent, for *per capita* or poll tax assessment."

It thus appears that it is the duty of the assessor to assess the poll tax of all male inhabitants over 21 years of age in any event, and all females over that age "who wish to exercise their franchise to vote," but either a man or a woman may assess in person or by agent.

This section of the act contains provisions—which we do not review—requiring the assessor, or his deputy, "to attend at places of holding elections" in the various townships, etc., for the purpose of assessing real, personal and poll taxes.

Section 8 of the act 172 requires the State Tax Commission to prepare and furnish to the county clerks of the State copies for all lists, blanks and records to be used in the assessment, extension and collection of taxes (except the blanks for poll tax receipts, which are prepared and furnished by the Auditor of State), and this section also provides that "no lists, blanks or records shall be used by any official in the assessment, extension or collection of taxes except as shall have had the approval of said commission."

It appears therefore that there is no such thing as an oral assessment, but assessments are made in writing and upon blanks which have had the approval of the State Tax Commission, and upon no other blanks. The county clerk is required to have these blanks printed and to deliver them to the assessor on or before the first day of January each year.

Section 13 of act 172 requires the assessor, after the 10th day of April, to make a house-to-house canvass of his county to assess the property of any person who has failed to assess, and requires that the assessor "shall assess all such persons for the *per capita* or poll tax."

The assessor is required to make to the county clerk a report of all assessments on or before the third Monday in August, which report shall be verified by the affidavit of the assessor, the form of which affidavit is set out in the act.

Act 172 contains provisions for the equalization of the assessments made by the assessor, etc., after which, in due course, the tax books are made by the county clerk and delivered to the collector of taxes for the collection of all taxes on the first Monday of the year.

Now, it may transpire that the assessor failed to assess a particular person, or to make return thereof, who, when he appears to pay his poll tax, is advised that he has not assessed. Provision is found in the law whereby such a person may pay his poll tax and qualify as an elector, but he can do so only by being assessed. Section 3738, Crawford & Moses' Digest, to which reference has

already been made, provides how that name may get on the tax books.

This section reads as follows: "At any time after the assessment lists have been delivered to the county clerk for the purpose of enabling him to prepare the tax books for the collector, any person whose name has for any cause been omitted from the said lists may have his name included in said list and placed upon the tax lists in the hands of the collector by application to the said clerk at any time before the Saturday next preceding the first Monday of July, when the collector is required to make his final settlement with the county court. If the said application shall be made after the tax books have been delivered to the collector, the clerk shall certify the said supplemental assessment, which he is hereby authorized to make, to the collector, and shall charge to said collector the amount of tax and penalties so added. In addition to the sum assessed against any such applicant for poll tax, the clerk shall extend against him a penalty for failing to return his assessment to the assessor at the proper time, one dollar—twenty-five cents of which shall go to the clerk for his services, and seventy-five cents shall go into the fund for general county expenses; and if said application shall be made after the 10th of April, the collector shall collect a penalty of twenty-five cents for a failure to pay the said poll tax at the time prescribed for making payment of taxes without penalty. In addition to the assessment of poll tax in such cases, it is hereby made the duty of said clerk to assess any property held by said applicant, and which, for any reason, has been omitted from the tax books."

Section 3738 must, of course, be read in connection with act 172 to ascertain how the county clerk shall assess the poll and other taxes of the delinquent applicant, and it appears, from what has already been said, that the assessment must be made upon blanks approved by the State Tax Commission, after which the county clerk may place the name of the party assessed upon the tax books.

The case of *Tucker* v. *Meroney, supra,* declares the law to be that one may have his name placed on the tax books through an assessment made pursuant to act 172, *supra,* or by the clerk, pursuant to § 3738, Crawford & Moses' Digest, but the implication is very clear in that case that the assessment must be made in one way or the other before the collector has the authority to issue a poll tax receipt, and that, unless authorized, the receipt does not qualify the taxpayer as an elector.

Now, while one must assess his personal property and his poll tax, either through the assessor in person or by an agent, or through the county clerk in the manner above stated, to be entitled to pay his poll tax, he does not have to pay other taxes in order that he may pay his poll tax. He may pay his poll tax without paying any other taxes. Section 3739, Crawford & Moses' Digest, gives this right.

The ruling of the circuit judge appears to conform to the views here expressed.

The assessor testified that he made a certificate in the back of his assessment book before it was delivered to the county clerk, but that he later entered names therein; that men would come in and tell him that he had made an error in not assessing their wives with a poll, and he would go to the county clerk's office and add their names to the book. Some brought a copy of their assessment list, the original of which was in his possession, and when these copies showed two polls he would list the wife as having been left off by error. These lists were all brought to witness after April 10. There was no name on these lists except that of the husbands. "It would just say two polls. They just got to coming in by bunches, and you could tell that the numbers had been changed, the figure 1 had been erased and the figure 2 substituted. A number of persons brought in as many as twenty lists."

We agree with the circuit judge that these assessments did not comply with the law. None of these assessments were made until after April 10, at which time the provisions of § 3738, Crawford & Moses' Digest, applied. Even those assessments which were not brought in "in

bunches," and which had not been mutilated, did not show the name of the second person assessed. The law appears to contemplate a separate assessment of each taxpayer, of all males and of all females, who wish to become qualified electors by paying a poll tax. Section 7 of act 172, *supra.*

One may assess who has no property subject to taxation, and one does assess who makes that statement and signs the blank assessment list showing no property subject to taxation. This may be done by the person himself or by his agent, and the husband may, of course, be the agent of his wife for this purpose. But some one must sign the list, otherwise there is no assessment, and there is no contention here that any husband had signed an assessment list for his wife.

For these reasons, we think the court was correct in holding that persons of this class had not been properly assessed.

The court also ordered excluded from the count the names of persons which had been placed on the tax books by the county clerk. The testimony in regard to these names was to the following effect: Persons applied to the county clerk to have him place their names on the tax books, and this was done upon this application without requiring any assessment to be made of personal property.

We think the court properly excluded these names, for the reason that no assessment of personal property was made. The fact—if, in any case, it was a fact—that these persons had no property subject to taxation would have been no reason for not placing their names on the tax books; but, nevertheless, they were required to sign a tax list showing the property, if any, owned by them.

There was a third class of voters held ineligible, whose votes were excluded; but it is unnecessary to pass upon their eligibility, as the judgment of the court must be affirmed if we uphold the action of the court in striking out the two classes of voters hereinbefore referred to, and, as we think the ruling of the court as to both

those classes conformed to the law as we have here interpreted it, the judgment must be affirmed, and it is so ordered.

EPSTEIN *v.* KANSAS CITY LIFE INSURANCE COMPANY.

4-2718

Opinion delivered November 7, 1932.

James R. Yerger, for appellant.

Carmichael & Hendricks, for appellee.

KIRBY, J., (after stating the facts). It is undisputed that the receiver collected the $5,000 rental as receiver, which he failed to pay into the court, though ordered to do so, and, upon appellee's motion for judgment against Clark as receiver for $5,000 and Sam Epstein, surety on his bond, for $1,000, the amount of the bond signed by the surety, the judgment was rendered.

Appellant insists that he was not bound, under the terms of the bond, to pay the amount of the penalty thereof for the money collected by the receiver and deposited by him in the bank which failed, resulting in the loss thereof. It is true the condition of the bond is not in the language provided in the statute, § 8600, Crawford & Moses' Digest, but it is in accordance with the requirements of the provisions of § 8614 thereof, requiring the receiver to execute a bond with one or more sureties approved by the court, in such form as the court shall direct, "to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein." The powers of such receiver are designated

in § 8615 of the Digest, to receive rents, collect debts, etc.; and the receiver and his surety under the bond, conditioned as it is to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein, were bound to the payment into the court of all moneys or assets which shall come into his hands as receiver in the case, according to the order of the court, as though it had been so expressly stipulated in the language of the statute, said § 8600, Crawford & Moses' Digest.

If there had been no statement of it relative to the execution of the bond and its liability under the later statute, which is in nowise in conflict, but is in harmony, with the first statute, a surety on a receiver's bond would have been bound to account for and pay over moneys collected by the receiver upon the order of the court. In *National Surety Company* v. *Byrd,* 179 Ark. 688, 17 S. W. (2d) 876, the court held that the receiver and the sureties on his bond were bound to account for and pay into the court, when required by its order, all money and assets coming into his hands as such receiver, and the failure to make such payment was not excused by the insolvency of a bank in which such funds were deposited. It was there said:

"The receiver is an officer of the court appointing him, and the condition of the receiver's bond, as prescribed by statute, is different from that required of administrators, the receiver being bound to account for and pay into court all money or assets which shall come into his hands as such receiver, and in that respect like the bonds of public officials, requiring them to account for and pay over money coming into their hands as such. Sections 1096, 2832, 10,029, Crawford & Moses' Digest.

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

NOLAN *v.* HASKETT.

4-2701

Opinion delivered November 7, 1932.

E. B. Klewer and *Hughes & Davis*, for appellant.

Sam M. S. Margolin, for appellee.

KIRBY, J., (after stating the facts). Appellants insist that the court erred in not instructing a verdict in its favor and in refusing to give its requested instruction No. 3. The undisputed testimony shows that the driver of the truck, in delivering the gasoline to appellees' filling station, connected the discharge hose on the truck with the intake pipe of the underground tank, "propped the lever down" so the flow of gasoline would continue, and went away, leaving it unattended while discharging the gasoline, knowing at the time that it was a dangerous thing to do, but having no thought of any danger at the time. He knew that the lever was so arranged that it would shut the gasoline off from the discharge hose if it was not continuously held by the operator to keep it open, and propped it accordingly when he went into the restaurant. If the lever had been released, the flow of gasoline would have been shut off, and if he had been operating the lever as he was supposed to do, he might easily have put out the fire caused by the match thrown down, before it gained headway, and certainly he could have shut off the flow of gasoline by releasing the lever, had he been operating it.

When the condition was discovered by the owner of the filling station and the driver of the truck, who were coming out of the building, the owner immediately shouted to the operator of the truck to cut off the gasoline and drive the truck out of the station, and, rushing to the discharge hose, jerked it out of the intake pipe so that the truck would be disconnected. The evidence is in conflict as to the time expiring before Haskett jerked the discharge hose out of the intake pipe, but the jury could

well have found that it was some minutes, giving ample time to shut off the flow of gasoline and move the truck, had the operator been engaged in doing this as Haskett thought was the case. It is true the driver testified that he warned Haskett against disconnecting the discharge hose, but Haskett denied this, and the gasoline, not having been shut off when the discharge hose was jerked out of the intake pipe, ran freely, and the flames spread rapidly, finally reaching the building and destroying it. The driver also claimed that jerking the hose from the intake pipe spread the gasoline and the fire so as to prevent him from reaching the truck and shutting off the flow of gasoline and driving it out of the station. The owner of the station was confronted with an emergency in trying to protect his property in disconnecting the discharge hose so that the truck might be moved, and the jury could have found that he did not disconnect the hose from the intake pipe until after he directed the driver of the truck to move it and gave him time enough to shut off the gasoline and start the truck. But for the negligence of the driver of the truck in leaving the hose unattended with the lever thereon "propped down" so that the gasoline would continue to flow concurring with the negligence of Hayden in throwing the lighted match to the ground, the injury would not have occurred. *Bennett* v. *Bell,* 176 Ark. 690, 3 S. W. (2d) 996; *Jonesboro L. C. & E. R. Co.* v. *Wright,* 170 Ark. 815, 281 S. W. 374. The jury was also warranted in finding that the conduct of Haskett, the owner of the station, under the circumstances and in the emergency, was not such contributory negligence, if contributory negligence at all, as would bar his right to recovery. The negligence of the operator of the truck in connecting the discharge hose with the intake pipe, "propping down" the lever and releasing the flow of gasoline which would otherwise have closed the discharge hose if it had not been so fixed, and leaving it unattended with the gasoline flowing, concurring with the negligent act of the third person, Hayden, in throwing the lighted match down near enough to the waste gasoline

to ignite it, was the proximate cause of the injury and damage, as the jury, whose province it was to determine the question, found. *Pulaski Gas Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1199; *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283, 214 S. W. 9; *Morgan* v. *Cockrill,* 173 Ark. 910, 294 S. W. 44.

Instruction No. 3 was properly refused, since in effect it took away from the jury entirely the question of whether the conduct of Haskett in pulling the hose out of the intake pipe amounted to contributory negligence such as would bar recovery, only submitting the question of whether his conduct and the effect of it constituted the proximate cause of the spread of the fire.

Instruction No. 8, given by the court, was more favorable to appellants than they were entitled to. It told the jury that, if they should find Riley, the employee of appellants, was negligent in the premises at the time of the fire, and that such negligence was one of the causes of the fire, "but further find that the negligence of the plaintiff, C. C. Haskett, was one of the contributing causes of the fire, or that he failed to exercise that degree of care which an ordinarily prudent man would exercise under like circumstances," then they were instructed to find for the defendant as against both of the plaintiffs, "because the contributory negligence, if any, of the plaintiff, C. C. Haskett, is a complete bar in this case, regardless of whether or not there was some negligence on the part of the defendants through their employee." The instruction states, "but further find that the negligence of the plaintiff, C. C. Haskett, was one of the contributing causes of the fire," clearly assuming that the plaintiff was negligent, and the attempt to define negligence in connection with this did not relieve against the error in assuming that the plaintiff was negligent, and was not remedied by stating that the jury should render a verdict against both plaintiffs because "the contributory negligence, if any, of the plaintiff, C. C. Haskett, is a complete bar in this case."

The jury were warranted in finding that the negligence of appellants, concurring with the conduct of Hayden in carelessly throwing the lighted match where it ignited the gasoline, was the proximate cause of the injury; and the testimony is amply sufficient to warrant the verdict. The jury did not find that appellees were guilty of contributory negligence that would bar recovery, notwithstanding the instruction of the court that was so confusing as to be more favorable to appellants than they were entitled to.

On the whole case we do not find any reversible error, and the judgment is accordingly affirmed.

LITTLE ROCK *v.* LENON.

4-2702

Opinion delivered November 7, 1932.

Linwood L. Brickhouse, for appellant.

Henry Donham, Martin Fulk and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

McHaney, J. The late Judge C. T. Coffman executed his will February 21, 1896, in which he appointed his wife, Jean H. Coffman, sole executrix without bond and made her his sole beneficiary. The will provided: "I give, devise and bequeath to my beloved wife, Jean H. Coffman, all the property, real, personal or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my death."

More than 27 years later, on June 9, 1923, he executed the following codicil to said will: "Know all men by these presents: That I, C. T. Coffman, being of sound and disposing mind and memory, do make and publish this, my codicil to my will, heretofore executed and dated February 21, 1896, being the only will which I have executed and which is now in force. I hereby direct that my said executor, being my wife, Jean H. Coffman, upon my death shall erect at the expense of my estate a suitable monument, in case same has not already been erected during my lifetime. It is my will that all property left by me to my wife which has not been used or expended by her during her lifetime be donated and turned over to the City Hospital of Little Rock, as a memorial to her and to me and to be used by the management of said hospital in such manner as they may deem to the best interest of same."

Thereafter, on October 14, 1925, Judge Coffman died without issue, and three days later the above will and codicil were probated, Mrs. Coffman being appointed executrix, in accordance with the directions of the will.

On February 2, 1932, the said Jean H. Coffman died testate, undertaking by her will to dispose of all the property of which she died seized, including all the property which came to her by the will of her husband, and ignoring the direction contained in the codicil to the will of her late husband that all property left by him to her "which has not been used or expended by her during her lifetime be donated and turned over to the City Hospital of Little Rock, as a memorial to her and to me," etc. Numerous beneficiaries are named in her will, many of

whom are related to her collaterally, a few to him, and several bequests of a charitable nature. Appellee Lenon was named executor in the will which was probated.

Appellant brought this action against the executor of her will and all devisees and legatees named therein, praying that the will of Judge Coffman be construed, the executor of Mrs. Coffman's will be enjoined from proceeding under her will until its rights were determined, and that he be ordered to turn over to it all the assets in his hands belonging to the estate of C. T. Coffman. Trial resulted in a decree against appellant, the court holding, under the will and codicil of C. T. Coffman, that his widow took fee simple title to all his property, and that her devisees and legatees became vested with the same title to the respective properties devised and bequeathed to them in her will. This appeal followed.

We are all agreed that by the original will of Judge Coffman, his widow, Jean H. Coffman, would have acquired fee simple title to all his property, had he not later executed the above codicil. We are also agreed that the codicil did not limit her power to use, expend, sell, convey or otherwise dispose of the property in her lifetime left her by his will. The difficulty of the writer has been to determine what effect the codicil had on the property left by him which had "not been used or expended by her." The majority hold that while the estate conveyed to her in the original will was the fee, the effect of the codicil was to convert the fee originally granted into a life estate with full power of disposition, and that, if any part of the estate devised to her remained unused or unexpended at her death, it thereupon passed as directed in the codicil. Some courts hold that a life estate, coupled with unlimited power of disposition, is equivalent to a fee simple title. The great weight of authority, however, including this court, supports the rule that a life estate may be created, coupled with power of disposition, and that such power does not change the life estate into a fee for the reason that the power of disposition is not in itself an estate, but is an authority so to do derived

from the will. See 17 R. C. L., page 624, § 13. We so held in *Archer* v. *Palmer,* 112 Ark. 527, 166 S. W. 99, even though the power of disposition might defeat the rights of a remainderman. See also *State* v. *Gaughan,* 124 Ark. 548, 187 S. W. 918; *Galloway* v. *Sewell,* 162 Ark. 627, 258 S. W. 655; *Reddin* v. *Cottrell,* 178 Ark. 1178, 13 S. W. (2d) 813. We have many times held that there can be no limitation over after a fee in a will for the reason, as stated in *Moody* v. *Walker,* 3 Ark. 147, that, "if a legatee possesses the absolute right of property, he certainly has the power of disposing of it in any way he may think proper, and therefore he might defeat the devise or limitation over." See also *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682; *Davis* v. *Sparks,* 135 Ark. 412, 205 S. W. 803; *Fies* v. *Fiest,* 145 Ark. 351, 224 S. W. 633; *Letzkus* v. *Nothwang,* 170 Ark. 403, 279 S. W. 1006; *Combs* v. *Combs,* 172 Ark. 1073, 291 S. W. 818; *Payne* v. *Hart,* 178 Ark. 100, 9 S. W. (2d) 1059; *First Nat. Bank* v. *Marre,* 183 Ark. 699, 38 S. W. (2d) 14. But here there has been no attempted limitation over after a fee. The codicil operates only on such property of his as may not have been "used or expended" by her. If there is no such property, the codicil is ineffective. It does not attempt to control her in any disposition of such property during her lifetime, but is, in the view of the majority, a disposition of such of his property as may remain unused or unexpended at her death. The rule announced in the above-cited cases, as to a limitation over after a fee given, has no application here.

The general rule relative to the construction of a will and a codicil is stated in R. C. L., vol. 28, p. 199, as follows: "It is the well-settled general rule that a will and codicil are to be regarded as a single and entire instrument for the purpose of determining the testamentary intention and disposition of the testator, and both instruments together will be construed as if they had been executed at the time of the making of the codicil. They will not, however, be considered as a single instrument where a manifest intention requires otherwise. The

construction of the provisions contained in a will and codicil may be different from that which would be given to the same provisions all embodied in a will. This is due to the fact that the mere taking of a codicil gives rise to the inference of a change in intention, and such an inference does not arise in the case of a will standing by itself. When a will and codicil are inconsistent in their provisions, the codicil, being the latest expression of the testator's desires, is to be given precedence."

This court follows the general rule above stated. In *Gibbons* v. *Ward,* 115 Ark. 184, 171 S. W. 90, we said: "A codicil is in legal effect a republication of the will, and the whole is to be construed together as if executed at the date of the codicil." This was quoted with approval in *Rogers* v. *Agricola,* 176 Ark. 287, 3 S. W. (2d) 26.

Undoubtedly, Judge Coffman intended by his original will to give his wife all his property without any strings tied to it. They were childless, but each had a number of collateral kindred. In 1896 his fortune was of little value, but in 1923 it had grown to quite a substantial sum. Even then he tied no strings to her right to use and enjoy his property, but only to the excess or surplus. For some reason he made the codicil, which gives rise to an inference of a change in intention as to what might be done with the surplus. He might have thought, and the evidence somewhat sustains this surmise, that too much of it would go to her relations to the exclusion of his. Whatever his purpose was, it was his will or wish that his excess property go to the City Hospital, if any remained at her death.

The will and the codicil are to be construed together to ascertain the intention of the testator. If the codicil is in conflict with the will, the codicil governs. We have many times held that, where the provisions of a will are in conflict, the last provision is controlling. *Cox* v. *Britt,* 22 Ark. 567; *McKenzie* v. *Roleson,* 28 Ark. 102; *Gist* v. *Pettus,* 115 Ark. 400, 171 S. W. 480. In the latter case we held there was no necessary repugnancy between the codicil and the will, and continued, saying: "But, if we

are mistaken in this, and the third paragraph of the will should be construed to devise the fee simple title to John W. Pettus, then this paragraph would be manifestly inconsistent with and repugnant to the codicil, and in that case the language of the codicil would control."

Therefore, if the codicil in this case be held to be in conflict with or repugnant to the will, which the majority does, by holding that the codicil converted the fee theretofore given into a life estate with power of disposition, then it necessarily follows that the codicil controls, and the surplus of his property at her death must go to the city for the City Hospital under his will.

The writer is of the opinion that there is no such repugnancy between the two instruments; that the language of the codicil, fairly construed, in the light of *Gibbons* v. *Ward* and *Rogers* v. *Agricola, supra,* together with the will, as one instrument as of the date of the codicil, constitutes a mere wish or will, precatory words, that she donate or give such of his property as remained, by will, to the City Hospital.

The record here does not disclose what or how much of his property, if any, remained on hand at her death. It therefore becomes necessary to reverse and remand the case with directions to ascertain such fact and to order the appellee, Lenon, as executor of Mrs. Coffman's estate, to deliver such property to appellant for the use and benefit of the City Hospital. It is so ordered.

CRAWFORD COUNTY BOARD OF EDUCATION *v.* SCHABERG SCHOOL DISTRICT NO. 69.

4-2726

Opinion delivered November 7, 1932.

[redacted]

D. H. Howell, for appellant.

Roy Gean, for appellee.

McHaney, J. The county boards of education of Crawford and Washington counties sought to combine Mountainburg School District No. 16, Schaberg School District No. 69, and Armada School District No. 93 in Crawford County, Arkansas, and two sections of land in Mt. Olive School District No. 30 of Washington County, under § 53 of act 169 of 1931, commonly known as the "school law." This section provides for the formation of school districts embracing territory in two or more counties. The procedure provided for in the second paragraph of that section was resorted to in this instance to effectuate the consolidation. It appears from the record that the two sections of land in Washington County which were sought to be included were wild and unoccupied. No person resided on said sections. The county boards entered an order creating the district, but on a trial *de novo* in the circuit court this order of consolidation was vacated and quashed.

For a reversal of the judgment of the circuit court, it is first contended that the court erred in issuing a writ of mandamus against appellant directing it to send up the record for trial *de novo*. It is contended that no appeal was taken as provided by law. We think appellant is in error, as, in the view we take of the matter, the order of the county board was void and was subject to be quashed, either by appeal or certiorari. The whole proceeding for the consolidation of the three districts was void for failure to comply with the applicable section of the "school law," § 44, and not § 53. We think the procedure prescribed in § 53 was not open to appellants in this case for the reason that in reality it was not sought to form a district embracing territory in two counties. We

think the record clear that a small amount of territory in Washington County was included in the scheme of consolidation in order to avoid the procedure necessary to a consolidation under § 44. The real object of the consolidation was for the Mountainburg District to take in the territory of the Schaberg and Armada districts without the consent of the qualified electors in the latter districts. We do not think a fair construction of the "school law" would permit the Mountainburg District to take over the other two without their consent by including two sections of uninhabitated wild land in Washington County. Section 44 provides, in express terms, that "no existing district shall be included in a new district under the provision of this section unless the majority of the qualified electors of the district to be included sign the petition, or, in case of an election, a majority of the voters in the election in the district on the question shall favor it." The effect of this proceeding is for Mountainburg District to take Schaberg and Armada districts without their consent.

The circuit court correctly quashed the proceedings and order of the county board of education, and this judgment is therefore affirmed.

HUNTER *v.* WOOLLARD.

4-2704

Opinion delivered November 7, 1932.

R. V. Wheeler, for appellant.

S. V. Neely, R. H. Berry and *Elton A. Rieves, Jr.,* for appellee.

McHaney, J. This is a special statutory proceeding brought under the provisions of act 135, Acts 1927, p. 452, regulating the granting of franchises for toll bridges, turnpikes or causeways. Section 3 of the act reads as follows: "Upon application being made to the county court for the granting of a franchise or privilege as herein provided, the applicant shall give notice by publication in some newspaper in the county or counties where said toll bridge, turnpike or causeway is situated, having a *bona fide* circulation therein once a week for two weeks, setting forth the fact that application has been made for the granting of such franchise or privilege, giving the name of the stream to be bridged or the location of the turnpike or causeway, and the date when said petition will be heard by the county court, which notice may be in the following form, to-wit:

"FORM OF NOTICE

"Upon the date named in said notice, unless the hearing is continued for cause, the court shall hear all interested parties, and, in the event said franchise or privilege is granted, an order of the county court shall be made, fixing the rates or tolls to be charged, which shall be entered of record."

The point involved in this appeal is the sufficiency of the notice under the above statute.

On November 28, 1930, a notice was published in the Earl Enterprise of Earl, Arkansas, to the effect that appellant has made application to the county court of Crittenden County, Arkansas, for a franchise to operate a toll bridge over the Mississippi bottoms in said county, and that same would be heard by the county court on

December 15, 1930. The first publication of the notice was made on November 28th, and the application or petition for franchise was not filed until December 1, 1930. Thereafter, the same notice was published on December 5th and 12th. At the hearing on December 15th, 256 protestants appeared and objected to the granting of the franchise. One of the grounds of protest was that no notice of the application had been published as required by law. The county court overruled the protest, granted the franchise, and an appeal was prosecuted to the circuit court, where it was held "that the first publication of the notice on November 28, 1930, was ineffective for the reason that the application was not filed with the clerk of the county court until December 1, 1930." The judgment of the county court granting the franchise was adjudged to be null and void. This appeal is from that order.

We think the court correctly so held. No notice could be given until application had been made to the county court as provided in the statute. The publication of the notice on November 28th was without effect because at that time no application had been made to the county court. The publication of the notice on December 5th and 12th was insufficient to give two weeks' notice of the application, because two weeks had not elapsed between the date of the first effective publication and the date of the hearing. Strict compliance with the statute relative to notice must be had in order to give the county court jurisdiction, this being a special statutory proceeding and the jurisdiction of the court being dependent upon strict compliance therewith. It would make no difference if all the people in the county had appeared to protest the application, because the jurisdiction did not depend upon the appearance of the protestants, but upon compliance with the provisions of the statute. *Nevius* v. *Reed,* 176 Ark. 903, 5 S. W. (2d) 327. As said by Judge Battle in *Gibney* v. *Crawford,* 51 Ark. 34, 9 S. W. 309: "The statute having prescribed the manner in which the notice should be given, it could not be given legally in any other man-

ner." In *Townsend* v. *Martin,* 55 Ark. 192, 17 S. W. 875 we held that, where the statute prescribes that the list of delinquent lands shall be published "weekly for two weeks," the first insertion of the notice should be made two full weeks before the day of sale, and failure to comply with the statute in this respect renders the sale void. There are many cases in our reports to the same effect, one of the latest being *Giese* v. *Jones,* 185 Ark. 548, 48 S. W. (2d) 232.

Since two full weeks did not elapse between December 5, the date of the first publication, and December 15, the date of the hearing, notice was not given "once a week for two weeks" as provided in the statute, the county court had no jurisdiction to make the order granting the franchise, and the circuit court correctly held it null and void.

Affirmed.

SILBERNAGEL & COMPANY *v.* TALIAFERRO.

4-2713

Opinion delivered November 7, 1932.

Reinberger & Reinberger, for appellant.

Harry T. Wooldridge and *Frank F. Boone,* for appellee.

BUTLER, J. Silbernagel & Company, the appellant, is a wholesale grocery and furnishing concern with its prin-

cipal place of business in Pine Bluff. In 1930 it had a customer, H. B. Chambliss, to whom it had advanced money and merchandise, who owed a balance at the end of that year. Chambliss rented a farm from the appellees, Ed Taliaferro and J. H. Taliaferro, at the beginning of the year 1931, at an agreed rental of $1,200. Chambliss applied to the appellant to furnish supplies to make his crop, and the appellant declined to do so unless the landlords would waive the lien for rents. At that time the appellant prepared a written waiver and gave it to Chambliss to obtain the signature of the landlords. The landlords declined to sign because there was no limit fixed in the waiver as to the amount of indebtedness, and thereupon the appellant, acting through its agent, wrote an additional clause at the end of the waiver limiting the amount of the waiver to the sum of $3,000. The waiver was then returned to the landlords, who signed the same, and which in its entirety is as follows:

"In consideration of Silbernagel & Company, Pine Bluff, Arkansas, furnishing cash, merchandise, supplies, etc., to H. B. Chambliss, for purposes of making crop for the year 1931 on lands belonging to me in Lincoln County, Arkansas, and described herein, I herewith agree to waive to Silbernagel & Company any and all amounts that may be due me for rents from said lands for year 1931, until such time as Silbernagel & Company shall have been paid any and all amounts due them by said H. B. Chambliss. I further agree not to furnish said H. B. Chambliss any cash or supplies myself, and any advances so made shall likewise be waived to Silbernagel & Company. The lands mentioned herein are described as follows: (Here follows land description.)

.....

"Signed.

"This agreement entered into with Silbernagel & Company, excepting that the amount waived by me shall in no event exceed the total sum of $3,000, and is limited by me to that amount.

"J. H. Taliaferro."

After a considerable part of the crops had been harvested and turned over to the appellant, the landlords brought this suit to recover rents due by Chambliss, alleging that the amount advanced to make the crop had been paid out of the cotton already appropriated, and that the appellees were entitled to the remainder as rent. and that the appellant was attempting to include an old indebtedness of Chambliss. The appellant answered, alleging that the waiver signed by the landlords was intended to, and did, include the indebtedness that Chambliss owed for the year 1930.

There is little, if any, dispute in the evidence. It tended to establish that the landlords and the appellant had never discussed the waiver, but that Chambliss had acted as the intermediary, and that neither he nor any one representing the appellant informed the landlords that Chambliss, at the time the waiver was signed, was indebted to the appellant for a balance on an old account. Witnesses for the appellant testified that it was the intention of the appellant and Chambliss that the waiver should extend, not only to the advances made for the year 1931, but to cover the balance for the year 1930, and that the balance for the year 1930 was covered and the inducement for appellant to furnish Chambliss supplies to make the crop of 1931. This understanding between Chambliss and the appellant, however, was never communicated to the landlords, and they did not know of any such understanding at the time they signed the waiver. They testified that they thought they were signing a waiver only as to the supplies advanced to make the crop of 1931, and that the sum of $3,000 named was for the purpose of limiting the advances of 1931 within that sum.

The chancellor found that the landlords, appellees, waived the rents only for the amounts furnished the tenant in 1931, and did not in fact waive any part of their rents for the past due account which Chambliss owed the appellant. He further found that, at the time of the rendition of the decree, there was a balance of $131.99 due the appellant for supplies for the year 1931 which it was

entitled to recover, and ordered the crops which had been taken charge of by a receiver to be sold and the proceeds first applied to the payment of the balance found to be due and the remainder applied to the payment of rents due the appellees.

We think a fair interpretation of the waiver in the light of the attendant circumstances fully justified the conclusion reached by the trial court. The language of the waiver discloses the purpose for which appellees signed the contract, and it is fairly to be inferred that, when they waived their rents for all amounts due by Chambliss and agreed not to furnish him anything themselves, they had in mind that the indebtedness referred to was that to be incurred for the purpose of making the crop for the year 1931, as that was the reason for which they were signing the waiver. The undisclosed intention of the appellant and Chambliss could not, and did not, bind the landlords. However, if the contract of waiver is ambiguous and calls for construction, we must construe it most strongly against the appellant, as the contract of waiver was prepared by it. *Leslie* v. *Bell,* 73 Ark. 338, 84 S. W. 491; *Wright Chevrolet Co.* v. *Kent,* 181 Ark. 923, 28 S. W. (2d) 700.

Affirmed.

BENTONVILLE ICE & COLD STORAGE COMPANY *v.* ANDERSON.

4-2727

Opinion delivered November 7, 1932.

[redacted]

J. T. McGill, for appellant.

Paul L. Anderson, for appellee.

BUTLER, J. For many years prior to the year 1930 the appellee, plaintiff below, was an orchardist near Centerton, Benton County, Arkansas. The appellant company for several years was operating a cold storage plant in Bentonville, in said county. It had been a custom for orchardists to place apples in the appellant's storage with instructions to sell them at the prevailing market price. During those years the appellee had placed apples in the appellant's storage, and, when they were sold, the appellant had remitted the proceeds of sale, less storage charges. Appellee delivered certain apples to the appellant during the year 1930. Thereafter the appellant sold the apples to one W. M. Zimmerman, a defendant below, on credit. Suit was instituted in the Benton Circuit Court against the appellant and Zimmerman for $309.25, the value of the apples. Upon a trial, judgment was entered in favor of the appellee for said amount, from which the appellant has duly prosecuted its appeal.

The complaint in effect alleged that the apples had been sold to the appellant company. There is no evidence, however, to establish a sale to the appellant, but all of

the evidence is to the effect that the appellant company acted as the agent for the appellee in the sale of his apples. At the close of the testimony, the appellant asked for an instruction directing the jury to return a verdict in its favor. This request was refused by the court, and exceptions saved, but, whether or not the exceptions were saved in the motion for a new trial, we are unable to say, as that motion is not abstracted or referred to in appellant's abstract and brief.

Counsel for the appellee say that in all previous years the appellant had sold the apples of appellee for cash, and that appellee had never authorized the sale to be made in any other manner, and that the apples were sold on a credit to an insolvent person upon an indefinite credit arrangement. The evidence as abstracted does not justify that statement. The appellee testified that he placed his apples with the appellant company with instructions to sell the same, as in previous years, and, when asked upon what terms appellant was authorized to sell the apples, he answered: "The only terms I have recollection of is as I had done before. I simply told them to sell the apples for me if an opportunity might come up for a sale. So far as I know that is the only instruction."

The manager of the appellant company testified that the quality of the apples was not as good—not as good a size as usual; that they were small and would not be a No. 1 apple; that he found a cash buyer for the apples, but the appellee was not willing to accept the price offered. The appellee, in testifying about this matter, stated in effect that the testimony of the manager regarding the cash buyer and his refusal to accept because of the price offered was true. The manager also testified that the appellee's apples remained unsold at about the close of the storage season, and that the company had to sell them; that it was trying to handle the apples to the best advantage for the appellee, and that Zimmerman, the man to whom the apples were finally sold, on a credit basis, was the only buyer that could be found.

The evidence fails to disclose what had been the custom regarding the sale of apples during the time appellee had done business with the appellant, or what was the financial responsibility of Zimmerman, the buyer, known to the appellant or which, in the exercise of ordinary care, it should have known. Neither was there any express direction given the appellant as to how the apples should be sold. In the absence of any proof of custom, or of the express direction of the owner, an agent must be reasonably diligent and exercise reasonable care in the selection of responsible purchasers, and to sell the commodity for its fair value or market price for cash, or upon a reasonable term of credit, and to exercise reasonable diligence in collecting the purchase money when intrusted with the collection, and to promptly account to the owner for all money and property which has come into its hands during, and by virtue of, the agency. *Ark. Fertilizer Co.* v. *Banks,* 95 Ark. 86, 128 S. W. 565. Of course, an agent is bound to make sales in accordance with the express direction of the owner (*Sledge & Norfleet Co.* v. *Mann,* 166 Ark. 358, 266 S. W. 264), and is liable for any damage resulting from a failure to obey the direction of the owner, or for failure to exercise proper care in the absence of such direction. *Houston Rice Co.* v. *Reeves,* 179 Ark. 700, 17 S. W. (2d) 884; *Marks* v. *F. G. Barton Cotton Co.,* 170 Ark. 637, 280 S. W. 674.

We are of the opinion that our cases support the majority rule declared in 25 C. J., paragraph 16, page 350, cited by the appellant, as follows: "That, in the absence of specific instructions to sell only for cash, appellant had implied authority to sell upon a reasonable credit, provided he exercised due care in doing so."

The appellant requested three instructions: the first was for a directed verdict, heretofore referred to; instruction No. 2 was in effect that, in the absence of express direction to sell for cash, appellant was not liable if it sold the apples on a credit and the buyer failed to pay for them; instruction No. 3, as requested, was as follows: "If you find that the plaintiff stored the apples

in question with the defendant, Bentonville Ice & Cold Storage Co., with instructions to sell said apples, and you further find that the apples were sold by the company as agent or broker for plaintiff, you will find for the defendant, Bentonville Ice & Cold Storage Co."

The court refused the instruction as asked, but qualified it as follows: "Unless you further find that the broker, Bentonville Ice & Cold Storage Co., sold said apples contrary to the agreement and understanding between it and the plaintiff, Anderson, or that it sold said apples on a credit without authority," and gave same as qualified, over the objection of defendant, appellant. There appears to have been no specific request for instructions made by the plaintiff.

On consideration of the authorities, *supra,* we think both instruction No. 2 and No. 3 might have been properly refused, as they overlooked the duty of the agent to use reasonable diligence to find purchasers and exercise reasonable care in the selection of responsible ones, but the qualification of instruction No. 3 was also erroneous because there was no evidence (or at least none abstracted) tending to show that the sale was made contrary to any agreement between the parties, or that it was the understanding that the apples were to be sold for cash.

The judgment must be reversed, and, as it appears from the evidence abstracted that the case might not have been fully developed, the cause is remanded with leave to amend the complaint and take further testimony if appellee is so advised, and for further proceedings in accordance with this opinion.

BULL *v.* ZIEGLER.

4-2724

Opinion delivered November 14, 1932.

Edward Gordon, for appellant.

Cockrill & Armistead, for appellee.

SMITH, J. Appellant says, in his brief, that "the only question to be determined on this appeal is whether or not the plaintiff in this case has a right to garnishee the State Highway Commission after filing suit in the Pulaski Circuit Court against the defendant, S. B. Ziegler, doing business as Ziegler Construction Company, which company holds an indebtedness against the State Highway Commission on account of constructing highways under a contract with the Highway Commission, and which has been specifically authorized to construct highways and to sue and be sued, the appellant being employed by the defendant in the construction of said highways and injured while so employed."

We think the court below correctly held that the right did not exist to garnishee money due Ziegler by the State Highway Commission, for the reason that the commission is an agency of the State, and, as such, is not subject to suits of this character.

The case of *Arkansas State Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879, is cited as authorizing this garnishment proceeding. But such is not the effect of that case. We did there hold that the State Highway Commission had been created as a corporate entity to contract with reference to the construction of certain State highways, and that the Commission might be sued in relation thereto, but we stated that the whole proceeding was statutory, and suits could be maintained only to the extent and in the manner authorized by statute. See also *Baer* v. *Arkansas State Highway Commission,* 185 Ark. 590 48 S. W. (2d) 842.

The instant case is not a suit to enforce a construction contract, but is a suit at law for damages for personal injuries by an employee of a contractor against his employer, with a writ of garnishment to impound money due the contractor by the State Highway Commission, in order that the money may be applied to the satisfaction of any judgment which the employee may finally recover.

In the chapter on Garnishment, 28 C. J., page 55, it is said that there is authority to the effect that, under a provision authorizing the summoning of persons and corporations generally as garnishees, a municipal or public corporation may thus be brought into the case. It is, however, also said: "But, according to the weight of authority, general provisions authorizing garnishment do not, in the absence of a clearly expressed legislative intention to such effect, apply to the Federal and State governments, or their officers or agencies. This rule includes all municipal or *quasi* municipal corporations or other public bodies charged with the performance of governmental functions, or their officers or agents."

An answer was filed on behalf of the Highway Commission, admitting its indebtedness to Ziegler, which raised no question as to the right of the plaintiff to impound the money due from the Commission to Ziegler by writ of garnishment, and it is argued that as the Commission does not raise the question that it is not subject to garnishment, the defendant cannot do so; in other words, that there has been a waiver by the Commission of its exemption from garnishment. We think, however, that this exemption may not be waived, and that the defendant, Ziegler, had the right to move, as he did do, to quash the writ, although the Highway Commission has not done so.

Numerous authorities on this question are reviewed in the case of *Welch Lumber Co.* v. *Carter,* 78 W. Va. 11, 88 S. E. 1034, by the Supreme Court of Appeals of West Virginia, where it is stated that, while there are cases holding that the exemption from process of garnishment

is a privilege personal to the agency possessing it, yet the weight of authority is opposed to this view, and that the public policy which forbids the process in the first instance forbids also its waiver. This case is annotated in 2 A. L. R. 1582, where many cases on the subject are cited.

It was held by the Supreme Court of Alabama, in the case of *Porter & Blair Hardware Co.* v. *Perdue,* 105 Ala 293, 16 So. 713, that garnishment is a remedy of statutory creation and existence, and that there is no authority to resort to it except in cases and against parties which are and who are within the terms of the statute. And, further, that public corporations and governmental agencies are held not to be subject to this process unless included, in unequivocal terms, by the letter of the statute, on grounds of public policy. It was there further said: "But whether the nonliability of such corporations to this process be put upon the idea of exemption merely from the operation of a statute broad enough to embrace them, or upon the idea that they are not embraced at all in the terms of the statute, is of no practical consequence. If they are not within the statute at all, no court has, nor by consent can acquire, jurisdiction to proceed against them in this way; and, if it is a mere matter of exemption, the same public policy which gives life to it is potent also to prevent the officers and agents for the time being of such corporations from waiving the exemption by appearing without objection and admitting indebtedness for the corporation. 8 Am. & Eng. Enc. Law, p. 1135."

Like the State of Alabama, we have no statute making these governmental agencies subject to garnishment.

We have held, in several cases, that, where contracts have been fully completed for certain governmental agencies, and nothing remains to be done except to pay the contract price due the contractor, the creditors of such contractor, if he be insolvent, may, by equitable garnishment, impound the money due him and subject it to the payment of their demands against him. The following are cases of this kind: *Henslee* v. *Mobley,* 148 Ark. 181,

230 S. W. 17; *Riggin* v. *Hilliard,* 56 Ark. 451, 20 S. W. 402. See also *First Nat. Bank* v. *Mays,* 175 Ark. 542, 299 S. W. 1002. These cases appear to have no application to the facts of this case.

We conclude therefore that the garnishment was properly quashed, and that judgment is affirmed.

BERRY *v.* HARRIS.

4-2721

Opinion delivered November 14, 1932.

W. A. Dickson, for appellant.

John W. Nance, for appellee.

SMITH, J. Appellant resides on an improved road eight miles from Bentonville, and has his mail delivered daily by a rural route mail carrier. Appellee is his neighbor and first cousin. On Tuesday, December 2, 1930, appellee purchased certain cattle from appellant, and in payment therefor gave a check for $600 on the Benton County National Bank, located in Bentonville. Appellee did not have this amount of money on deposit with the bank at the time he delivered the check, but he had arranged with the bank for its payment, and he told appellant that he could get his money at any time. The cattle were loaded in a truck by appellee and taken to Kansas City, Missouri, where they were sold, and the pro-

ceeds of the sale were deposited by him to the credit of the Kansas City correspondent bank of the Benton County National Bank.

Appellant is a farmer, and it was his custom—known to appellee—to go to Bentonville to sell produce and to make purchases on Saturdays, and, except in cases of emergency, he did not go on other days.

On the Saturday following the sale of the cattle appellant went as usual to Bentonville, and upon arriving there he found that the bank upon which his check was drawn had closed its doors that day, and it has not since reopened.

The parties had several conversations about the check, and appellant has at all times demanded that appellee pay it. The position of the latter was that they should divide the loss between them. Finally appellee paid appellant $200, which the latter refused to accept in full settlement of his demand, but when this payment was made appellee stated that he would pay nothing more unless the court compelled him to do so.

This is a suit on appellant's part to recover the balance of $400, and is defended by appellee upon two grounds: (a) that appellant had negligently delayed to cash the check, and (b) that an accord and satisfaction had been accomplished.

The court found there had been no accord and satisfaction; and we concur in that view.

The difficult question is, whether, as found by the court below, appellant, by his delay, has not himself sustained the loss.

The law of the subject was reviewed in the recent case of *Federal Land Bank of St. Louis* v. *Goodman,* 173 Ark. 489, 292 S. W. 659, where the court quoted as follows from the case of *Burns* v. *Yocum,* 81 Ark. 127, 98 S. W. 956: "'A check, like a bill of exchange, must be presented for payment within a reasonable time, and what is a reasonable time will depend upon the circumstances of each particular case.'"

It was said in the Goodman case, *supra,* that what was a reasonable time in any case depends on the circumstances of the particular case, and "means such time as a prudent man would exercise or employ about his own affairs."

The instant case is on the border line, but, when the situation and circumstances of the parties are taken into account, we have concluded that the check was not held for a time so unreasonable as to require the payee to sustain the loss. The payee was a farmer, not engaged in a commercial business. He resided eight miles from the trading town, in which the bank was located upon which his check was drawn, and only three days intervened before the check was presented for payment. Under all the circumstances we have concluded that appellant was not guilty of unreasonable delay in presenting the check for payment.

Having found that appellant had negligently failed to present the check within the time required by law, the court below decreed that appellant be subrogated to the rights of appellee in the deposits of the latter with the insolvent bank, to the extent of $400.

The entire decree will be reversed, and the cause will be remanded with directions to enter a personal judgment against appellee for the unpaid balance of $400 with interest.

LILE *v.* STATE.

Crim. 3817

Opinion delivered November 14, 1932.

Hays & Smallwood and *Cochran & Arnett,* for appellant.

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

KIRBY, J. This appeal is from a judgment of conviction for the murder while attempting robbery of one Cyrus Luman, who was killed by being struck on the head with a blunt instrument on the night of April 3, 1932, at about 7 or 8 o'clock, as he was closing his store, located in the Northern District of Logan County.

The only eye-witness stated that, while Mr. Luman had his back turned trying to lock the store door, a man with a white mask over his face ordered him to "Stick 'em up!" and as Luman turned the robber struck him on the head two or three times, knocking him down, and took witness' horse, upon which he had come to the store, and fled. The robber was about the same size and height as defendant.

The defense was an alibi, and 12 or 15 witnesses testified about having seen the defendant at other places during the day and on the night of the killing, which, if true, would have rendered it impossible for him to have been present at the time of the killing.

A witness, Frank Faulkenbury, who testified he was with the defendant all day, said he was in the vicinity of the killing and turned back near a certain filling station, and when they arrived at a graveyard a little before sundown he and his wife got out of the car, and Owen Lile, the appellant, went north for the purpose of getting some wine. That he was gone about an hour, and returned shortly after dark. This witness was called for further cross-examination the next day, and, being asked if he had not made the statement to certain people, naming them, on the night before that he was so drunk after he left Harkey Valley that he didn't remember anything, admitted that he made the statement, and said that he was so drunk after he left Harkey Valley that he did not know what happened. He also said that his first statement made to the deputy prosecuting attorney and a deputy sheriff was made upon their promise to turn him out of jail and let him go to work, he being in jail at the

time charged with the murder of Luman. Thereupon, the prosecuting attorney, in the presence and hearing of the jury, arose and said to the court, "If the court please, I want this man arrested and held on a charge of perjury." And the court replied: "Mr. Sheriff, you will take this witness into your custody." Defendant's attorney objected to the statement made by the prosecuting attorney and the action of the court, and saved exceptions. This is the only error urged for reversal of the cause.

In *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380, it is held that the commitment of a witness for perjury during the trial of the cause before a jury was prejudicial error. See also the note in the case of *State* v. *Swink,* 151 N. C. 726, 66 S. E. 448, 19 A. & E. Annotated Cases, wherein it is said to be the general rule that the commitment of a witness for perjury during a trial is prejudicial error. It was an invasion of the province of the jury by the trial judge to tell them in effect that the witness perjured himself in his testimony that would have been beneficial to appellant on the trial, necessarily discrediting his former testimony placing the defendant in the vicinity of the murder where he could have been present at the time of the killing.

The court might well have ordered the witness arrested after he left the court room and the presence of the jury, if he thought it should have been done, without having it done at the time, and, for this error, the judgment is reversed, and the cause remanded for a new trial.

UNITED STATES OZONE COMPANY *v.* MORRILTON ICE COMPANY.

4-2731

Opinion delivered November 14, 1932.

W. P. Strait, for appellants.

Robinson, House & Moses and *Edward Gordon,* for appellees.

MEHAFFY, J. On June 28, 1926, the appellants sold to the Morrilton Ice & Fuel Company, Charles Daugherty and James Daugherty certain material for $2,020, who paid cash with the order $510, leaving a balance of $1,510. This sum was not paid, and on September 30, 1926, appellants filed suit in the Conway Chancery Court against the Morrilton Ice & Fuel Company and the Daughertys for the balance due and prayed judgment for the debt, interest and costs, and that a lien be declared, and the property described be sold to pay the indebtedness, interest and costs.

A decree was entered in favor of appellants for the indebtedness, a lien was declared, and the property was ordered sold. An appeal was taken to this court, and the case was affirmed here. *Morrilton Ice & Fuel Co.* v. *Montgomery,* 181 Ark. 180, 25 S. W. (2d) 15. The Morrilton Ice & Fuel Company was a partnership, composed of James Daugherty and W. Charles Daugherty.

Before the above case was determined, a corporation was organized by the Daughertys under the name of Morrilton Ice Company, and the property of the partnership was conveyed to this corporation in November, 1927. About December 5, 1925, W. Charles Daugherty and James Daugherty executed and delivered to the Bank of Morrilton a note for the sum of $10,000. The note became due and payable December 12, 1925, and bore interest at the rate of 10 per cent. per annum until paid. The mortgage was properly recorded, and it contained the following clause:

"This mortgage is also given to secure any other indebtedness that we, or either of us, may be due the said Bank of Morrilton at any time prior to a foreclosure of this instrument."

Thereafter, in February, 1926, the Bank of Morrilton made another loan of $12,000 which became due in February, 1927. This note also bore interest at the rate of 10 per cent. per annum until paid. There was still another loan made July 29, 1926, for $4,216, and this note also bore interest at the rate of 10 per cent. per annum until paid.

The Bank of Morrilton thereafter became insolvent, and the Bank Commissioner took charge and sold the assets of the Bank of Morrilton to the First State Bank of Morrilton. In October, 1927, the First State Bank of Morrilton assigned and delivered the notes above mentioned, together with the mortgage securing the payment of said notes, to the Bankers' Trust Company of Little Rock, Arkansas, and thereafter the Bankers' Trust Company transferred and assigned said notes and mortgage to the Southwest Public Service Corporation.

It is alleged by the intervener, Southwest Public Service Corporation, that there is still due $37,607.80, with interest at the rate of 10 per cent. per annum from November 1, 1930, until paid.

The assignment to the Bankers' Trust Company was as follows: "For value received, this note, together with all mortgage liens securing the payment of same, is hereby transferred and assigned to the Bankers' Trust Company without recourse on the First State Bank."

This suit was begun by appellants in the Conway Chancery Court, who alleged the indebtedness of $1,510 with interest, for which they had a materialman's lien; that the lien had been foreclosed, the property ordered sold, and appeal taken to this court, where the judgment was affirmed. They also alleged the indebtedness claimed by the interveners and their mortgage were fraudulent and void, and that the transfers were fraudulent and void,

and it was further alleged that the debt to the Bank of Morrilton had been paid.

The defendants in the action, Morrilton Ice & Fuel Company and the Daughertys, filed answer denying the material allegations of the complaint. The Southwest Public Service Corporation filed an intervention alleging the indebtedness above set out, and the case was tried on the evidence of witnesses and the notes and mortgage and assignments thereof.

There is some conflict in the evidence, and the chancellor entered a decree in favor of the appellees, thereby holding that the intervener's lien was superior to appellants' lien. There were some charges of fraud in the transfer of certain property to Daisy Hines Daugherty, wife of W. Charles Daugherty, but these questions are not argued by appellants, and we will not discuss them. The only question for our consideration is, whether the appellees' lien is prior to the mechanic's lien established by appellants.

As we have already said, there is some conflict in the evidence, and there is no question about the priority of appellees' lien, unless appellants have established fraud.

It is contended by the appellants that, at the time the Morrilton Ice Company was organized as a corporation and issued shares, the appellants had a valid, subsisting lien on the new ice plant, and they contend that the pendency of their suit is constructive notice of the matters involved in the suit.

This is true, but the mortgage now held by appellees was executed to the Bank of Morrilton prior to the time of the bringing of the suit, and also prior to the time that appellants purchased the property for which they claim and have established a lien, and, unless there was some fraud, either in the debt, notes and mortgage, or the transfers, then unquestionably the mortgage lien would be prior to appellants' lien, so that, after all, it is a question of fraud.

If the transactions described by appellants were in good faith, and such transactions took place prior to the

rights of the appellants, the appellants would have no right to complain, and appellees' mortgage would have priority.

Appellants call attention to many authorities which we do not deem it necessary to discuss, because there is no dispute about the law. We do not deem it necessary to set forth the evidence, because, as we have already said, there was some conflict, and the only question is whether or not the evidence established fraud. Fraud is never presumed, but must be affirmatively proved, and the burden of proving fraud is upon the party who alleges it and relies on it. 27 C. J. 44 *et seq.*

Whether or not there has been fraud in any case is usually a question of fact. Fraud is a question of law only when the facts are undisputed and but one reasonable conclusion can be reached from the evidence, or where there is an entire failure to sustain the issue. 12 R. C. L. 444-445.

The rule is well established in this court that the finding of the chancellor on questions of fact will not be set aside by this court unless we can say that the finding of the chancellor is against the preponderance of the evidence.

We have very carefully examined the evidence, and have reached the conclusion that the finding of the chancellor is not against the preponderance of the evidence, and the decree is therefore affirmed.

HICKMAN *v.* WEIDMAN.

4-2732

Opinion delivered November 14, 1932.

H. P. Smith, for appellant.

Ross Mathis, for appellee.

McHaney, J. Appellant sued appellees to recover damages for personal injuries received by him while in their employ as a log-hauler in the woods. He was driving a four-mule team hitched to a log wagon, riding the lead mule of the rear span, and, while avoiding an obstruction in the log road, the wagon ran over a sapling which was dragged down onto appellant, striking him on the back and neck with such force as to crush him down on the pommel of the saddle, break three of his ribs and otherwise seriously injure him. Negligence of appellees was alleged to be that they failed to furnish him a safe place to work—failed to furnish him a safe road over which to haul logs. The particular allegations from the complaint in this respect being as follows: "That it was the duty of defendants to furnish plaintiff with a reasonably safe road over which to travel to said log yard, they having cut out said road and furnished it for plaintiff's passage thereover. That defendants, in cutting said road, failed to exercise ordinary care, but cut said road hurriedly and carelessly, leaving it narrow, crooked and dangerous. That plaintiff had used said road only on a few occasions, and at most of those times only for the purpose of taking his team alone to and from his work. That he had suggested to defendants that said road was not wide enough to haul logs over. That on said date plaintiff advised defendant, Weidman, when directed to go for said load of logs, that he, Weidman, according to his information, had recently, and since plaintiff had been over said road, cut certain special order logs along the course of said road and thrown some of the tops thereof in said road, which tops had not been entirely removed, thereby causing said road to be dangerous for the purpose of driving a wagon and team thereon. That defendant, Weidman, thereupon advised this plaintiff that he could get over said road and directed him to go for said load of logs. That plaintiff, without fault or carelessness on his part in carrying out said orders and attempting

to pass around a tree top thrown in said road by defendant, Weidman, the said road thereby being made narrow, caught the bumper on the front end of said log wagon against a sapling, frightening the teams, one of which he was riding, throwing said sapling against his back and neck, crushing him down against the pommel of the saddle, breaking three of his ribs, and severely injuring his back and neck, causing him great physical pain and mental anguish."

Appellees interposed a general demurrer to this complaint, which the court sustained, and upon his declining to plead further, his complaint was dismissed.

We think the court was correct in so holding, and that this case is ruled in principle by the recent case of *Williams Bros.* v. *Witt,* 184 Ark. 606, 43 S. W. (2d) 237. We think the complaint fails to allege any negligent act upon the part of appellees. An experienced log-hauler, such as appellant alleges himself to be, knows without investigation that in hauling logs from the woods he doesn't have an improved highway to travel over, and that the roads are crooked by reason of the necessity of avoiding obstructions. All these facts are known to the employee, as well as to the employer. He simply took the trail through the woods as he found it and voluntarily assumed all the risk and hazard in passing over it. The complaint shows that appellant knew and appreciated the danger incident to driving over the road. The driving of the team over or upon the sapling which was dragged down and struck appellant was his own act, and was not participated in by the appellees in any respect whatever. He was simply instructed to haul the logs and necessarily had to use his own judgment in doing so. His employers were not present and were not immediately directing his actions. If there was any negligence, it was that of appellant himself. In *Williams Bros.* v. *Witt, supra,* we said: "The right-of-way where appellee received his injury was his accustomed place of work. Its condition was open to his observation when he took the job. Appellee had been engaged in farming and logging

all of his life, and the work he was performing was no different from hauling wood on a farm or in hauling logs. An unavoidable accident is a complete defense against liability."

So here, appellant's injuries were not caused by any negligence of the appellees, but was simply an unavoidable accident, for which no person is responsible.

The court correctly sustained the demurrer, and the judgment of the court must be affirmed.

CANTLEY *v.* IRBY.

4-2822

Opinion delivered November 14, 1932.

W. E. Rhea and *G. B. Segraves,* for appellant.

McHANEY, J. Petitioner is the receiver of the St. Louis Joint Stock Land Bank, and respondent is the judge of the chancery court of Lawrence County. It is sought to compel, by mandamus, the respondent to appoint a receiver in certain mortgage foreclosure suits now pending in his court. In addition to the mortgage indebtedness and default in its payment, the complaints alleged that the lands were not of sufficient value to pay the amount of the judgment that should be rendered against them, and that the mortgagors were insolvent. The respondent declined to appoint a receiver or to hear any testimony in support of the above allegations, because of the provisions of § 1 of act 253, Acts 1931, p. 791. This section reads as follows: "In an action by a mort-

gagee for the foreclosure of his mortgage, and the sale of the mortgaged property, a receiver may be appointed where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt; provided, however, that no receiver shall be appointed at the instance of the holder of the mortgage where it appears that the debtor or mortgagor has mortgaged his crops, or his interest therein, for the purpose of obtaining money or supplies for the making of the crop and/or waived his rents, for said purpose, and that said mortgage debt and/or the consideration for said waiver of rents has not been repaid."

This statute does not make it obligatory on the court to appoint a receiver, but the provision is that it "may" do so, except in case the mortgagor has mortgaged his crops or waived his rents to obtain money to make the crops, which is the situation in the cases now pending in respondent's court.

The writ of mandamus will not issue to control the judicial discretion of an inferior court, but only to compel an exercise of such discretion. Such has always been the rule in this court since *Gunn* v. *County of Pulaski,* 3 Ark. 427, and still is. *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002. The respondent was vested with the discretion to appoint or to refuse to appoint a receiver. He exercised such discretion by refusing to appoint, and his action in so doing can be reviewed in this court only by appeal on the whole case. In this court, on a proper showing that the fruits of the litigation might be lost through delay, the case would be advanced.

Therefore petitioner had a complete and adequate remedy by appeal, and the writ of mandamus will be denied.

ALLEN *v.* BARNETT.

4-2867

Opinion delivered November 14, 1932.

Ernest Neill, for appellant.

S. M. Casey, for appellee.

BUTLER, J. Independence County was the owner of a common claim for deposits it had on hand in an insolvent bank amounting to the sum of $28,882.42. This bank has been in the course of liquidation since its failure in 1930, and no dividends have been paid on this claim, or any other of its class, except by special trade-out by conveyance or by assignment by the Bank Commissioner of lands or personal property other than money in satisfaction of such claim.

With this condition existing, the county court, on September 5, 1932, entered into a contract with the appellee by which it undertook to sell to him the aforesaid claim at the rate of twenty-five cents on the dollar, aggregating the sum of $7,220.60, and on that date entered an order directing the manner in which said contract should be carried into effect by the clerk and treasurer of said county. These officers questioned the power of the court to make the contract and order, and refused to comply therewith.

A petition for mandamus was filed in the circuit court, replies were filed by the appellants, and, upon consideration of the pleadings and testimony, the court found

"that said order made by the county court was fair and just in its terms and without collusion, and that the price obtained for the deposits was fair and reasonable and as good as can be obtained at this time, and that the other deposits in said bank, both State and individual, have been sold for no greater sum. And that, on account of the uncertainty as to the time of liquidation of said bank, and the date when the county and its various agencies would receive any dividend therefrom, that it is to the best interest of the county that said deposit claim be sold and the proceeds made available now for the county, and therefore the court finds that the petition for mandamus of plaintiff should be; and it is, hereby granted. It is therefore considered," etc.

On appeal the appellants do not question the good faith of the county court in making the order or its beneficial effect. Indeed, the evidence is not in conflict, and fully warrants the findings of fact made by the court. The question presented is one of power in the county court to make the sale to appellee, it being the contention of the appellants that no express authority is to be found in the Constitution or statutes, and that, as a county court could not pay a claim of the county in any greater amount than the value of the claim in lawful money of the United States, they reason that a demand of the county could not be sold for less than its face value. The county court is a creature of the Constitution, and it is not to be doubted that it has only such power as is expressly granted by the Constitution and statutes in aid thereof, or which are necessarily implied from the authority conferred.

The question before us is not the allowance and payment of a claim against the county, but the sale by the county of a demand it has for money due it. Therefore, § 2088, Crawford & Moses' Digest, quoted by the appellants to sustain their contention, does not apply. Section 28 of article 7 of the Constitution prescribes the jurisdiction of county courts, and § 2279 of Crawford & Moses' Digest is the statute passed in aid of the constitutional

provision. The applicable part of the sections of the Constitution and Digest is as follows:

Section 28, article 7, Constitution: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, etc., * * * and in every other case that may be necessary to the internal improvements and local concerns of the respective counties."

Section 2279, Digest: "The county court of each county shall have the following powers and jurisdictions: * * * to have the control and management of all the property, real and personal, for the use of the county; * * * to sell and cause to be conveyed any real estate or personal property belonging to the county and appropriate the proceeds of such sale for the use of the county."

We have held that the above provisions of the law authorize the county court, in the exercise of a sound discretion and acting in good faith, to sell real estate in the manner prescribed by statute. *State* v. *Baxter,* 50 Ark. 447, 8 S. W. 188; *Little Rock Chamber of Commerce* v. *Pulaski County,* 113 Ark. 439, 168 S. W. 848; *Ivy* v. *Edwards,* 174 Ark. 1167, 298 S. W. 1006. Indubitably, the power to sell personal property exists, as does the power to sell and convey real property. Section 9736 of Crawford & Moses' Digest, cited by the appellee, defines "personal property" as including "money, goods, chattels, things in action and evidences of debt"; so, the demand of the county for the deposit in the insolvent bank is personal property within the meaning of the statute, and, under the express provisions of the Constitution and statutes quoted, *supra,* we are of the opinion that the county court was authorized to make the order, and the circuit court was correct in awarding the mandamus, and its action in so doing is affirmed.

KIRBY, J., dissents.

HOGAN *v.* THOMPSON.

4-2735

Opinion delivered November 14, 1932.

J. Roy Howard, for appellant.

Fred A. Isgrig and *Harry Robinson,* for appellee.

BUTLER, J. Suit was instituted by the appellee in the court below to recover on a promissory note executed by the appellant, due six months after date, with interest thereon at the rate of 10 per cent. per annum from date until paid. The answer admitted the execution of the note, but set up usury as a defense thereto. The case was submitted to the court sitting as a jury on the following agreed facts:

"That on November 17, 1931, the defendant, J. P. Hogan, applied to the plaintiff, Anne Thompson, for a loan of $100. That the plaintiff was engaged in the loan business in Little Rock, Arkansas, and that she was also the agent of the Merchants' Coupon Service Company of

New York, a large firm dealing in all kinds of jewelry, radios, washing machines, and other merchandise.

"That the plaintiff agreed to make the defendant a loan of $100 if he would purchase a $10 coupon at the cost of $7.50, which he could use for $10 cash in the purchase of $40 or more merchandise from the Merchants' Coupon Service Company.

"That the defendant agreed to purchase said coupon, and gave his note for $100, due six months after date and bearing interest at the rate of 10 per cent. per annum, as evidenced by the note filed with the complaint. That defendant received $92.50 cash and a $10 coupon.

"Defendant admits that the coupon may be used for $10 cash upon the purchase of any article of $40 or more, but states that he has not used, or does not intend to use, said coupon, and that he agreed to purchase it in order to obtain the loan.

"It is further agreed that the plaintiff did not know at the time the loan was made that the defendant did not intend to use the coupon in the purchase of merchandise."

The conventional rate of interest in this State is 10 per cent., and, by § 13 of article 19 of the Constitution, all contracts for a greater rate of interest are declared to be void. This constitutional inhibition cannot be avoided by any trick or device, and the courts will closely scrutinize every suspicious transaction in order to ascertain its real nature; and if it appears that the contract is merely one for the loan of money with the intention on the part of the lender to exact more than the lawful rate of interest, the contract will be declared usurious and void. *Ellenbogen* v. *Griffey,* 55 Ark. 268, 18 S. W. 126; *Reeve* v. *Ladies' Building Ass'n,* 56 Ark. 320, 19 S. W. 917; *Dickerson-Reed, etc., Co.* v. *Stroupe,* 169 Ark. 277, 275 S. W. 520.

The principles by which the usury laws are to be applied in any given case are well settled. The burden rests upon the party pleading usury to establish it by a fair preponderance of the testimony, and it must appear that

there was an intent by the lender to exact more than the lawful rate of interest, and usury will not be inferred where the opposite conclusion can be reasonably reached. *Citizens' Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697; *Bauer* v. *Wade,* 170 Ark. 1020, 282 S. W. 359; *Cammack* v. *Runyan Creamery Co.,* 175 Ark. 601, 299 S. W. 1023. Collateral contracts entered into contemporaneously with a contract for the lending and borrowing of money, where the collateral agreement is in itself lawful and made in good faith, will not invalidate the contract for the loan of money as usurious, although its effect might be to exact more from the borrower than the sum which would accrue to the lender from a legal rate of interest. This is based on the principle that, since the law forfeits the entire loan and interest thereon for an exaction of usurious interest, however small, the intent to exact a usurious interest must be clearly shown and will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached. In the application of that principle, it was held in the case of *Citizens' Bank* v. *Murphy, supra,* that a loan of money was not usurious although the lender received certain commissions for collecting money which was applied to the payment of the debt, which commissions with the interest charged exceeded 10 per cent.

In *Simpson* v. *Smith Savings Society,* 178 Ark. 921, 12 S. W. (2d) 890, the court quoted with approval the general rule stated in 27 R. C. L., § 31, at page 230, to the effect that an agreement for a loan is not usurious, even though the lender refused to make it unless the borrower would enter into another contract from which the lender might gain advantage, if the collateral agreement was fair and legal.

In the case at bar the appellee was engaged in the loan business, and was also the agent of a mercantile firm which dealt in various commodities. The $10 coupon which the appellee required the appellant to purchase as a condition precedent to her making the loan could be applied in payment at its face value upon the purchase price

of any article of merchandise amounting to $40 or more purchased from the mercantile company. In the absence of a showing to the contrary, we must infer that the articles in which the mercantile company dealt were such as the company purported them to be, and the price for which they would be sold would be such as was usual and customary for such articles, and that they were worth the price demanded. The borrower did not intend to purchase any of the articles of merchandise or to use the coupon, but only bought it in order to obtain the money. The lender, however, at that time did not know that the borrower did not intend to use the coupon in the purchase of the merchandise. Therefore there can be no presumption that she intended the sale of the coupon as a device by which she might extort a sum greater than the legal rate of interest from the buyer, and, applying to the transaction the principles heretofore announced, we conclude that the court correctly found there was no usury shown, and that the appellee was entitled to recover her debt and interest.

Affirmed.

OGDEN *v.* WATTS.

4-2738

Opinion delivered November 21, 1932.

Gentry & Gentry, for appellant.

SMITH, J. On May 21, 1921, Henrietta Colter, being indebted to Emma Anderson, executed a note to evidence the debt and a mortgage, of even date, to secure its payment one year after date. The mortgagor died intestate and childless on December 9, 1929. After executing the note and mortgage, the mortgagor married Preston Watts, who furnished his wife the money with which to pay the note, but he took no assignment thereof until December 14, 1929, which was subsequent to the date of the death of his wife. On the last-mentioned date Watts took an assignment of the note and mortgage to himself, and on September 2, 1931, brought suit against the heirs of his wife to foreclose the mortgage. No payments had been indorsed upon the note.

An answer was filed by Ogden, who alleged that he had acquired the interests of the heirs of Henrietta Colter. This answer alleged the note was barred by the statute of limitations. Other defenses were also set up, which we do not consider, as, in our opinion, the suit was barred by the statute of limitations at the time it was filed.

The court below found that the note was barred by the statute of limitations at the time it was paid, but it appears to have been the view of the chancellor that, having furnished the money with which to pay the note and the mortgage at the request of his wife, the mortgagor, plaintiff was entitled to a lien on the land for the money paid, against which sum the rent of the property subsequent to the death of plaintiff's wife was charged him and credited on the debt claimed by him, and this appeal is from that decree.

It is conceded that, under act 149 of the Acts of 1925, page 441, entitled, "An act to abolish curtesy in this State," the plaintiff—the husband—had an interest in

the mortgaged property upon the death of his wife intestate, and that to protect this interest he had the right to be subrogated to any subsisting lien which he was required to discharge, and had discharged, to protect that interest. He was not a volunteer. *Charmley* v. *Charmley,* 125 Wis. 297, 103 N. W. 1106, 110 Am. St. Reps. 827; *Spurlock* v. *Spurlock,* 80 Ark. 37, 96 S. W. 753; *Jefferson* v. *Edrington,* 53 Ark. 545, 14 S. W. 903; *McDaniel* v. *Conlan,* 134 Ark. 519, 204 S. W. 850.

It is the law, however, as is very clearly stated in *Charmley* v. *Charmley, supra,* that the right acquired by the party thus subrogated is to use the security just as the original holder thereof might have done, and that "the devolution of such cause of action does not interrupt the running of the statute. Upon the termination of the full statutory period measuring the life thereof, it is destroyed. (Citing many authorities.) To enable a person to see what interest one has in the property of another by the right of subrogation, he must look at the matter from the viewpoint of the original owner before the devolution." The case of *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373, is to the same effect.

The mortgage being barred by the statute of limitations when the husband furnished the money to pay the note it secured, the lien thereof was not extended, nor was it acquired by subrogation. The lien had been extinguished before the payment was made. The money paid the payee in the note was not a payment on the note, but was a payment of the note, which was then an unenforcible obligation. This payment did not revive the note, nor extend the lien securing it. The husband—the appellee here—acquired therefore no right which he could enforce under this mortgage.

It is to be borne in mind that this proceeding is not one to enforce the husband's rights under the act of 1925, *supra.* Nor is it one to probate a demand against the estate of the deceased wife. We need not therefore consider whether it was barred as such demand. The suit is one to enforce, by subrogation, a mortgage securing a

note, both of which instruments were assigned to the plaintiff, and the question presented is disposed of by holding, as we do hold, that, the note being barred when it was paid, no right of subrogation was acquired by the payment.

The decree of the court below will therefore be reversed, and the cause will be remanded, with directions to dismiss the complaint as being without equity.

DILLARD *v.* WILSON.

4-2739

Opinion delivered November 21, 1932.

Feazel & Steel, for appellant.

Carrigan & Monroe, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in the circuit court of Hempstead County to recover $472.74 for supplies furnished to her tenants, J. L. Rogers and Wyatt Rogers, during the year 1930, on written order of appellee addressed to appellant. The order was in the form of a letter, and is as follows:

"Mr. Dillard: Luther and Wyatt Rogers are renting land from me. I bought pair of mules, wagon, &c, for them to work; of course, I have mortgage on a team and also on crop. They say you furnished them last year and would like to trade with you this year. I have tried to see you so we could talk this matter over, but

weather prevents. So you talk with them; let them have what they need. I am willing to do what you require, that is, in a reasonable way. Their note for mules &c is $240 with int. Mr. Wilson is to sell their cotton. I will gladly collect your acct. You can call me if I have not made myself clear. I will back them up in their trade.

(Signed) "Mrs. David Wilson."

Appellee filed an answer interposing the defense that appellant furnished unreasonable and excessive amounts of supplies.

The cause was submitted upon the pleadings, testimony adduced by the parties, and instructions of the court, resulting in a verdict and judgment in the sum of $250 against appellee, from which is this appeal.

During the progress of the trial, and over the objection and exception of appellant, the court admitted the testimony of E. E. Hughes, S. H. Bryant and Ralph Routen, to the effect that it was the custom of the trade amongst merchants in this locality to limit the amounts furnished tenants from $100 to $150, situated as appellee's tenants were. The court construed the written order as authorizing appellant to furnish appellee's tenants only such amounts as were customarily furnished by other merchants to tenants similarly situated, and, over the objection and exception of appellant, instructed the jury that, if it found appellant furnished appellee's tenants unreasonable and excessive amounts, it should deduct this excess from appellant's claim.

There is no dispute in the testimony as to the amount and value of the supplies actually furnished by appellant to said tenants.

A reversal of the judgment is sought upon the ground that the court misconstrued the order and erroneously admitted evidence contradicting the terms thereof. It is argued that, under the express terms of the order, appellant was authorized to furnish appellee's tenants with supplies in unlimited amounts provided no collusion was shown to exist between appellant and the tenants to furnish and receive unreasonable amounts.

Our construction of the order is that it authorized appellant to furnish only such supplies as were reasonably needed by the tenants to pitch and cultivate a one-team crop. Under this interpretation of the order, the court properly admitted testimony as to the customary needs of the tenants, and correctly instructed the jury.

No error appearing, the judgment is affirmed.

BUCKEYE COTTON OIL COMPANY *v.* WESTERFIELD

4-2722

Opinion delivered November 21, 1932.

Cockrill & Armistead, for appellant.

Clark & Clark and *George A. McConnell,* for appellees.

MEHAFFY, J. Sometime prior to July 5, 1927, C. W. Jones entered into a contract with the Continental Gin Company for the purchase of the gin machinery involved in this suit. The machinery was delivered at Conway on July 5, 1927. The agreement was that one-third of the purchase price was to be paid cash, but when the property was delivered Jones was unable to make the cash payment, and the Continental Gin Company took the note of Jones and Eula H. Jones, his wife, in the sum of $2,317, due September 1, 1927, secured by mortgage dated July 5, 1927, on one acre of ground on which the gin was located, and also on the machinery purchased by Jones.

On the same date Jones and his wife executed two promissory notes in the amount of $1,158 each to the Continental Gin Company, one note due November 1, 1928, and one due December 1, 1928. By the terms of the notes, title to the gin machinery was to remain in the Continental Gin Company until the notes were paid. On February 27, 1928, Jones and wife executed two promissory notes to J. S. Westerfield, one note for $500 due August 1, 1929, and one note for $3,500 due February 27, 1930. Westerfield did not at the time advance to Jones the $4,000, but advanced $1,816,69, and the balance of the $4,000 was a debt from Jones to Westerfield secured by mortgage on Jones' home. To secure the payment of this $4,000, Jones executed a mortgage on the same property, the one acre of ground and gin machinery, which was described in the mortgage to the Continental Gin Company. This mortgage executed on February 27 was recorded on March 1 1929. Of the cash advanced by Westerfield at the time Jones executed the notes and mortgage, $579.85 was paid to the Continental Gin Company in satisfaction of its note and mortgage executed by Jones and his wife. On February 3, 1930, the Buckeye Cotton Oil Company purchased from the Continental Gin Company the two title-retaining notes of Jones and wife, and paid therefor the sum of $2,299.89, the amount of principal and interest due, and the Buckeye Cotton Oil Company took an assignment of the notes without recourse, and on the same day, February 3, 1930, the Buckeye Cotton Oil Company loaned to Jones and wife the sum of $3,000 and took three notes of $1,000 each. The Buckeye Cotton Oil Company did not actually let Jones have the $3,000, but the notes which it had purchased from the Continental Gin Company, which Jones owed, together with the cash which it let Jones have at that time, amounted to $3,000. The three promissory notes given by Jones and wife to the Buckeye Cotton Oil Company, above mentioned, for $1,000 each were due November 1, 1930, November 1, 1931, and November 1, 1932. On the same day, February 3, 1930, Jones and wife, to secure the payment

of the three notes, executed and delivered to the Buckeye Cotton Oil Company a mortgage on the same real estate and gin machinery mentioned above. This mortgage was recorded on April 4, 1930.

Suit was begun in the Faulkner Chancery Court by the Arkansas Foundry Company to enforce a materialman's lien. The appellee, Westerfield, filed answer and cross-complaint, in which he claimed a first lien on the real property and gin machinery in question, and asked that the Buckeye Cotton Oil Company be made a party. The Buckeye Cotton Oil Company filed its answer and cross-complaint, setting up its notes and mortgage and asking that its lien be adjudged superior and paramount to the rights of the other parties. It also asked in its cross-complaint that, if the court found that the Continental Gin Company had waived the title-retaining provisions of its notes, the Buckeye Cotton Oil Company have judgment against the Continental Gin Company for the amount due on the notes purchased from the Continental Gin Company. Westerfield contended that his mortgage was superior and paramount to any claim of any of the other parties to the suit. The Buckeye Cotton Oil Company contended that its lien was superior and paramount to the interest of any of the parties to the suit. The Buckeye Cotton Oil Company contended that by reason of the purchase of the title-retaining notes from the Continental Gin Company its rights under these notes was superior to the claim of Westerfield. It also claimed that if the title-retaining provisions in the notes had been waived by the Continental Gin Company it was entitled to a judgment against the Continental Gin Company.

Westerfield testified that, when he took the notes and mortgage from Jones and paid the balance due on the mortgage to the Continental Gin Company, he was informed by the representative of the gin company that the amount he paid it paid the entire debt, and that, unless he had so understood it from the gin company, he would not have loaned the money and taken the notes and mortgage.

W. C. McGinley, representative of the Continental Gin Company, testified that he told Westerfield that that paid the mortgage, but that there were title retaining notes held by it which were given for the purchase price of the machinery. This testimony is contradicted by Westerfield.

W. F. Bradford, representative of the Buckeye Cotton Oil Company, testified about the purchase of the title-retaining notes from the Continental Gin Company, and introduced the notes and letter. The evidence was in conflict, and the chancellor found that Jones and wife were indebted to Westerfield in the sum of $4,440, for which he should have judgment, and that this sum should bear interest at the rate of 6 per cent. per annum until paid. That Westerfield's debt was secured by mortgage on the real estate and gin machinery, and that his lien was superior to any right, title, interest or lien of any other parties to the suit. The court also found that Jones and wife were indebted to the Buckeye Cotton Oil Company in the sum of $3,387.50, and that Jones was further indebted to the Buckeye Cotton Oil Company in the sum of $327.69, and that these amounts should bear interest at 6 per cent. per annum until paid. The court further found that the indebtedness due the Buckeye Cotton Oil Company was secured by a mortgage executed by Jones and wife dated February 3, 1930, and that this mortgage constituted a lien against the property above mentioned, and that this lien was subordinate to the lien of Westerfield, but superior to any right, title, interest or lien of the other parties to the suit. The court also found that the indebtedness due Westerfield and the Buckeye Cotton Oil Company was past due, and that each was entitled to a decree for the amounts above mentioned, and also found that the Buckeye Cotton Oil Company had no cause of action against the Continental Gin Company. There was a decree and judgment for the amounts above mentioned, and for the foreclosure of the mortgage and for sale of the property if the amounts were not paid. It was provided in the decree that the commissioner should

first pay the cost and expense of sale and costs of suit and then pay Westerfield the amount of his decree with interest; that he should then pay to the Buckeye Cotton Oil Company the amount of its decree with interest; that the remainder, if any, should be held subject to the orders of the court. It was also ordered and decreed that the cross-complaint of the Buckeye Cotton Oil Company be dismissed as to the Continental Gin Company.

It is contended by appellant that the Continental Gin Company did not waive title. It cites and relies on *Jordan* v. *Wilkerson & Carroll Cotton Co.*, 152 Ark. 533, 238 S. W. 780. In that case the court said: "Immediately after sale, and in ignorance of the fact that the purchaser had executed a mortgage, the seller took a mortgage to secure the purchase money. The first mortgage was given by the seller at a time when the vendor had title, and the court said that the first mortgagee was not misled to its disadvantage, and that it was manifest that appellant would not have accepted the mortgage in lieu of the retention of its title if it had actually known that its vendee had theretofore executed a mortgage to appellee." The court stated that under the circumstances in that case appellant, in good conscience and equity, should have been restored its rights under the note and contract in which it retained title. The court said: "This equitable principle was applied by this court in the restoration of a senior mortgagee's prior lien, where the senior mortgagee through ignorance of an intervening mortgage to a third party had taken a renewal mortgage and satisfied the first or original mortgage of record." The court cites as announcing the same doctrine, *Wooster* v. *Cavender*, 54 Ark. 153, 15 S. W. 192, and *Shurn* v. *Wilkinson*, 131 Ark. 167, 198 S. W. 279.

The question we have here was not decided or discussed in either of those cases. In the Wooster case, Judge HEMINGWAY, speaking for the court, said: "As the appellees acted in good faith and without culpable neglect under a mistake as to a material fact, it is within the ordinary powers of a court of equity to grant them

relief, provided it can be done without working hardship or injustice to innocent parties. In the Shurn case, *supra,* the court reaffirmed the doctrine announced in the case of *Wooster* v. *Wilkerson.* None of these cases in any way modify or change the rule announced in the case of *Thorton* v. *Findley,* 97 Ark. 432, 134 S. W. 627. This court said in the last-mentioned case: "And, as a general rule, if the vendor takes a mortgage or other security for the price without their reserving title, such act will be regarded as a waiver of the condition of the original sale and an election to consider the sale as absolute." There is nothing in the mortgage to the Continental Gin Company reserving title. When the Continental Gin Company took a mortgage on the machinery without reserving title, such act was a waiver of the title-retaining provision in the note. There is some conflict of authority as to the effect of taking a mortgage to secure the payment of the purchase price of property where the vendor has retained title. Taking a mortgage to secure the payment is inconsistent with ownership in the vendor. If the title remains in the seller and he takes a mortgage, he would be taking a mortgage on his own property. This being true, it is immaterial whether the vendor takes a mortgage on the property sold for all or only a part of his debt, because the taking of the mortgage is a recognition of title in the purchaser and is a waiver of the title-retaining provision of the note. Again, when Westerfield took his mortgage, he testified that he paid the Continental Gin Company $579.85, and was told that that settled the debt. This evidence is contradicted by the witness for the gin company, but he testified that he would not have paid the money to the gin company if he had known it claimed title to the property. Moreover, the gin company accepted the money and knew at the time that Westerfield was lending the money to Jones and taking a mortgage on the property as security. It is next contended that the Buckeye Cotton Oil Company did not waive title. What we have said above as to the mortgage given to the Continental Gin Company applies here. In

addition to what we have said, the Buckeye Cotton Oil Company purchased the notes from the Continental Gin Company, and the notes were transferred without recourse. In addition to the amount of the note purchased from the Continental Gin Company, the Buckeye Cotton Oil Company advanced Jones enough money to make the loan $3,000. For this amount it took from Jones three notes for $1,000 each, and at the same time took a mortgage on the gin machinery to secure the payment of these three notes. There was no provision either in the notes or mortgages reserving title. This was inconsistent with a claim of title in itself. It took these notes and mortgage after Westerfield's mortgage and with a knowledge of the Westerfield prior mortgage on the same property. It would make no difference whether the Continental Gin Company had waived the title retained in the notes or not. The Buckeye Cotton Oil Company waived its rights and, since the transfer of the debt was without recourse, it would have no claim against the Continental Gin Company. The Buckeye Cotton Oil Company knew when it purchased the debt that Jones had given a mortgage to the Continental Gin Company on the property, and, if this was a waiver, the Buckeye Cotton Oil Company knew as much about it as the Continental Gin Company.

We find no error, and the decree is affirmed.

SQUIRE *v.* SQUIRE.

4-2743

Opinion delivered November 21, 1932.

E. F. Friedell, for appellant.

McHaney, J. This is an action for divorce and custody of an infant child brought by appellant against appellee under our "ninety-day divorce law," commonly so-called, same being act 71, Acts of 1931, p. 201. This act amends § 3505, Crawford & Moses' Digest, and, among other things, provides that the plaintiff must prove, but need not allege, "a residence in the State for three months next before the final judgment granting a divorce in the action, and a residence for two months next before the commencement of the action." Appellant established her residence in Texarkana, Miller County, Arkansas, on November 4, 1931. On January 9, 1932, she began this action by filing complaint, making affidavit for warning order against appellee, a nonresident, causing same to be published according to law, and having an attorney *ad litem* appointed, who notified appellee of the pendency of the action and made report thereof. All necessary legal steps to obtain constructive service were taken, and appellee actually appeared and moved to quash the service, at which time he was served with process. On February 12, 1932, the cause was tried on the depositions of witnesses theretofore taken and upon oral testimony before the court, with the result that appellant's complaint was dismissed because the court was of the opinion that it had no jurisdiction of the parties. After reciting the substance of appellant's testimony in regard to her residence in Texarkana, the decree recites: "From the above testimony it is perfectly apparent that the plaintiff had no permanent intention on November 4, 1931, (the date she moved to Texarkana) and has no permanent intention at this time of making Arkansas her permanent home."

We think the learned trial court misconstrued the effect of act 71, *supra.* It does not provide that the plaintiff must, at the time of becoming a resident of this State, or at the time of trial, have a "permanent intention * * * of making Arkansas her permanent home." All that is required in this respect is that proof must be made of a residence in this State of two months before suit is brought, and of three months before final judgment. The statute makes no mention of a permanent intention of making Arkansas a permanent home. Under the old statute, § 3505, Crawford & Moses' Digest, it was necessary to allege and prove, in addition to a legal cause of divorce, a residence in this State for one year next before commencement of the action. Under this statute this court held in *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459, that actual and not constructive residence was contemplated. See also *Vanness* v. *Vanness,* 128 Ark. 543, 194 S. W. 498, and *Wood* v. *Wood,* 140 Ark. 361, 215 S. W. 681. But it has never been held that the plaintiff must have had a permanent intention to make this State a permanent residence. We have held that absence from the State for a few months on a visit, being temporary, did not interfere with the residence once established. *Wood* v. *Wood,* 140 Ark. 361, 215 S. W. 681. The law of divorce is purely statutory, and the General Assembly has enacted the statute under consideration. Whether it be good or bad is not a question for the courts.

In this case the undisputed proof is that appellant had been a resident of the State for more than three months before the trial. The statute relative to jurisdiction had been literally complied with, and the court was of the opinion that the evidence was sufficient to establish a cause of divorce. She frankly admitted that she came to this State to obtain a divorce; that she would remain here if she could secure employment to support herself and child. Even though she moved to this State to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the court of jurisdiction, if she were actually and in good faith a *bona fide* resident for the period prescribed by the statute.

The decree will therefore be reversed, and the cause remanded, with directions to grant a divorce and the custody of the child to appellant.

TEMPLE COTTON OIL COMPANY *v.* HOLLIDAY.

4-2744

Opinion delivered November 21, 1932.

McMillan & McMillan, Buzbee, Pugh & Harrison and *Jones & Jones,* for appellant.

J. H. Lookadoo and *Bush & Bush,* for appellee.

McHANEY, J. Appellee recovered judgment against the appellant in the Clark Circuit Court for damages in the sum of $30,000 for injury and death of Oliver D. Holliday, while he was employed by the appellant in its oil mill in Arkadelphia, alleged to have been caused by the negligence of appellant, its servants and employees. The Temple Cotton Oil Company prosecuted an appeal to this court, and the judgment of the Clark Circuit Court was affirmed. On motion for rehearing, this court reduced the judgment to $17,500. After the adjournment of the term of the Clark Circuit Court, and after the judgment had been affirmed in this court as modified, appellant filed in the circuit court of Clark County its motion for a new

trial, on the ground of newly-discovered evidence. The motion for new trial on the ground of newly-discovered evidence alleged the trial of the case in the circuit court, the verdict and judgment, and the affirmance by this court on January 18, 1932. It was alleged that Oliver Knapp was the witness in the original trial who testified as to any negligence and as to Holliday's injuries. Knapp had testified that he was present when the negro, Phillips, and the deceased, Holliday, were at the linters. Appellant sets out at length the testimony of Knapp in the trial in the circuit court, and alleges that it has discovered evidence which was unknown to it and not available before the time of trial nor at any time prior to the January term, 1932, and that it could not have been discovered by the exercise of reasonable diligence until after the adjournment of the term of the Clark Circuit Court at which the case was tried; that the newly-discovered evidence was material in the trial of said cause. The petition then sets forth in substance the newly-discovered evidence and the names of the witnesses. It alleged that these witnesses would testify that Knapp made admissions going to show and showing that he was not present when Holliday received his injuries, and that all of said admissions except those made to Saurie and Keisler were made after the case had been tried, and that they therefore did not exist at the time of the trial; that the admissions made to Saurie and Keisler were made shortly after the accident, but were not disclosed to petitioner until after January, 1932. Affidavits were filed in support of the petition for a new trial. It was also alleged in the petition that its counsel and manager exercised all reasonable diligence to ascertain and produce the testimony of witnesses to sustain the defenses of petitioner; that at the time of the accident petitioner had many employees engaged in the operation of the Arkadelphia mill, and the evidence of none of them was known or disclosed to the petitioner or its attorneys or employees until after the case had been tried and after January, 1932, and after judgment had been affirmed by this court. It alleged that

none of said witnesses were present or participated in the trial or had any connection whatever with the trial, or knew anything of the testimony of Knapp until they heard the matter discussed after judgment. It also alleged that, if the newly-discovered evidence had been available upon the hearing of the original motion for new trial, it is probable that the circuit judge would have granted the motion. But that it was not available and could not have been discovered and produced at the hearing of said motion with reasonable diligence. Petitioner thereafter filed an amendment to its petition and attached certain affidavits, and alleged that this newly-discovered evidence had come to the knowledge of the petitioner since filing its original petition. Still later petitioner filed a second amendment and offered to prove by other witnesses that Knapp was not present when Holliday was injured. A response was filed to the petition to which was annexed certain affidavits. There was a specific denial of all the material allegations in the motion. The response also stated that the newly-discovered evidence could only be cumulative, and that it was for the sole purpose of impeaching Knapp and discrediting his testimony. The response also alleged that the petition did not comply with the law which provides that the party asking for a new trial for newly-discovered evidence should not only state in his motion that he did not know of the existence of his testimony, but also should show facts from which it will appear that he could not have ascertained or obtained such evidence by reasonable diligence, and that neither the petition nor affidavits show any diligence. The response also alleged that the appellant was duly notified that Knapp was present and would testify, and the servants of the company tried to procure from Knapp a written statement before the trial with a full knowledge that he would be a witness; that it knew this five months before the trial. Numbers of the witnesses who testified for the petitioner were at the time of the injury, and still are, employees of the company. The petitioner filed a reply to the response, denying the allegations. A number

of witnesses testified, some of them to statements made by Knapp, and others that Knapp was not present at the time of the accident. A number of witnesses were also introduced by appellee, and they contradicted the witnesses of appellant. It would serve no useful purpose and would make this opinion entirely too long to set forth the evidence.

Appellant introduced several witnesses who testified in support of its motion for new trial on the ground of newly-discovered evidence. The appellee also introduced several witnesses who testified, and the evidence is in irreconcilable conflict.

The trial court found, first, that the appellant had failed to exercise reasonable diligence to procure the newly-discovered evidence; second that the evidence set out in appellant's motion and introduced on the trial of said motion was merely cumulative; and, third, that the newly-discovered evidence would not probably have changed the result.

We find it necessary to consider only the first finding of the trial court; that the appellant failed to exercise reasonable diligence to procure the newly-discovered evidence. Practically all the evidence upon which appellant bases its right to a new trial is to the effect that Oliver Knapp, who had testified at the trial that he was present when Holliday was injured and testified as to the accident and injury, was not present, and that Knapp had made certain admissions since the trial. A number of witnesses testified that Knapp was not present, and that he had made the admissions since the trial. Knapp himself, and a number of other witnesses, testified that he was present, and the evidence that he had made certain admissions was contradicted. In addition to this, appellant says in its brief in this case that the original complaint which was filed by appellee on October 9, 1930, alleged that "deceased, Holliday, and Oliver Knapp went downstairs and returned to the linter room; that the machinery was not in operation when they left, but was when they returned." The case was not tried until March

2, 1931, nearly five months after the complaint was filed. On March 2, 1931, when the case was tried, Knapp testified to statements in the complaint that they went downstairs and came back, and the machinery was not running when they went downstairs and was running when they came back up; and he also testified that Mr. Thompson, the superintendent, was upstairs part of the time. Mr. Thompson was present at the trial and testified, but did not contradict Knapp. Mr. Thompson was called as a witness twice on the trial of the motion for new trial, but he never contradicted this testimony of Knapp at any time. Appellant therefore knew when the complaint was filed that Knapp was a witness, and knew, according to its own statement from the statements in the complaint, something of what Knapp would testify. In addition to this, the record shows that the trial was on March 2, 1931, and appellant was given until March 23, 1931, to file its motion for new trial. It appears therefore that, by the exercise of any diligence at all, appellant could have discovered the evidence that it produced at the trial of the motion. Appellant says that it tried to get a statement from Knapp as to what his testimony would be, but that Knapp refused to give a statement. This certainly should not have caused appellant to be less diligent in the preparation of its case and the ascertainment of the facts.

Appellant cites numerous cases in support of its contention, but the question has been decided many times by this court. "It has been well settled by this court that applications for new trial on the ground of newly-discovered evidence are to be received with caution, and are to be left largely within the sound legal discretion of the trial court. Unless such discretion has been manifestly abused, the appellate court will not disturb the action of the trial court. An application on account of newly-discovered evidence should be corroborated by the affidavits of other persons than the accused, and, if it can be done, by those of the newly-discovered witnesses themselves. It is not sufficient that the applicant should state that he did not know of the existence of the testimony in time

to have brought it forward at the trial, but it is necessary that he should show facts from which it must appear that he could not have ascertained or obtained such newly-discovered testimony by reasonable diligence." *Rynes* v. *State,* 99 Ark. 121, 137 S. W. 800; *Freo Valley R. R. Co.* v. *Rowland,* 164 Ark. 613, 262 S. W. 660; *Little* v. *State,* 161 Ark. 245, 255 S. W. 892; *Northwest Ark. F. M. T. Ins. Co.* v. *Osborn,* 180 Ark. 757, 22 S. W. (2d) 387; *Conner* v. *Bowers,* 184 Ark. 102, 41 S. W. (2d) 977; *Kearns* v. *Steinkamp,* 184 Ark. 1177, 45 S. W. (2d) 519; *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. (2d) 20; *State use, Calhoun County* v. *Poole,* 185 Ark. 370, 47 S. W. (2d) 590; *Citrus Products Co., Inc.,* v. *Tankersley,* 185 Ark. 965, 50 S. W. (2d) 582.

It is the well-settled rule of this court that a new trial on the ground of newly-discovered evidence will not be granted unless the applicant has shown reasonable diligence. Whether he has shown diligence is a question in the sound legal discretion of the trial court, and, unless there is manifestly an abuse of discretion, the finding of the trial court will not be disturbed. There was no abuse of discretion in this case, and the judgment is affirmed.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* JOHNSON.

4-2591

Opinion delivered November 14, 1932.

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

John L. McClellan, Sam T. Poe and *Tom Poe,* for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of Hot Spring County to recover $2,000 for permanent injuries received by him in an automobile accident on a certificate of insurance issued to him by appellant under group policy G-2377, issued by appellant to the Missouri Pacific Railroad Company, protecting its employees from total disability on account of bodily injury or disease; and to recover $1,000 for the loss of an eye in the same accident on a certificate of insurance issued to him by appellant under group policy ADD-501, issued by appellant to the same railroad company, protecting its employees against accidental injuries. Appellee alleged that he was totally and permanently injured in an automobile accident on the 8th day of March, 1930, before he attained the age of sixty years, and, as a result of the accident, also lost the sight of his right eye, and prayed for judgment in the sum of $3,000 and costs, including an attorney's fee.

Appellant filed a motion to transfer the cause to the United States District Court for the Eastern District of Arkansas, alleging a diversity of citizenship, and that the amount sued for, including an attorney's fee, exceeded $3,000. This motion was denied over the objection and exception of appellant.

Appellant, reserving its objection to the jurisdiction of the court to try the cause, filed an answer denying the material allegations of the complaint.

The cause was submitted upon the pleadings and testimony, resulting in a judgment for $3,000 and costs, including an allowance of an attorney's fee in the sum of $550, from which is this appeal.

The group insurance policies were issued and delivered to the Missouri Pacific Railroad Company and remained in its possession in its general office at St. Louis. They were never in the possession of appellee nor subject to his inspection as far as the record reflects. The certificates were the only documents issued to him under the terms of the major policies. The only provision in the certificates as to either notice or proof of loss is as follows:

"Immediately upon receipt of due proof of loss, the company will pay to the employee, in full settlement of all obligations hereunder the amount set opposite such loss: * * *."

Only those protected under group policy G-2377 were eligible for protection under group policy ADD-501. Group policy ADD-501 contained the following provision relative to notice and proof of claim:

"Immediate written notice with full particulars and full name and address of insured employee shall be given by the employer to the company of any accident, injury or loss for which claim shall be made under the terms thereof. Affirmative proof of loss, on forms furnished by the company, must be furnished to the company at its home office, St. Louis, Missouri, within ninety days after the date of the loss for which claim is made."

Group policy G-2377 and the certificate issued under same provide that indemnity benefits of $2,000 shall be payable only if the insured, before attaining the age of sixty years, has become totally and permanently disabled; and group policy ADD-501 and the certificate issued under same provide that an indemnity of $1,000 shall be paid for the loss of one eye resulting from bodily injuries effected through external, violent and accidental means, independently of all other causes, * * *."

The facts, stated most favorably to appellee, are as follows:

On March 8, 1930, before appellee attained the age of sixty years, he was injured in an automobile wreck. As a result of the accident, appellee received a severe injury to his neck and spine and lost the sight of his right eye. After recovering to some extent from the injury to his neck and spine, he returned to his work on April 28, 1930, and performed the light duties connected with the character of work he was employed to do with the assistance and aid of his co-laborers until the shops closed down in December, 1930. He was unable to do the heavy work connected with his job. He did not realize the serious condition of his neck and spine until October, 1931, at which time Dr. Law, of Little Rock, made an X-ray picture of the injured parts, which revealed that his neck bones had been fractured. The picture showed that there was a compression type fracture of the bodies of the fifth and sixth cervical vertebrae; that the sixth cervical vertebra was crushed and tilted; that there was a dislocation of the cervical column; that the thoracic and dorsal vertebrae were jammed together; that the articulation between the vertebrae in the lower spine were narrowed and the bodies of the third and fourth dorsal vertebrae tilted; and that ankylosis had followed as a result of the injuries to the spine.

According to the testimony of a majority of the physicians who were witnesses in the case, appellee should never have returned to work and his neck and spine injuries permanently disabled him from performing hard manual labor. His duties required that he perform labor of that character.

Appellant contends for a reversal of the judgment upon the ground that the trial court erred in denying its petition for removal of the cause to the Federal court. It is argued that to include an attorney's fee in the amount sued for exceeds $3,000, interest and costs, and in amount makes the cause a removable one under the Federal Removal statute (28 USCA 41, 71). This court has ruled

otherwise in the case of *Mutual Life Insurance Company* v. *Marsh,* 185 Ark. 332, 47 S. W. (2d) 585. In the case referred to it was ruled that an attorney's fee in cases of this nature must be taxed as costs in compliance with the express terms of § 6155 of Crawford & Moses' Digest.

Appellant also contends for a reversal of the judgment on the ground that the undisputed testimony reflects that appellee was not totally and permanently disabled. This court has said that total disability as used in contracts of this character exists when the injury of the insured prevents 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 him, in his condition, not to do. *Industrial Mutual Insurance Company* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029; *Mutual Benefit Health & Accident Association* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812. The testimony in the instant case tends to show that appellee should not have attempted to perform his accustomed duties in the due exercise of common care and prudence. The testimony warranted the submission of the issue of total and permanent disability of appellee to the jury.

Appellant also contends for a reversal of the judgment on the ground that appellee failed to notify appellant within a reasonable time of his total and permanent disability and loss of eye resulting from the automobile accident. It is true, as argued, that he did not notify appellant of the accident and consequent injuries for about nineteen months, but he testified that his failure was due to the fact that the major policy requiring that notice be given was not in his possession or subject to his inspection. The requirement for notice and proof of the injuries was not in the certificate delivered to him. When he obtained information that notice was required, he notified appellant. The question as to whether he gave the notice within a reasonable time was a question for the jury and not the court. The facts in this case bring it within the rule announced in the cases of *Concordia*

Fire Insurance Company v. *Waterford,* 145 Ark. 420, 224 S. W. 953, 13 A. L. R. 1387, and *Missouri State Life Insurance Company* v. *Barron, ante* p. 46.

Under our view of the case, the issue whether the injury received by appellee in the automobile accident resulted in permanent and total disability and the loss of his right eye, and whether he gave appellant timely notice, were questions for determination by the jury under proper instructions. We have examined the instructions and find no conflict in them, and that they correctly announced the law applicable to the facts in the case.

No error appearing, the judgment is affirmed.

WOODMEN OF UNION OF AMERICA *v.* HENDERSON.

4-2728

Opinion delivered November 14, 1932.

J. D. Shackleford, for appellant.

W. Wilson Sharp, for appellee.

KIRBY, J. This appeal is from a judgment of the Monroe Circuit Court in favor of appellees upon an insurance benefit certificate in which they were named as beneficiaries.

The appellants filed a general demurrer to the complaint, and later a special demurrer, alleging that the court was without jurisdiction of the defendants or either of them. The demurrers were overruled, and, there being no further pleadings by the defendants, the cause proceeded to trial in the absence of the attorney for appellants, and judgment was rendered for the amount of the policy, costs, etc.

Appellants moved to vacate the judgment because the action was not filed in the proper county and the court was without jurisdiction over the defendants.

There is no bill of exceptions in the record, and appellees state in their brief that the testimony showed that they were citizens and residents of Monroe County, where the insured died.

It is urged that the court erred both in overruling appellants' demurrer and in denying their motion to vacate the judgment. The appellants insist that the court erred in overruling the demurrers, and argue that the court was without jurisdiction because the complaint did not allege that the beneficiaries were residents of Monroe County, and that the insured died there. The allegations of the complaint were sufficient without alleging the county of the residence of the insured and where his death occurred; since in fact he was a resident of that county and his death occurred there, and it could and would have been shown upon a motion to make the complaint more definite and certain, or upon an objection to the jurisdiction of the court on that account. The complaint did not show that the decedent, insured, was not a resident of the county and that his death did not occur there (§ 6150, Crawford & Moses' Digest), and the evidence introduced disclosed that he was such resident and died there.

Neither was error committed in overruling the motion to vacate the judgment, since no sufficient cause was alleged therefor, and it contained none of the grounds prescribed by the statute for such vacation, nor was any defense to the cause of action alleged therein.

The presumptions are all in favor of the validity of the judgment, and, as already said, there is no bill of exceptions containing the testimony, and the judgment must be affirmed.

It is so ordered.

WILLIAMS *v.* MATHIS.

4-2730

Opinion delivered November 14, 1932.

E. L. Carter, for appellant.

Isaac McClellan and *Wm. J. McClellan,* for appellee.

MEHAFFY, J. Appellant brought suit in the Grant Chancery Court on a note for $800, the payment of which was secured by mortgage on certain real estate. The note and mortgage had been executed by William C. Vickry and wife, Homie E. Vickry, to the Conservative Loan Company. The note and mortgage were afterwards assigned, and the appellant who brought the suit was the owner at the time of the suit.

In addition to the note for $800 and mortgage securing it, there were other notes given secured by a second mortgage for interest, but there is no controversy about the foreclosure of the second mortgage.

W. A. Mathis filed answer and intervention, alleging that one acre of the land was sold under a mechanics' lien, and that he became the purchaser.

Paul J. Clark also filed an intervention, alleging that Vickry, after the execution of the note and mortgage sued on, sold the lands to A. L. Harton; that A. L. Harton sold these to J. W. Hensley, and that Hensley conveyed the lands to the intervener, Paul J. Clark, and that said in-

tervener, Clark, purchased the lands at delinquent tax sale, but the lands had been redeemed. Clark claimed to be the owner by reason of his purchase from Hensley.

The appellants, David Williams and E. L. Carter, filed answer to the interventions, and the case was tried on an agreed statement of facts, and the court entered a decree in favor of E. L. Carter for $41.26 against William C. Vickry and Homie E. Vickry; found that W. S. Mathis held a mechanics' lien against one acre, which was included in the mortgages; that said lien was for repairs made upon the dwelling house situated on one acre of ground, and that a deed by the commissioner had been executed to W. A. Mathis. The court, however, found and held that Carter had a second lien on all the lands described in mortgages, except one acre claimed by Mathis, and, as to that one acre, that Carter had a first lien.

The court held also that the mortgage securing the note held by David Williams did not give the date of the maturity, and that there had been no memorandum of credit or of extension entered upon the margin of the record, and that said mortgage was barred by the statute of limitations as to the rights and interests of Mathis to the one acre described in the commissioner's deed.

The court held that Williams had a prior lien against all the land described in the mortgage except the one acre claimed by Mathis. The court held that the deed to Clark was executed after this suit was begun, and that he was not an innocent purchaser.

There was no appeal from the judgment and decree in favor of Carter, and therefore the only question for our consideration is whether Williams' lien was prior to the claims of Mathis and Clark; that is, whether appellant's claim was barred by the statute of limitations as to the claim of Mathis to the one acre and the claim of Clark under his deed.

The appellee contends that, since the mortgage did not show on its face when it was due, it became due immediately, and that Mathis and Clark had a right to

believe, since no memoranda were on the margin of the record, that Williams' note and mortgage was, as to them, barred by the statute of limitations.

They contend that, since this mortgage was made in 1920 to secure the payment of a note mentioned in the mortgage, and since the mortgage did not give the date of the note, the statute of limitations began to run at once, and was barred when this suit was begun.

We do not agree with the appellees in this contention. Where a mortgage is conditioned for the payment of a certain sum with interest, according to the tenor and effect of the note, to secure which the mortgage was given, and the note provides for the payment of interest annually, as shown by the interest coupons of this $800 note, the terms of such note are imported into the mortgage, and the note and mortgage are to be read and construed as one instrument.

The mortgage provides: "The foregoing conveyance is on condition that whereas the said grantors are justly indebted to the said Conservative Loan Company in the sum of eight hundred dollars for borrowed money, evidenced by certain promissory note of even date herewith executed by the mortgagors to the mortgagee herein, with interest thereon at 10 per cent. per annum, the interest from date until maturity being evidenced by coupons attached to said note (or in partial payment prior to maturity, in accordance with the stipulation of said note). "Now if, the said grantors shall pay or cause the said note to be paid, with interest, according to the tenor and effect thereof, then this instrument to be null and void; otherwise to be and remain in full force and effect."

There are numerous other provisions in the mortgage, but what we have quoted above is sufficient to show that the note was described, and it also clearly appears that the note was not due immediately, for it is expressly provided that the interest from date until maturity is evidenced by coupons attached to said note.

How could any one assume that the note matured immediately when the mortgage shows on its face that the

interest to maturity was evidenced by coupons attached to the note?

If no such provision was in the mortgage, a person desiring to purchase the land would know, at least he would be put on inquiry, as to when the note matured, because, as we have already said, the note and mortgage are to be construed together as one instrument, and the statement in the note as to when it becomes due is imported into the mortgage. 41 C. J. 452; *Scheibe* v. *Kennedy*, 64 Wis. 564, 25 N. W. 646.

Where a mortgage contains no express promise of interest and specifies no time of payment, it has been held that it is a mortgage due presently, or as soon as given. There are many authorities holding this, but no authority has been called to our attention holding that, where a mortgage describes a note, shows not only that it bears interest, but that interest coupons are attached to the note, such note is payable presently. The great weight of authority seems to be that, where the mortgage describes the note as bearing interest, and gives the amount, the note and mortgage must be construed together as one instrument.

Not only is this position supported by the weight of authority, but this court has approved this doctrine. It was said:

"The $6,000 note was sufficiently identified in the mortgage. The date and amount were given, together with the interest it bore. The only requirement is that the description be sufficient to put interested parties upon inquiry, which, when followed up, will inform them of the extent of the incumbrance." *Bank of Dyer* v. *Cole*, 157 Ark. 583, 249 S. W. 32.

We therefore hold that the interveners were not innocent purchasers. The provisions in the mortgage were sufficient to put them upon inquiry and it was their duty to ascertain when the note matured.

The evidence conclusively shows that the note was not due until 1930, and it would not have been barred until five years after that time. No payments had ever been

made on it, except the interest had been paid up to 1929, and no extension of time had ever been agreed to. There was therefore no payment made on the note, and no extension of time, and the statutes providing for memorandums on the margin of the record, have no application.

It follows from what we have said that the decree on appeal must be reversed, and, on cross-appeal, affirmed.

The decree of the chancery court is reversed, and the cause is remanded with directions to enter a decree foreclosing the mortgage of appellant, and in accordance with this opinion.

WASHA *v.* PRAIRIE COUNTY.

4-2746

Opinion delivered November 21, 1932.

George W. Craig and *W. Wilson Sharp,* for appellant.

J. F. Holtzendorff, for appellee.

SMITH, J. Appellant brought this suit by filing a claim in the county court of Prairie County against that county for the value of certain land which the county

had condemned for the construction of a part of State highway No. 70 along a changed route. The county court disallowed the claim, and there was a verdict adverse to the claimant upon an appeal to the circuit court, and a trial there before a jury.

The taking of the land is admitted, and it was established by undisputed evidence that the land taken had a market value. It is therefore insisted that the judgment from which this appeal comes must be reversed, inasmuch as the jury allowed the claimant no damages for his land.

It is true, of course, as appellant insists, that private property cannot be taken, appropriated or damaged for public use without just compensation therefor. Section 22 of article 2 of the Constitution so provides. It is true also that, before the owner can be said to have been compensated by benefits derived from the appropriation of his property, such benefits must be, not those enjoyed by the public generally, but must be special benefits accruing to the particular owner of the land from which a part had been taken. *Ross* v. *State Highway Commission,* 184 Ark. 610, 43 S. W. (2d) 75; *Ross* v. *Clark County,* 185 Ark. 1, 45 S. W. (2d) 31.

But it is also the law 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 before the taking, the owner in such case has received just compensation in benefits." *Cate* v. *Crawford County,* 176 Ark. 873, 4 S. W. (2d) 516. See also *Paragould* v. *Milner,* 114 Ark. 334, 170 S. W. 78; *Weidemeyer* v. *Little Rock,* 157 Ark. 5, 247 S. W. 62.

The testimony on the part of the county was to the effect that highway No. 70 was one of the principal roads in the State, and was a part of the interstate highway known as the "Broadway of America," and that the route of this highway had been changed to run through the town of Hazen and the land of appellant adjacent thereto, thus giving appellant a frontage along this highway, and that the result of this relocation of the highway was to make the portion of appellant's land which

remained of greater value than the whole thereof would be without the road.

The case was submitted under correct instructions defining the elements of damage which the landowner had the right to have the jury consider, but an instruction given at the instance of the county told the jury that these damages might be compensated by the enhancement of the value of the portion of the land not taken, and that, if this enhancement was equal to or greater than the damages sustained, the claimant had received compensation and could recover nothing in addition.

The testimony warranted the submission of this issue, and sustains the verdict of the jury. The judgment must therefore be affirmed, and it is so ordered.

PINE BLUFF IRON WORKS *v.* ARKANSAS FOUNDRY COMPANY.

4-2740

Opinion delivered November 21, 1932.

Hooker & Hooker, for appellant.

Barber & Henry and *Troy W. Lewis,* for appellee.

KIRBY, J., (after stating the facts). The case was tried by the court without the intervention of a jury, and without any special findings of facts requested or made or separate conclusions of law stated.

It is insisted that the court erred in treating the complaint as amended to conform to the proof, and that there is not sufficient evidence to support the judgment.

The suit was brought upon the theory of the sale of the materials by the appellee company directly to the appellant company, and the failure to pay the balance due therefor, and apparently decided upon the theory that appellant was the agent only of an undisclosed principal in making the sale of the materials to the Construction Company and in collecting and remitting the money due therefor, the complaint being amended, after the introduction of the proof without objection, to conform and correspond thereto.

If appellant was only the agent, as he claims to have been, in the sale and delivery of the materials to the contractor, he evidently regarded himself bound to the collection and remittance of the money due and received for the materials, and deposited the contractor's drafts and check paid therefor in his own bank to the credit of his

checking account, sending the amount due appellee company by his own check after taking out his commission, etc.

He received the check from the construction company for the balance due the Arkansas Foundry Company, together with the amount due him and his company, deposited it to his own credit in his bank, and sent his own check for the balance due for the materials furnished by the appellee company. This check was put in the bank here, forwarded to the bank at Pine Bluff for collection, and charged against appellant's account, but the bank failed and was taken over by the Bank Commissioner, who afterwards reversed the charge on the bank's books against appellant's account and returned the check unpaid. Appellant made out his claim for all his account in the failed bank, including the $600 not paid out on this check, which was returned to the payee and afterwards demanded by appellant company, and paid out of the two dividends received on the amount from the failed bank, $120, to appellee company for credit on its account.

Appellant need not have been considered a guarantor of the collection of the account and sale price of the materials delivered by him to the contractor, but, according to his own understanding, he was authorized to collect for the materials, and could, not, of course, accept other than money in payment therefor. The undisputed testimony shows that he deposited the money received for the materials in his own bank to his credit without anything to indicate that he received it on account of or for his principal, or anything to indicate that it was not his own money, and, having so deposited it, he became liable for the loss of it through the bank failure. Of course, if he had deposited it to his principal's credit or in such a manner as to indicate that it was not to his own personal account, such would not have been the case. *Darragh Company* v. *Goodman,* 124 Ark. 532, 187 S. W. 673, 31 Cyc. 1468 (f); see also 2 C. J. 742.

No error was committed by the court in allowing the complaint to be amended to conform to the proof intro-

duced without objection, since no new or different cause of action was stated thereby. *Griffin* v. *Anderson-Tully Co.*, 91 Ark. 292, 121 S. W. 297; *Shapleigh Hdw. Co.* v. *Hamilton*, 70 Ark. 319, 68 S. W. 490.

The original suit was on account for goods or materials sold and delivered to appellant, and the facts showed that the materials were delivered to appellant only as agent and by him sold to the Construction Company without disclosure of his principal and with authority to collect and remit the proceeds of the sale.

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

MISSOURI PACIFIC RAILROAD COMPANY *v.* MONTGOMERY.

4-2741

Opinion delivered November 21, 1932.

Brundidge & Neelly, Thos. B. Pryor and *H. L. Ponder,* for appellant.

Pace & Davis and *R. W. Robins,* for appellee.

MEHAFFY, J. The appellee, Alex. Montgomery, on June 7, 1930, was in the employ of the appellant, Missouri Pacific Railroad Company, as a brakeman on a freight train running from Monroe, Louisiana, to El Dorado, Arkansas. While in the service of appellant as such brakeman, he was under the direction of the conductor, who was in charge of the train, getting out a switch list, sitting down at the conductor's desk in the caboose. He had been called by the conductor and directed to do this work. While engaged in this work, he was thrown against the desk by a violent jerk of the train and injured. The appellee was at the time of the injury engaged in interstate commerce, assisting in operating a train which was carrying interstate commerce, and this 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 negligence of the engineer in stopping the train in an unusual and violent manner; that he was thrown against the desk and permanently injured; that the engineer, in a sudden and violent manner, checked the train without notice or warning, throwing him against the writing desk, injuring his right side, fracturing five or six ribs and otherwise injuring him, and that he is in constant pain and suffering. At the time, and since his injury, he has suffered great and excruciating pain of body and mind, and will continue to suffer throughout the remainder of his life. He further alleged that, at the time of his in-

juries, he was a strong, able-bodied man, 38 years of age and was earning $200 per month; that since his injury he has suffered great pain of body and mind and will continue to suffer, and that his injury is permanent; that since his injury he has not been able to perform any labor of any kind, and alleged that he was damaged in the sum of $25,000, 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 interposed the defenses of contributory negligence and assumption of risk. The undisputed evidence showed that the appellant was engaged in interstate commerce at the time of the injuries, and that appellee was engaged in interstate commerce. There was a verdict and judgment for $12,500, and the case is here on appeal.

Appellant's first contention is that the court erred in not giving instruction No. 1, requested by appellant, which directed the jury to return a verdict for the appellant. Appellant insists that this instruction should have been given because it says that the evidence is not legally sufficient to sustain the verdict; that evidence of the violent jerk of the train injuring appellee is not evidence of negligence. We have held that, under the Federal Employers' Liability Act, it is necessary for the injured employee to prove that the railroad company was negligent, and that its negligence was the proximate cause of the injury. The burden is on him to prove these facts, and, if he fails to prove either, he cannot recover. The negligence of the railroad company must in whole or in part cause the injury.

Appellant first calls attention to *St. Louis-San Francisco Railway Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102. We said in that case: "No witness was able to say just how the accident happened." We said further: "There was no evidence which tended to prove how the accident happened. As we have stated, it might have occurred in one of several ways." Appellant calls attention to several cases decided by courts of other States, but it is unnecessary to review them. In numerous cases

decided by this court, we have announced the rule contended for by the appellant. Appellant cites the case of *Patton v. T. & P. Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275. That case was decided before the Employers' Liability Act, but in that case the court said: "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact, as to be properly submitted to and determined by them." In that case the court also said: "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence." This is the well-established rule of this court. Appellant cites other cases to the same effect.

Attention is also called to *A. T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351, 50 S. Ct. 281. It was held in that case that the injured employee must not only prove negligence of the company, but that the negligence proved was the cause of the injury. 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. *Missouri Pacific Rd. Co* v. *Skipper*, 174 Ark. 1083, 298 S. W. 849.

Moreover, the court gave the jury the following instruction, among others: "The court instructs you that mere proof of a violent or unusual shock, jar or jerk on a freight train is not sufficient to show that it was caused by the carelessness of the engineer, and the fact that the brakeman suffered an injury caused by such operation of a freight train does not give rise to any presumption of negligence."

The undisputed evidence shows that appellee was injured by being thrown against the desk at which he was sitting at work in the performance of his duty. The appellee testified: "At the time I was injured I was getting out a switch list, and was sitting down at a writing desk. The conductor had requested me to do this, and I was engaged at that when I was injured." He also testified that it was the most violent "run-in" he had ever experienced. He had been engaged in railroading for about twenty years. Had fired and run an engine. He said the violent jar was caused by the improper application of the air by the engineer. He was asked on cross-examination: "In stopping a freight train of that length you would have more or less jerks in the caboose as the slack works out?" and he answered: "Not like the one when I got hurt." Appellee further testified that the bump in the caboose was caused by the improper application of the air. If it had been applied properly, it wouldn't have occurred. He said he was certain the brakes were released. He heard the air released through the retainer valves. The air had not gone in the usual way. Another brakeman, Charles E. Seal, was riding in the cupola of the caboose and could see the slack running in, and he prepared himself. He saw the violent movement of the train and was protecting himself against getting hurt. In that way he avoided injury. The movement was violent.

J. W. Barnard, who had had experience in handling all kinds of trains and who had worked for appellant for thirty years, from 1899 to 1929, testified that, with a train of 97 cars going 25 miles an hour and a "run-in" of sufficient violence to injure appellee and throw another man from a standing position in the caboose to the floor, in his judgment, the violent "run-in" would be caused by improper handling of the train. If stopping is properly done, there will not be any jar in the caboose of a train that has 100 box cars on it. The train can be stopped so that there will not be any jar. While the engineer, V. L. Brown, testified that he did not put on the brakes at

all, he also testified that he could not tell how there would be a jar; that it was his business to keep it from being a jar. He also said, if he had handled the train in the manner he said, there would be no jar that he knew of. The conductor, a witness for appellant, testified that there was a jolt, and that he had never seen any worse; that the brakes were applied. He knew the brakes were applied because he heard the air released. He was standing in the caboose, and was thrown down by the violent jar.

Some of appellant's witnesses testified that there was no violent jar, but all admit that, if the brakes were applied, that it was improper handling of the train. Not only do the witnesses testify that the air was applied improperly, but appellant's witnesses testify that there was trouble after this "run-in." They had to get out and release the brakes by hand. This testimony is not contradicted. There was substantial evidence of negligence, and the court did not err in refusing to give appellant's requested instruction No. 1.

Appellee and other witnesses had made statements which were introduced in evidence. We will not set forth this evidence. The credibility of witnesses and the weight of the evidence are questions for the jury. There was substantial evidence of negligence.

Appellant next contends that appellee assumed the risk. If the injury had been caused by an ordinary or usual jar, appellee could not recover. The court gave to the jury the following instruction: "The court instructs you that the plaintiff, by entering the service of defendant as a brakeman, assumed all the risks ordinarily incident to that employment, and, if you find from the evidence that he was injured by a cause ordinarily incident to his employment, that is one that in the performance of his duties it was contemplated he would meet and encounter, then he cannot recover in this action, and your verdict will be for the defendant." This instruction was given at the request of the appellant. When one enters the employ of another, he assumes all the risks and hazards ordinarily incident to the employment, and the mas-

ter is not liable for injury resulting to the servant if the injury to the servant was caused by one of the ordinary or usual risks or hazards of the employment; but the servant does not assume the risk of the negligence of the master for whom he works or any of its servants, unless he knew of the existence of the negligence. *Miss. River Fuel Corp.* v. *Morris,* 183 Ark. 207, 35 S. W. (2d) 607; *Aluminum Co. of N. America* v. *Ramsey,* 89 Ark. 522, 117 S. W. 568; *S. W. Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2d) 373; *C., R. I. & P. Ry. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197; *Western Coal & Mining Co.* v. *Burns,* 168 Ark. 976, 272 S. W. 357; *C., R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273 S. W. 15; *St. L. S. W. Ry. Co.* v. *Martin,* 165 Ark. 30, 262 S. W. 982; *M. P. Rd. Co.* v. *Remel,* 185 Ark. 598, 48 S. W. (2d) 548.

It would, of course, have been impossible for the appellee to have known of the existence of the negligence of the engineer, because he was in the caboose sitting and could not have seen any evidence of the negligence before his injury. The brakeman riding in the cupola saw the effect of the brakes and knew the danger and prepared himself, but the appellee and conductor, who were in the caboose, could not know this.

Appellant's next contention is that the method used to stop or slow down the train at the point of accident, is not negligence on his part. The engineer testified that he did not use the brakes at all. Several witnesses testified, not only that he did, but that he jammed the brakes so that they had to get out of the train and release them by hand. Moreover the engineer's testimony shows that, if he used the brakes, as the witness testified, it would have been improper. The engineer testified, as we have said, that he did not use the brakes at all. Other witnesses testified that he did, and the circumstances show that the brakes were used.

Appellant contends that the court erred in refusing to give instructions requested by it. The instructions requested by appellant and refused by the court were

some of them peremptory, and the others were all covered by other instructions given by the court.

There was evidence of the serious injury of appellee and of his pain and suffering, and substantial evidence that this was caused by the negligence of the appellant. We find no error, and the judgment is affirmed.

[redacted]

GRAVETTE *v.* VEACH.

4-2737

Opinion delivered November 21, 1932.

[redacted]

Rice & Rice, for appellant.

W. A. Dickson and *W. O. Young,* for appellees.

BUTLER, J. There are a number of interesting facts connected with this litigation, but which are not essential to its determination, and which we deem it unnecessary to set out. The pertinent facts which are virtually uncontradicted are as follows:

A number of the ladies of the town of Gravette, moved by an altruistic spirit, organized themselves into an unincorporated society which they called the Civic Improvement Club. After a time they conceived the idea of purchasing a park to be used by the public, which was to be a memorial to Field Kindley, a young man who had been reared in the town of Gravette by his aunt and who had lost his life in the service of his country. This club located a number of vacant lots which were owned by a nonresident of the town. Two of the ladies were appointed a committee to visit the owner and endeavor to arrange for the purchase of the property. The owner agreed to sell the property for $1,500, giving the club until a certain time to complete the purchase. The ladies immediately proceeded to solicit subscriptions, and in a short time raised $750, but, as the time limit approached they discussed the situation with Dr. Buffington, the mayor of the town, and interested him in their project, and he agreed to, and did, advance from his private funds the sum of $750, which sum, together with the money already raised, made up the purchase price of the property. This was paid to the owner, who conveyed the land by warranty deed to Dr. Buffington. Dr. Buffington stated that he did not remember just why the deed was made to him, but it was evidently done to protect him in the advances he had made. The ladies continued their activities in the matter of raising funds, and soon made up the amount that Dr. Buffington had advanced, and paid it over to him. When this was done, Dr. Buffington secured the service of a resident lawyer, who had died before this controversy arose, to prepare the necessary papers to carry into effect the intentions of the club. He drew a warranty deed conveying the property to the city, but inserted in the deed the following clause: "The above-de-

scribed property is to be used for public park purposes and is to be under the control of the ladies of Civic Improvement Club of Gravette." This deed was executed in June, 1924, and the Civic Improvement Club entered into possession of the property and proceeded to improve and beautify it. They erected a monument to the memory of Field Kindley, built a band stand, and otherwise adorned and improved the property.

In 1925 or 1926 the ladies of the Civic Improvement Club incorporated the club under the same name and with the same membership, its charter providing that each member of the unincorporated society was to become and be member of the incorporated society, and such others who might desire to join after the incorporation would be admitted to membership upon the unanimous vote of the charter members and the payment of a fee. The club remained in possession of the property and exercised control over it until shortly before this litigation arose, during which time the town of Gravette had contributed nothing to the purchase price or to the sums required to improve the property, its sole contribution being the furnishing of lights and water for the park to the amount of $36 per year.

There appears to have been no conflict as to the management of the park until August, 1930. It was the custom of the town to have a picnic annually during that month, and for some reason (possibly to raise funds for the city treasury) the town council made arrangements with a "carnival" to visit the town, which carnival, at the instance of the town council, came and pitched its tents and appurtenances upon the public park, over the protest of the club. Just what was said and done by the ladies is not disclosed by the record, but the men began to write articles and to publish them in the town paper about the ladies, which reflected upon the management of the park, and intimated that the ladies were difficult to get along with. The ladies met and called to their assistance nine men of the town, evidently not among those protesting, and designated them as "trustees," the purpose

being to use the trustees as a go-between for the club and the town council with the object of establishing a *modus vivendi.* These gentlemen were unable to negotiate a truce and, shortly after they had approached the council, the city filed this suit, exhibiting a copy of the deed from Dr. Buffington, heretofore referred to, alleging title in itself, and that the ladies of the Civic Improvement Club were setting up claim of control under said deed, and praying that the title be quieted in the town, and that the Civic Improvement Club be enjoined from interfering with, or attempting to exercise control over, the property.

At the hearing before the chancellor, where the evidence above recited was detailed by the witnesses, the court denied the prayer of the complaint, finding the facts to be as stated herein, and decreeing valid the clause in the deed granting control of the property to the Civic Improvement Club, and that legal title to the park was vested in the town of Gravette (plaintiff), but that the Civic Improvement Club should continue in the control of the property for the use named in the deed.

The appellant challenges the correctness of this decree, and invokes the well-settled rule that, where a grant is made in a deed of the title in fee, a subsequent clause limiting the absolute title, being in irreconcilable conflict with the title conveyed by the granting clause, is void. *CarlLee* v. *Ellsberry,* 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60; *Levy* v. *McDonnell,* 92 Ark. 324, 122 S. W. 1002, 135 Am. St Rep. 183; *Veasey* v. *Veasey,* 110 Ark. 393, 162 S. W. 45. The appellant contends that the granting clause conveys to the grantee the fee simple title, and that under the rule, *supra,* the clause quoted is void. It must be conceded that the rule contended for is the one established by our decisions, but the rule is not one of positive law, but rather one of construction to be applied where there is a clear repugnance between the nature of the estate granted and subsequent clauses in the deed, either in the habendum clause or elsewhere; for, in such cases, the courts are of necessity compelled to choose between the conflicting clauses, and it is

then that the arbitrary rule is invoked. In cases where the intention of the parties may be ascertained from a consideration of the entire instrument and the several clauses may be reconciled, the rule contended for must yield to that cardinal rule of construction that the intention of the parties as drawn from the entire instrument must govern.

"While the cardinal rule of construction is that the intention of the parties as drawn from the whole deed must govern, where such intention is uncertain, resort must be had to well-settled but subordinate rules of construction to be treated as such, and not as rules of positive law, the modern rule being that the intention of the parties when ascertained will prevail over all technical rules of construction; and it has been said that, since the language employed in deeds varies so materially and so much, precedents are rarely controlling in a concrete case, except as they may furnish general aiding rules. Where a deed expresses two conflicting intentions, it must be construed according to the rules of construction, although they may be denominated arbitrary. Further, a construction which will leave the way open for repeated and indecisive litigation should be avoided." 18 C. J. 252, § 197.

"A deed must be construed according to the intention of the parties, as manifested by the language of the whole instrument; and it is our duty to give all parts of the deed such construction, if possible, as that they will stand together; but where there is a repugnancy between the granting and habendum clauses, the former will control the latter." *Dempsey* v. *Davis,* 98 Ark. 570-573, 136 S. W. 975.

In *Whetstone* v. *Hunt,* 78 Ark. 230, 93 Ark. 979, cited in *Dempsey* v. *Davis, supra,* the following language was quoted with approval: "If," says Mr. Washburn, "there is a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former; but if they can be construed so as to stand together by limiting the estate without contradict-

ing the grant, the court always gives that construction in order to give effect to both."

An examination of the deed involved in the instant case shows no irreconcilable conflict in its several clauses, but, considered in its entirety, it clearly discloses the intention of the grantor. That intention primarily was to provide a park to beautify the town and promote the rational pleasure of its inhabitants. In carrying out this purpose the town of Gravette and the Civic Improvement Club were constituted qualified trustees, the one to hold the legal title and the other to exercise a power in trust. This trusteeship was divided, perhaps because it might have been the opinion of the scrivener, although erroneous, that the Civic Improvement Club, being only a voluntary association, was not qualified to hold the legal title; that this is true is now insisted by the appellant. It contends that at the time the deed was made the Civic Improvement Club was an entity unknown to the law, without power to hold or convey property. We do not agree with the position taken by learned counsel. It is well recognized that at common law voluntary and unincorporated associations may hold real property, either as the donees of the legal title or the beneficiaries of a trust, and that such associations when organized to promote some purpose beneficial to the general public, or of certain classes thereof, are to be deemed as charitable societies and governed by rules of law applicable thereto. 1 Beach on Trusts, § 317 *et seq.*

It is true, the right of such organizations to take the beneficial interest in real estate or to hold as trustee for benevolent uses is denied in some jurisdictions, but in others, including our own, that right is recognized and enforced. *Biscoe* v. *Thweatt,* 74 Ark. 545, 86 S. W. 432. From a consideration of the evidence, it is unquestionable that the creation of the park had its inception in the minds of the ladies of the Civic Improvement Club, and that they, in fact, were the purchasers, contributing from their own funds (and it is immaterial how these funds were derived) to the purchase price of the property, and

Dr. Buffington was merely their agent. The power therefore to administer the trust might well be implied to rest in the club and result from the nature of the transactions. It is unnecessary, however, to fix the interest of the club on that ground, for it has itself spoken through its instrument, and in the deed rests its expressed will. There is an express trust, therefore, by which the town of Gravette is to hold the naked legal title for the use of the public, such use to be administered through the agency of the Civic Improvement Club, and the property to be under its control. Express trusts are such as are created by the deliberate or intentional act of the grantor, and, in our opinion, the deed in question creates a trust and brings it within this classification. See *Bray* v. *Timms,* 162 Ark. 247, 258 S. W. 338; *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437.

Since it appears that by the charter of the Civic Improvement Club, incorporated in 1925 or 1926, all the members of the voluntary association became members of the incorporated society, this *ipso facto* dissolved the voluntary association and transferred its property and rights to the corporation. 5 C. J., § 18, p. 1338. It follows from the views expressed that the decree of the chancellor is correct, and it is therefore affirmed.

STROUD *v.* SNOW.

4-2745

Opinion delivered November 21, 1932.

E. E. Hopson, for appellant.

P. S. Seamans, for appellee.

BUTLER, J. G. W. Stroud, the appellant, was the owner of a tract of land, a part of which he undertook to subdue and cultivate. In doing this he went beyond his line, cleared and inclosed a small parcel of land beyond his true boundary which he occupied under a claim of ownership for a period of approximately twenty years. At about the expiration of this period of time the appellee, Snow, purchased a tract of land adjoining that of the appellant on which the appellant's fence had been built and the lands aforesaid inclosed and held.

On the trial of the case in the court below, the appellee and his witnesses testified that, after the purchase by appellee, he notified the appellant that his fence was over the property line, and after some discussion the appellant agreed that when the line was run by the surveyor, he would put his fence back on the true line, that the line was run by the surveyor, and the appellant was present at the time and then and there agreed to carry out his former promise. This was disputed by the appellant, who testified that he had never made any such agreement, but that the appellee entered on the land during the night and constructed a fence across the property, and that he thereupon brought this action, which was a suit for forcible entry.

Over the objection of the appellant, the court gave instruction No. 1 as follows: "Your verdict will be for the plaintiff for the title and possession of the property in controversy, and assess his damages, if you find that he has been damaged, for such an amount as you believe from the evidence to be a fair and reasonable rent for the land during the time the defendant has had same in his possession; unless you further find from the evidence that there was a controversy between the plaintiff and the defendant as to where the line between them should properly be; and then, unless you further believe from the evidence that an agreement was entered into between them that the line as surveyed by the county surveyor

should be recognized as a proper line and a fence constructed in accordance therewith, in which event your verdict should be for the defendant for the title and possession of the property in controversy."

To the giving of this instruction, timely exceptions were saved, and it is now urged that the instruction was erroneous, and that the court should have given instructions (a) and (b) requested by appellant.

Instruction (a) was for a directed verdict in favor of the plaintiff for possession of the land and $120 damages. Instruction (b) is as follows: "You are instructed that if you find from the evidence that the plaintiff, G. W. Stroud held the land in question in open, notorious and adverse possession for seven consecutive years, then you will find for the plaintiff and assess his damages for such sums as you find to be fair, reasonable rent for said land during the time that the defendant has had same in possession."

The court refused these instructions, to which ruling timely objections were made and exceptions saved. The jury found for the defendant and settled the disputed question of fact against the appellant, so that we must treat the agreement as established. This presents the single question, is the agreement sufficient to divest the title to the land in controversy acquired by lapse of time and the adverse possession of the appellant beyond the statutory period? The general rule is stated in 2 C. J., § 559, p. 256, as follows: "A title which has ripened by adverse possession cannot be divested by parol abandonment or relinquishment, but must be transferred by deed." This rule is recognized by this court in *Hudson* v. *Stillwell,* 80 Ark. 575-578, 98 S. W. 356, where we said: "If the occupancy was adverse for the statutory period, it operated as a complete investiture of title, and a subsequent executory agreement to readjust the boundary lines or any other act done in recognition of the validity of plaintiff's claim to the land would not remove the statute bar and reinvest the title." To the same effect are the decisions in *Parham* v. *Dedman,* 66 Ark. 26, 48 S. W. 673;

Shirey v. *Whitlow*, 80 Ark. 444, 97 S. W. 444; *O'Neal* v. *Ross*, 100 Ark. 560, 140 S. W. 743; *Hutt* v. *Smith*, 118 Ark. 10, 175 S. W. 399; *Blackburn* v. *Coffee*, 142 Ark. 430, 218 S. W. 836; *Dermott* v. *Stinson*, 144 Ark. 208, 222 S. W. 54, cited by the appellee.

In the recent case of *Haskins* v. *Talley*, decided by the Supreme Court of New Mexico, November 17, 1923, and reported in 29 N. M. 173, 220 Pac., at page 1007, our cases are reviewed, and the doctrine therein announced is approved as the general rule. See also *Lusk* v. *Yankton*, 40 S. D. 498, 168 N. W. 375.

The agreement under consideration in *Hudson* v. *Stilwell*, 80 Ark. 575, 98 S. W. 356, was a verbal one, and the reason for the rule announced in that case, which we have quoted, was that the agreement was such a one as would affect an interest in lands and was within the inhibition of the statute of frauds. *Parham* v. *Dedman*, 66 Ark. 26, 48 S. W. 673. The words in that rule, "or any other act done, etc," refer to executory agreements.

In the instant case there was no testimony as to anything except an executory agreement. There was no possession of the land in dispute surrendered by appellant or taken upon that surrender by appellee. Therefore, instruction No. 1 given by the court and heretofore set out was not only contrary to the rule announced in the cases cited, but was also not in accord with the rule announced in *Taylor* v. *Rudy*, 99 Ark. 128, 137. S. W. 574, cited in *Buchanan* v. *Roddy*, 171 Ark. 855, 286 S. W. 1020, as follows: "Where there in uncertainty as to the boundary, or the owners of adjoining lands are in disute as to the dividing line, the parol agreement of such owners as to the boundary establishes the line, and, when followed by possession with reference thereto, is conclusive on them"; and in *Cox* v. *Daugherty*, 75 Ark. 395, 36 S. W. 184; "Persons owning adjacent lands may, by agreement, establish the boundaries between their lands, regardless of the lines of the Government survey."

These cases are where there were agreements which had been executed and possession acquired under them which brought them without the inhibition of the statute of frauds, and there is no conflict in the principles announced in those cases with that announced in *Hudson* v. *Stilwell, supra,* and the other cases cited.

The judgment of the court below is reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

STATE EX REL. ATTORNEY GENERAL *v.* TAYLOR.

4-2875

Opinion delivered November 28, 1932.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellant.

Shinn & Henley, for appellee.

Daily & Woods, amici curiae.

SMITH, J. The court below made a finding of fact in which it is recited that, during the year 1930, School District No. 12 of Newton County, known also as Western Grove School District, issued various school warrants. The validity of these warrants is not questioned. Upon presentation for payment to the county treasurer, the warrants were not paid on account of lack of funds in the treasury to the credit of the district. But they were

all registered as provided in §§ 8980 and 8981, Crawford & Moses' Digest, and were so registered during the year 1930. Section 8980 required the county treasurer to keep in his office a well-bound book, in which he shall register, by number and in the order of presentation, all school warrants that may be presented to him for payment. It further provided that "this registration to be made before the warrant is paid, and it shall show the date of the presentation of the warrant, by whom drawn, on what district, and in whose favor, and for what purpose drawn, the amount and date of the warrant, date of payment, and to whom paid; and said book shall at all times be subject to the inspection of any taxpayer." Section 8981 provides that: "The order of any board of directors, properly drawn after the passage of this act, shall be presented to the treasurer of the proper county within sixty days after it was drawn by the said board of directors. All such orders shall be paid in the order of their presentation."

After the issuance and registration of the school warrants here in question, the General Assembly, at its 1931 session, passed several acts to which reference will be made. One of these is act 169 (Acts 1931, page 476), entitled, "An act to provide for the organization and administration of the public common schools." By this act §§ 8980 and 8981, Crawford & Moses' Digest, have been repealed. Other acts passed at the 1931 session are as follows: Act 203 (Acts 1931, page 665), entitled, "An act for the relief of the school teachers of the State." There was passed also act 206 (Acts 1931, page 673), entitled, "An act to make an appropriation of funds for the payment of the salaries of teachers and for other purposes." There was passed also act 207 (Acts 1931, page 674), entitled, "An act for the relief of the school teachers of the State."

These three acts last mentioned, read together, authorized and provided for the creation of a fund to be known as the "State Equalizing Fund," to be loaned by the State Board of Education, as the administrators

of the fund, to the school districts of the State with which to pay the salaries of teachers of such districts. Notes are executed by the districts to cover such loans, the form thereof being approved by the Attorney General. A prerequisite to any loan is the passage of a resolution by the board of directors of the school district requesting the loan. For the payment of such loans, when made, "the full faith and credit of the school district is hereby pledged."

District 12 of Newton County made application for a loan, and its board of directors passed an appropriate resolution, and, pursuant thereto, executed a note on one of the forms prepared by the Attorney General. This note was dated September 7, 1931, and was made payable October 1, 1932, and recited that: "This note is payable from the first moneys coming into the treasury of the Western Grove School District No. 12 from the last settlement with the county tax collector, and allotment of State funds, before the maturity of this note, and the board of directors of said school district has created a special fund in the treasury of the school district for the prompt payment of this note at its maturity, and said fund is irrevocably pledged therefor, as is also the full faith and credit of said school district."

When the county collector made his settlement and paid into the treasury the funds collected for the account of district 12, there was not enough money to pay both the warrants registered for payment in 1930 and the note for the money borrowed from the board of education in 1931, as above stated.

As both the registered warrants and the note cannot be paid by the treasurer with funds now on hand, the question arose, Which should be first paid?

Upon the facts stated, the court below declared the law to be that, "* * * upon the registration of said school warrants the holder and owner had a vested right to have said warrants paid under the provisions of §§ 8980 and 8981 of Crawford & Moses' Digest, which was in effect at the date of the issuance and registration of said warrants."

We concur in this view, for two reasons. The first is that it does not appear that the Legislature of 1931 attempted, either specifically or by implication, to displace the priority of registered school warrants; and for the second reason that such an attempt would be unavailing as impairing the obligation of a contract, contrary to the provisions of both the State and Federal Constitutions.

Legislation should be so construed, if it may be done reasonably, as to render it constitutional, and, with this canon of construction in mind, we are led to the conclusion that the 1931 legislation, *supra,* did not intend to displace rights which had been acquired before its passage. No language in any of the acts mentioned requires that holding. The law as it existed prior to the repeal of §§ 8980 and 8981, Crawford & Moses' Digest, *supra,* advised one about to contract with a school district that he might, after performing his contract and receiving a warrant in payment therefor, register this warrant, and that he would thereafter be entitled to have his warrant paid in the order of its registration. Legislation which postpones this right of payment to that extent impairs the obligation of the contract and is void.

It was held, by the Supreme Court of Washington, in the case of *Eidemiller* v. *City of Tacoma,* 14 Wash. 376, 44 Pac. 877 (to quote a headnote), that: "Where the law provides that a treasurer shall pay warrants in the order of their date and issuance, a statute, enacted after the warrants are issued, providing for the diversion of a fund out of which they are to be paid in such order, so that subsequent orders may be first paid, is invalid, as impairing the obligation of contracts."

The decision in the case of *McCracken* v. *Moody,* 33 Ark. 81, involved the application of the same principal. See also *Tipton* v. *Smythe,* 78 Ark. 392, 94 S. W. 678, 7 L. R. A. (N. S.) 714, 115 Am. St. Rep. 44.

It is not contended by the Attorney General that legislation is valid which impairs the obligation of a contract. The contention is that the 1931 legislation does not im-

pair the obligation of a contract. But, if the legislation of 1931 is to be construed as diverting funds which would otherwise have been applied to the payment of registered warrants in the order of their registration, we conclude that the obligation of those contracts would be impaired if the payment of those warrants is to be postponed until other obligations of the district have been paid and which obligations were authorized and incurred after the right of prior payment had become vested under §§ 8980 and 8981, Crawford & Moses' Digest.

The decree of the court below conforms to these views, and it is therefore affirmed.

JOHNSON *v.* BEEDE.

4-2747

Opinion delivered November 28, 1932.

J. Fred Parish and *Coleman & Reeder,* for appellants.

F. M. Pickens and *Jones & Wharton,* for appellees.

HUMPHREYS, J. The sole question presented by this appeal is whether the circuit court of Jackson County erred in dismissing appellants' petitions to exempt Richwoods and Cow Lake townships from the county-wide stock law adopted by the voters of Jackson County at the general election on November 4, 1930, because said petitions for the exemption thereof were not filed before the county court within three months after the adoption of the county-wide stock law. Under the law, as it existed

when the county-wide stock law was adopted, a majority of the voters in any township in said county were privileged by petition within six months from the date of the adoption to exempt the township from the provisions of the stock law. A majority of the voters in each of said townships filed petitions for this purpose on February 23, 1931, more than three months after the adoption of the stock law by the counties; but, in the meantime, and before the petitions were filed, act 44 of the Acts of 1931 was passed amending § 324 of Crawford & Moses' Digest as amended by act 206, Acts of 1925, by allowing petitioners in the several townships in said counties only three instead of six months in which to petition to exempt the townships after the adoption of the general stock law. The circuit court, on appeal from the county court, dismissed the petitions of appellants for the reason that they were not filed within the three months after the adoption of the general stock law.

Appellants contend that the court erred in dismissing the petitions for the alleged reason that the effect of the amendment changing the time from six to three months in which they might file petitions to exempt their townships from the provisions of the general stock law deprived them of vested rights. This argument would be sound if amendatory act 44 of 1931 swept away any contractual obligation or title, legal or equitable, to the enjoyment of property. The amendatory act operated upon a remedy only by changing the time from six to three months in which appellants might file petitions to exempt their townships from the provisions of the general stock law from the date of the adoption thereof. One does not have a vested right in remedies or matters of procedure. *Steers* v. *Kinsey,* 68 Ark. 360, 58 S. W. 1050; *Little Rock Railway & Electric Company* v. *Dowell,* 101 Ark. 223, 142 S. W. 165.

No error appearing, the judgment is affirmed.

SUGG *v.* UTLEY.

4-2749

Opinion delivered November 28, 1932.

[redacted]

Rice & Rice, for appellant.

J. T. McGill, for appellee.

KIRBY, J. This appeal challenges the correctness of a decree of foreclosure on certain lands as being erroneous because of an excessive amount recovered and the failure of the court to dismiss the action and render judgment for the amount of taxes paid by appellant under a void tax sale of the lands in accordance with the statute, §§ 3709, 3710, Crawford & Moses' Digest.

The suit was filed August 22, 1931, alleging that on July 23, 1926, the note and mortgage was given to the Pittsburg Mortgage & Investment Company to secure a loan of $2,500 bearing 6 per cent. interest from date until maturity, interest payable semi-annually, represented by 14 interest notes to bear 10 per cent. interest after maturity, and reciting that failure to pay any one at maturity should cause the entire indebtedness to be-

come due and payable. The note and mortgage were made exhibits A and B to the complaint, and had been sold and assigned to the plaintiff before maturity.

It was alleged that the interest note for $75, due February 1, 1930, the one for $75 due August 1, 1930, and another for $75 due February 1, 1931, were past due and unpaid; and that plaintiff elects to declare the entire indebtedness due.

The principal note provides: "That the sums promised to be paid shall bear ten per cent. interest after maturity, whether the same becomes due according to the terms hereof or by reason of default of any payments of principal or interest." The mortgage recites: "That the principal note of $2,500 shall bear six per cent. interest until due and, after maturity, eight per cent."

The note is made due and payable 7 years after date; and the mortgage also provides that, if default be made in the payment of the notes when due, the whole indebtedness shall, at the option of the holder, become immediately due and payable.

A general demurrer was filed but not passed on, and later an answer denying all the allegations of the complaint was filed by appellant.

The execution of the note and mortgage, the recording thereof and the assignment to the plaintiff, as alleged, is conceded, as is also the nullity of the State's proceedings and the deed to appellant, on account of the nonpayment of the taxes. Appellant paid the State $90 for the deed under the tax sale.

It is first insisted that the court erred in not dismissing this suit for failure to comply with the statute, §§ 3709, 3710, Crawford & Moses' Digest, requiring an affidavit of tender of taxes first filed, etc. This assignment of error can be disposed of simply by stating that no motion was made for dismissal of the suit or any objection made to the proceedings therein because of any such failure, and it was a matter which could be waived, and was, in fact, waived by such failure to make timely objection thereto. *Spain* v. *Johnson,* 31 Ark. 314; *Trigg* v.

Ray, 64 Ark. 150, 41 S. W. 55. Then, too, this is only a proceeding to foreclose a mortgage on certain lands with an allegation that the tax forfeiture thereon and deed thereunder was void, as the court held them to be.

Neither was the decree rendered for an excessive amount as claimed. The note contains the following clause:

"All sums herein promised to be paid shall bear ten per cent. per annum interest after maturity, payable annually, whether the same becomes due according to the terms hereof or by reason of default of any payment of principal or interest. This clause is preceded by the following acceleration clause: "If default be made for ten days in the payment of any sum, either principal or interest, after the same becomes due and payable according to the terms thereof, then the whole amount herein promised to be paid shall, at the option of the holder hereof, at once become due and payable."

In that part of the mortgage pertaining to the interest rate after maturity the figure 8 is printed, and, by oversight evidently, was not marked out or erased and the figure 10 substituted therefor. The note, however, as already recited, provides: "All sums herein promised to be paid shall bear ten per cent. per annum interest after maturity, payable annually, whether the same becomes due according to the terms hereof or by reason of default of any payment of principal or interest." The provisions of the note would control as against the recite in the mortgage, which is only a security and incident to the debt. 1 Jones on Mortgages (7th ed.), page 484; *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865.

It is contended that the principal note did not bear an increased rate of interest until the date of its maturity 7 years after date, and then that such increased rate should only be calculated from August 22, 1931, the day suit was filed, to January 11, 1932, the date of the decree. The interest was calculated at 10 per cent. from August 1, 1931, the date when the last interest note due became delinquent, and when the principal and other indebted-

ness was declared due by reason of the default. Under the terms of the contract, it was agreed that all sums promised to be paid should bear interest at 10 per cent. per annum after maturity, whether same became due according to the contract or by reason of the acceleration clause for default made in payment of principal or interest, and the payment of the interest on the principal contract at the increased rate became due upon any default made in payment of principal or interest according to the terms of the contract; and the court did not err in so holding.

Neither was appellee liable to the payment of the amount of the consideration for the void tax deed from the State attempting to convey the lands. It is conceded that the court properly held the tax forfeiture and deed void, and certainly appellee could not be required to pay such amount, not being bound in the first instance to pay the taxes on the land.

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

MOORE *v.* CHILDERS.

4-2885

Opinion delivered November 28, 1932.

W. A. Cunningham, E. H. Tharp, W. A. Jackson and *O. C. Blackford,* for appellant.

W. P. Smith, Chas. D. Frierson and *Charles Frierson, Jr.,* for appellee.

KIRBY, J., (after stating the facts). The court did not err in refusing to make the *nunc pro tunc* order requested. Upon a hearing it was disclosed that appellant's attorneys, when the demurrer was sustained, did not ask leave to amend, and the court noted on its docket that appellant elected to stand on his complaint and declined to amend, and dismissed it. The deputy clerk stated that the court read the docket entry, and none of appellant's attorneys objected to it, and that the motion to amend was not filed until the next day, September 1, which was more than 10 days after the expiration of the time allowed by law in which to file the contest.

This court has held that, in contested election cases for nomination to any particular office, it is necessary to allege the number of candidates for the particular

office and the vote received by each, in order to disclose whether the contestant received a plurality of all the legal votes cast, upon the proper deduction made for illegal votes. In *Hill* v. *Williams*, 165 Ark. 421, 264 S. W. 964, the court, in holding a demurrer to the complaint properly sustained, said: "There should have been an allegation in the complaint showing the number of votes received by each candidate, so that it would appear, after deducting the alleged fraudulent votes from the number accredited to appellee, that appellant would then have more votes than either one of his opponents.

"The demurrer to the complaint was properly sustained, as the general allegations therein of irregularities and fraud were mere conclusions, and the specific allegation failed to show that appellant received a plurality of all the legal votes cast for sheriff and collector at said election."

The complaint could not have been amended when the motion to remedy the defect was made on the 1st of September, since the amendment was not offered within 10 days after the certification of the nomination complained of, the provision of the statute requiring the contest to be filed within 10 days thereafter being mandatory and jurisdictional, and the failure to institute the contest properly within this time was fatal to the contestant. *Hill* v. *Williams, supra; Gower* v. *Johnson,* 173 Ark. 120, 292 S. W. 382; *Bland* v. *Benton,* 171 Ark. 805, 286 S. W. 976; and *Storey* v. *Looney,* 165 Ark. 455, 265 S. W. 51.

It is only amendments, in such contested election cases, to make the complaint and allegations thereof more definite and certain that may be allowed after the 10-day period for bringing the contest has expired, and such amendments alleging new and additional grounds of contest are not permissible. *Bland* v. *Benton, supra; Wilson* v. *Cardwell, ante* p. 261.

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

KOSER *v.* OLIVER.

4-2751

Opinion delivered November 28, 1932.

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

Cooper & Gathings, for appellee.

MEHAFFY, J. The appellants and appellees were candidates for members of the Crittenden County Board of Education. The appellees were declared elected, and the appellants began this suit to contest the election of appellees before the Crittenden County Board of Education on March 25, 1932. The county board of education met on April 21, 1932, to hear the contest. The appellees filed a motion to dismiss on two grounds: 1. That the county board of education had no jurisdiction, and that such jurisdiction was in the county court. 2. That the contest had been prematurely instituted as no certification of

the result had been filed with the county court clerk at the time of the institution of the contest, March 25, 1932. The motion of contestees was granted by the county board of education and the action dismissed. An appeal was prosecuted to the circuit court of Crittenden County, and the contestees filed motion to dismiss in the circuit court upon the same grounds as were stated in the motion filed with the county board of education. The circuit court held that the jurisdiction was vested in the county board of education, but that the contest had been prematurely instituted, and granted the motion and dismissed the complaint. The returns as made to the county board of education showed that M. L. Aldridge had received 464 votes; W. A. Koser, 483 votes; R. L. McElroy, 489 votes, and A. C. Oliver, 493 votes, and the county board of education adopted a motion to certify the election of A. C. Oliver and R. L. McElroy as members of the board. The contestants alleged fraud, and depositions had been taken tending to show that Koser and Aldridge had received many more votes than the contestees. This evidence was not considered, however, because the court held that the action must be dismissed because it had been prematurely brought. Section 30, act 169 of the Acts of 1931, among other things, provides: "Any contest of any results of any election in any school district shall be brought within 15 days after such election, if the results thereof shall have been certified to the county clerk 5 days previously, or within 5 days after such results have been certified and not thereafter."

It was manifestly the intention of the Legislature to limit the time in which a contest might be brought and not to prevent the contest from being brought sooner than that time, if the contestant desired to bring it sooner. It was evidently the intention of the Legislature that a contest might be brought any time after the election, not later than fifteen days after the election, unless the result was certified to the county court 5 days previous to the time of beginning the contest. In other words, it was the intention of the Legislature to give persons desiring to contest

the election 15 days after the election in which to bring his suit, or 5 days after the result had been certified to the county court. This is not a contest of the certification of the nominee or election of a candidate, but it is a contest of the result of the election. The result of that election, as shown by the face of the returns, was known and certified on March 24. The certificate of the board of education shows that a meeting was held on March 24, and the result of the election declared by the board, and certification made, but it is contended by the appellee that, because the certification of the result had not been filed with the county clerk, the suit could not be maintained. The record shows that the board of education met on March 11 and adjourned until March 24, at which time it declared the result. The board, however, did not file the certification with the county clerk until April 12.

The primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature, and the true meaning of the Legislature must be ascertained from a consideration of the whole act, and, when the intention is thus manifested, the court will not permit punctuation to control, but will disregard punctuation or will repunctuate, if necessary, to give effect to what otherwise appears to be the purpose and true meaning of the statute. 25 R. C. L., p. 960 and p. 965; 59 C. J., p. 948 and p. 989; *Berry* v. *Cousart Bayou Drainage District,* 181 Ark. 974, 28 S. W. (2d) 1060.

We said in a recent case: "Such a construction ought to be put upon the statute as may best answer the intention which the lawmakers have in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other considerations; and, whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contradictory to the letter of the statute. And such construction ought to be put upon it as will not suffer it to be eluded." *Gill* v. *Sanders,* 182 Ark. 453, 31 S. W. (2d) 748; *Turner* v. *Edrington,* 170 Ark. 1155, 282

S. W. 1000; *Casey* v. *Smith,* 185 Ark. 149, 46 S. W. (2d) 38; *Manley* v. *Moon,* 177 Ark. 260, 6 S. W. (2d) 281; *Indian Bayou Drainage District* v. *Dickie,* 177 Ark. 728, 7 S. W. (2d) 794.

We recently quoted with approval the following: "But, while the courts cannot add to, take from or change the language of a statute to give effect to any supposed intention of the Legislature, words and phrases may be altered and supplied when that is necessary to obviate repugnancy and inconsistency and to give effect to the manifest intention of the Legislature." *Hazelrigg* v. *Board of Penitentiary Com.,* 184 Ark. 156, 40 S. W. (2d) 998.

Act 169, which provides for the contest, also provides that the persons elected members of the county board of education shall qualify within 30 days. The county board of education in this case did not file the certification with the county clerk until more than 30 days after the election, so that the persons certified by them were already serving before this certification was filed.

It should be kept in mind that this is a contest of a result of the election, and not a contest of the certification of a candidate or officer. There appears to be no reason why one might not begin a contest immediately after the election, and there is nothing in the act that either prohibits this or indicates that one must wait until after the certification is filed with the clerk. The purpose of the statute is to require the contest to be filed within a certain number of days, and to prohibit its filing thereafter. It is similar to a suit of any other character where there is a statute of limitations. One is prohibited from bringing a suit on an open account after three years, on a written instrument after five years, but that does not mean that the action cannot be begun immediately after the cause of action accrues. So here, the Legislature has fixed a time within which a contest must be begun, and it cannot be begun thereafter, but it may be begun at any time after the election within the time limited by the statute.

Appellant insists that the case should be tried here on the evidence introduced, but this evidence was not passed on by the circuit court, and since the circuit court dismissed the complaint, holding that the action had been prematurely brought, the judgment is reversed, and the cause remanded with directions to overrule the motion and proceed with the trial of the cause.

SMITH, J., disqualified and not participating.

W. T. RAWLEIGH COMPANY *v.* MOORE.

4-2753

Opinion delivered November 30, 1932.

A. D. Whitehead, for appellant.

W. G. Dinning, for appellee.

MCHANEY, J. Appellant sued appellee on a bond executed by him and U. G. Fletcher as sureties for one Ginn, which guaranteed the payment of any balance that might be due and owing to it by Ginn, for goods sold and delivered by it to the latter. The bond contained the following provision: "It is agreed that there are no conditions or limitations to this undertaking except those written or printed hereon at the date the same was signed by us, and that no alterations, changes or modifications

hereto shall be binding or effective upon the W. T. Rawleigh Company, unless executed in writing and signed by ourselves and the said the W. T. Rawleigh company, and the corporate seal of the said company thereto affixed. Provided, however, that the liability of the sureties shall not exceed one hundred dollars." Liability was limited to $100 by typewritten addition to the bond. Appellee defended on the ground that, although he signed the bond at the solicitation of Ginn and one Jackson, agent of appellant, he did so on the express condition that one E. B. Fletcher would sign the bond with him and agree to share whatever liability there might be on said bond up to $100. Appellee was permitted to testify, over appellant's objections, that Jackson solicited him to sign the bond, and that he told Jackson he would do so if he would get E. B. Fletcher to sign also, and that he would not agree to be bound unless this was done.

The trial court submitted the question to the jury on an instruction that told the jury to find for appellant unless they found that at the time appellee signed it he notified the agent of appellant that he would not be liable thereon until Mr. E. B. Fletcher signed it. And further: "If you find from a preponderance of the evidence that Mr. Moore told the agent of the company he wouldn't be liable on the bond until Mr. E. B. Fletcher signed it, then the agent should not have sent the bond to the company without getting his signature on it, and, if he did, then the company would be bound by the acts of its agent, and it would not make Mr. Moore liable." The jury returned a verdict for appellee, on which judgment was rendered, and this appeal followed.

The court correctly permitted the testimony, and instructed the jury, and this question is ruled by the following cases: *Halliburton* v. *Cannon,* 160 Ark. 428, 254 S. W. 687; *Taylor* v. *Deese,* 179 Ark. 39, 14 S. W. (2d) 255; *Taylor* v. *Viner,* 185 Ark. 285, 47 S. W. (2d) 6. Many other cases might be cited. The undisputed testimony is that appellee told appellant's agent that he would not be bound unless E. B. Fletcher also signed. Instead of

getting E. B. Fletcher to sign, U. G. Fletcher was induced to do so. Judgment was rendered against him and Ginn, as they did not defend or appeal. Notice was therefore given to appellant's agent, and notice to the agent is notice to it.

The judgment is therefore affirmed.

FORT SMITH GAS COMPANY *v.* GEAN.

4-2748

Opinion delivered November 28, 1932.

Hill, Fitzhugh & Brizzolara, for appellant.

George W. Dodd, for appellee.

BUTLER, J. On the 12th day of July, 1916, John Emrich and Katie E. Emrich conveyed to the appellant's predecessor in title a right-of-way across 240 acres of land to be used for the laying and maintenance of pipe lines for the transportation of oil and gas, and the privilege of erecting and maintaining telegraph and telephone lines, if necessary. Reservation was made by the grantors for the use of the premises, except for the purposes specified in the grant, that they might recover damages arising to the crops and fences if the same were injured by the grantees in the exercise of the easement. The consideration named in the deed for the grant of the right-

of-way was the sum of $1 "and the further consideration of all gas used by grantors for domestic use free of charge, to be paid when such grant shall be used or occupied."

After the execution of the conveyance the way for a pipe line was located and laid across the property of the grantors, some two or three hundred feet distant from a residence then occupied by Mr. and Mrs. Emrich. Emrich made connection with the pipe line, and laid a pipe from it to his home, and he and Mrs. Emrich used the gas for domestic purposes until they died some years later. After they died the residence was in charge of a caretaker for a time, who only used the basement. The lands were devised to a granddaughter, who, in August, 1931, conveyed five acres out of the tract, and on which the Emrich residence was located, to the appellees, no part of which was on the right-of-way. Shortly after this, a gas meter was installed by the appellants and a charge made for the use of the gas as was made to other customers in the city of Fort Smith. This resulted in the bringing of this action by the appellees to restrain the appellants from discontinuing the furnishing of natural gas for domestic purposes to the appellees in the Emrich dwelling, and for a mandatory injunction requiring them to furnish said gas free of charge.

The chancellor heard the case on the pleadings and testimony and found that the right to the use of gas free of charge was a covenant running with the land and became annexed and appurtenant to the dwelling house on the tract of land purchased by the appellees, and therefore they were entitled under their deed to the use of gas free of charge. The appellants seek a reversal of the decree on three grounds: first, that there was no covenant in the conveyance by Emrich of the right-of-way running with the land; second, that there could be no specific performance of the contract; and, third, that the contract is void as against public policy. We need consider only the first contention as our view of that is determinative of this litigation.

It is our opinion that the stipulation in the conveyance quoted, *supra,* was personal to the grantors and not a covenant real as is insisted by the appellees. We have examined with care all of the authorities cited in the splendid brief of counsel for the appellees which he contends support the view that the use of gas for domestic purposes mentioned in the conveyance of the right-of-way was a covenant running with the land and appurtenant to the Emrich residence. To sustain the view that a covenant to furnish gas is one to run with the land, counsel cite *Indiana Natural Gas Co.* v. *Harper,* 50 Ind. App. 555, 98 N. E. 743; *Harper* v. *Hope Natural Gas Co.,* 76 W. Va. 207, 84 S. E. 770, L. R. A. 1915E 570; *Indiana Natural Gas Co.* v. *Hinton,* 159 Ind. 398, 64 N. E. 224; and Thornton on Oil & Gas, (2d ed.) §§ 92 and 93 (now § 99, vol. 1, 4th ed.). An examination of these cases shows that all of them arose out of contract for lease of land for the exploration or production of oil and gas, and the furnishing of gas free of charge was a part of the rent issuing out of the demised premises.

The cases of *Johnson* v. *American Gas Co.,* 8 Ohio App. 124, and *Anderson* v. *Empire Natural Gas Co.,* 116 Kan. 501, 227 Pac. 347, 41 A. L. R. 253, cited by appellees, appear to be more nearly in point, but in the Johnson case the contract under consideration was one where the gas company was granted an easement over a certain farm in consideration of the sum of $1 and the furnishing of free gas in the residence of the grantor. The court in discussing the consideration, said: "Beyond question, the real consideration was the gas to be furnished * * * and this 'in the residence of John McLandsborough,' not to or for John McLandsborough, but in the residence; therefore, the name 'John McLandsborough' is descriptive of the residence in which the gas was to be furnished."

In the Alderson case, *supra,* the grant was the right of laying a gas pipe across the real estate of the grantor, and as part of the consideration therefor the grantee agreed to furnish gas "for use on the premises" at a

certain rate. Construing the language of the contract, the court said: "'The only reasonable construction of the contract is that gas was to be furnished on the premises leased for use in the buildings thereon by whoever might be the owner thereof at any time in the future, so long as the land is occupied by the pipe lines of the defendant.''

Murphy v. *Kerr,* 5 Fed. (2d) 908, 41 A. L. R. 1359, cited by the appellees, was a case where a stipulation in a deed to furnish water on the tract of land conveyed was held to be a covenant running with the land, but the tract conveyed was without water and without means of obtaining it save in the mode existing at the time of the conveyance as mentioned in the deed. At the time the land was conveyed to the grantee, water was being conveyed into a reservoir then established on the land through pipes already laid connecting the reservoir with water on another parcel of land owned by the grantor. Here the easement was *in esse* at the time of the grant, and was not only beneficial, but essential to the use of the land conveyed. So, in the case of *Hess* v. *Kennedy,* a New Jersey case, 69 N. J. Eq. 138, 61 Atl. 464, where a deed conveyed a certain lot on which there was a residence with water fixtures and a drain pipe crossing another parcel of land belonging to the grantor and emptying into a public sewer, and where the deed contained no specific mention of the drain but the usual clause conveying ''ways, waters, privileges, with the appurtenances, etc,'' it was held that the drain then existing was an easement appurtenant to the lot conveyed and passed to the grantee and those holding under him because it was in being at the time of the grant and necessary for the enjoyment of the land conveyed.

In *Southern Pac. Ry. Co.* v. *Spring Valley Water Co.,* 173 Cal. 291, 159 Pac. 865, L. R. A. 1917E 680, relied on by appellee, the question involved was whether the language of the instrument constituted an agreement by the water company to furnish water to the railroad company, and, if so, whether an enforcement of it would be

opposed to public policy. The grant of the easement was "in consideration of the construction and maintenance of a highway at Newark Station and the free use of water therefrom for fire and station and all other railroad purposes." The court merely held that the stipulation contained such an agreement, and that the same was not contrary to public policy.

The facts in *Toothe* v. *Bryce,* 50 N. J. Eq. 589, 25 Atl. 182, and the principle involved are similar to the cases of *Murphy* v. *Kerr* and *Hess* v. *Kennedy, supra.* In none of these cases is the covenant like that in the case at bar. The two cases most nearly approaching this, as has been said, are *Johnson* v. *American Gas Co.* and *Alderson* v. *Empire Gas Co., supra,* but it is to be noted that in both of these cases, as has been said, the reference is made to "the premises" or "the residence" where the gas is to be used. It is the general rule that those covenants which are held to run with the land and to inure to the benefit of those succeeding in title to the grantee are such as generally affect the land itself and confer a benefit on the grantor, but where the covenant imposes a burden on real estate for the benefit of the grantor personally it does not follow the land into the possession of an assignee.

It is the contention of the appellants that the agreement to furnish the gas free of charge in consideration of the conveyance of the right-of-way was a personal right to the grantor, and to this view we assent. The consideration named in the conveyance was "all gas used by grantors for domestic use." It does not limit the use of gas to the grantor in his residence, or at any other place, but makes it personal to him to be used where and when it may be convenient, so long as its use is applied for domestic purposes. We are of the opinion, with the appellants, that the case of *Field* v. *Morris,* 88 Ark. 148, 114 S. W. 206, controls the case at bar, and the principle announced in Washburn on Easements, page 17, § 1, there quoted with approval by the court, applies here: "A right in gross (a personal right), whether an easement or a profit in the land, is clearly not assignable or inheritable

if it is created by a grant in which the right is given to the grantee, without any mention of heirs or assigns or successors, etc., or other words which show an intent to extend the right beyond the person of the grantee. Such a grant conveys only a personal right to the grantee, and when he dies the right is extinguished, and no attempt which he may make in his lifetime to assign or transfer the right will be successful." In the Field case the grantor inserted in the deed the following words: "Reserving to ourselves the use of one and one-half acres free of rent, where the mill and gin stands in southwest corner of said tract, with the privilege of removing buildings and machinery therefrom, * * * and we are to have the use of one and one-half acres free of rent as long as we or others holding under us may want to use same for running machinery at said point." And, in commenting upon this, the court said: "The last quotation from the deed shows only how long Darter and wife were to have the use of the land free of rent. 'Others holding under us' refers to persons holding like tenants. No mention of heirs, assigns, or successor, or words of the same import, is made in the reservation. It is exclusively to Darter and his wife, was personal, and died with Darter; his wife having had only the right of dower in the land and joined with him in executing the deed for purpose of relinquishing dower."

It is argued that words of inheritance in connection with the covenant are not a prerequisite to a covenant running with the land, and that, by the terms of § 1498 of the Digest, such words are not necessary to convey an estate in fee simple; all this may be, but here the covenant is not real but personal, and there was no attempt by any one to convey Mr. and Mrs. Emrich an estate in fee, and the statute can have no application.

Reliance is placed by appellee on several cases of this court to sustain his contention that the covenant in the conveyance from Emrich is one which will inure to his successors in title, to-wit, *Railway Co.* v. *O'Baugh,* 49 Ark. 418, 5 S. W. 711; *St. L., I. M. & S. R. Co.* v. *San-*

ders, 91 Ark. 133, 121 S. W. 337; *Rugg* v. *Lemley,* 78 Ark. 65, 93 S. W. 570; *Bank of Hoxie* v. *Meriwether,* 166 Ark. 39, 265 S. W. 642; *Holtoff* v. *Joyce,* 174 Ark. 248, 294 S. W. 1006. But in none of these cases was the covenant like or similar to that in the Emrich conveyance; the first two involved the interpretation of agreements relating to the erection and mode of payment of "party walls"; the second two related to agreements under which dams and levies were built on the grantor's lands, and the last case (174 Ark. 248) was a covenant for an easement in an alley to be carved out of lands of the grantor adjoining as a way of ingress and egress to the parcel conveyed. In all of these cases the benefit was to the land, and the provisions in the several deeds were real covenants, as defined in *Bank of Hoxie* v. *Meriwether, supra,* as those which relate to the realty and having for its main object some benefit inuring to it.

In the instant case, as in *Field* v. *Morris, supra,* no mention is made in the deed of heirs, assigns or successors, or words of similar import used. The language used in the grant under consideration interprets itself. No premises or places are mentioned where the gas was to be used, nor are any words used indicating that it was for the benefit of any one but the grantors alone. Therefore, it was personal to the Emrichs and died with them. It makes little difference what the value of the right-of-way really was, or whether Emrich received more or less than its value in his lifetime, and the evidence on this issue we deem immaterial and unnecessary to set out, as we think that the language of the instrument itself must govern.

It follows from the views expressed that the trial court erred, and its decree must be reversed, and the cause remanded with directions to dismiss the complaint of the appellees for want of equity. It is so ordered.

TAYLOR *v.* HARRIS.

4-2750

Opinion delivered December 5, 1932.

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

Hill, Fitzhugh & Brizzolara, for appellee.

SMITH, J. This case involves an attack, both direct and collateral, on the decree of the Logan Chancery Court for the Northern District, which was affirmed by this court in the case styled *American Bank & Trust Co.* v. *First National Bank of Paris,* 184 Ark. 689, 43 S. W. (2d) 248.

The First National Bank brought suit to foreclose a mortgage executed by T. B. Harris and wife to it. The

complaint alleged that the American Bank & Trust Company claimed an interest in the property covered by the mortgage, and asked that the last-named bank be made a party to the action and required to assert its interest, if any such it had. The American Bank & Trust Company filed an answer to the complaint of the First National Bank and a cross-complaint against Harris and wife, in which it was alleged that Harris and wife had executed to it a mortgage upon the same lands described in the mortgage to the plaintiff bank, and it was prayed that the foreclosure of this mortgage be decreed as prior and superior to that of the plaintiff bank.

Harris and wife did not answer either the complaint of the First National Bank or the cross-complaint of the American Bank & Trust Company, but the First National Bank did file an answer to this cross-complaint and insisted that the indebtedness of Harris and wife to the American Bank & Trust Company which was secured by the mortgage to the latter had been paid, and that therefore the mortgage held by the plaintiff bank was superior.

The trial court held that so much of the debt due by Harris and wife to the American Bank & Trust Company as was secured by the mortgage to that bank had been paid, and that therefore the mortgage of the First National Bank was not only a first lien, but was the only lien on the lands which were described in both mortgages. It was decreed, however, that Harris and wife were indebted to the American Bank & Trust Company, and a personal judgment was rendered for this debt, and the foreclosure of the mortgage to the First National Bank was decreed as the only lien upon the land. This was the decree affirmed by this court on the appeal, *supra*.

Harris died February 12, 1931, and at the time of his death had valid life insurance, which the insurer offers to pay. In the meantime, the American Bank & Trust Company had been taken over by the State Bank Commissioner as being insolvent, and its assets are being liquidated by that officer. Upon the death of Harris, the Bank Commissioner caused a writ of garnishment to

issue upon the decree for debt rendered by the Logan Chancery Court against Harris, above referred to, in favor of the American Bank & Trust Company. Mrs. Harris had qualified as administratrix of the estate of her deceased husband, and, as such, she filed, on March 19, 1931, a motion to quash the garnishment, upon the ground that the judgment against her husband and herself was void, as having been rendered without service. On March 23, 1931, Mrs. Harris filed a suit, in her own name and on behalf of the estate of her husband, in which she prayed that the original decree of the Logan Chancery Court against herself and her husband be vacated and set aside, as having been rendered without service upon herself or her husband. This motion and the complaint appear to have been treated as a single pleading, and were heard and disposed of together.

The original complaint of the First National Bank was filed January 26, 1929, and the answer and cross-complaint of the American Bank & Trust Company against Harris and wife were filed March 7, 1929. According to the testimony of the clerk of the chancery court, no record in that office shows the issuance of service of any process on the cross-complaint, and Mrs. Harris testified that there was no service, and that she never knew that she and her husband had been made parties to the cross-complaint filed by the American Bank & Trust Company, and did not know until after the issuance of the writ of garnishment that any judgment had been rendered against her or her husband on this cross-complaint.

The original decree of the chancery court contained the following recital as to the service of process in the case: "This suit was brought by the plaintiff against the defendants on the 26th day of January, 1929, and summons were duly served upon all of the defendants in the month of January, 1929. The defendants, Thomas B. Harris and Sue Harris, although duly summoned, have wholly failed to answer, demur or to otherwise plead, and have wholly made default."

In the complaint filed by Mrs. Harris, for herself and for the benefit of the estate of her husband, to vacate the judgment for debt in favor of the American Bank & Trust Company, it is alleged that the decree was rendered without service or knowledge of the existence of the suit, and that neither Mrs. Harris nor her husband were in fact indebted to the American Bank & Trust Company, and the plaintiff prays that she be permitted to make that showing. The court below granted the prayer of her complaint and vacated the decree, and this appeal is from that order.

For the affirmance of the decree here appealed from, it is insisted that the court was without jurisdiction to render the personal judgment against Harris and wife, for the reason that, under § 1204, Crawford & Moses' Digest, and the general equity practice, a cross-complaint in favor of one defendant against another is only permitted where it affects the subject-matter in the original complaint, and it is insisted that the rendition of a personal judgment against Harris and wife in favor of the American Bank & Trust Company has no relation to a suit to foreclose a mortgage executed by Harris and wife to the plaintiff bank—the First National. So much of § 1204, Crawford & Moses' Digest, which defines the practice in regard to filing cross-complaints, as is relevant here, reads as follows: "Section 1204. A defendant may file a cross-complaint against persons other than the plaintiff, and have proceedings thereon as follows: First. When a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action, he may make his answer a cross-complaint against the co-defendant or other person." The second paragraph of this § 1204 provides for service of process upon cross-defendants.

We think this statute conferred authority for the cross-complaint filed by the American Bank & Trust Company against Harris and wife. This bank alleged that it had a mortgage lien upon the lands embraced in the mortgage to the First National Bank, and that its

mortgage was superior thereto. The American Bank & Trust Company was therefore interested in the subject-matter of the original cause of action, and had the right to foreclose its mortgage by cross-complaint. *Connelly* v. *Hoffman,* 184 Ark. 497, 42 S. W. (2d) 985.

Having jurisdiction for the purpose of foreclosing these mortgages, after determining their priority, and having assumed that jurisdiction, the chancery court determined the question of the priority of the mortgages, and, in the determination of that question, reached the conclusion that the debt remaining unpaid and due to the American Bank & Trust Company was not in fact secured by the mortgage, but, having also ascertained that some debt was due from Harris and wife, judgment was rendered for the amount thereof. This practice was entirely proper and conforms to the uniform holding that, where chancery takes jurisdiction in a case for one purpose, it will retain the case and administer complete relief. *Home Life Insurance Co. of N. Y.* v. *Masterson,* 180 Ark. 170, 21 S. W. (2d) 414.

For the reversal of the decree of the court below, appellants cite cases holding that, in a collateral attack upon the judgment of a court of superior jurisdiction, every presumption must be indulged in favor of the jurisdiction of the court, unless it affirmatively appears from the record itself that the facts essential to the jurisdiction of the court do not exist. A late case to that effect, citing a number of earlier cases to the same effect, is that of *Road Imp. Dist. No. 4* v. *Ball,* 170 Ark. 522, 281 S. W. 5.

The record in the instant case is not silent as to the service of summonses and the time thereof. The decree contains the affirmative recital that "summons were duly served upon all of the defendants in the month of January, 1929," whereas the cross-complaint was not filed until March 7, 1929, thereafter. So that we have the affirmative recital in the decree itself that the defendants, Harris and wife, were summoned before the cross-complaint against them was filed, and the presumption does

not therefore arise which would be indulged in the absence of this recital that the court had, before rendering judgment for the debt, ascertained that it had acquired the jurisdiction so to do.

Under the facts stated, appellees contend that the decree in favor of the American Bank & Trust Company was properly vacated against both Mrs. Harris and the estate of her husband. But this relief cannot be granted, so far as the estate of Mr. Harris is concerned, for the reason that, whether served with process or not, he was apprised of the pendency of the cross-complaint before the decree was pronounced thereon. *Weeds* v. *Quarles,* 178 Ark. 1158, 13 S. W. (2d) 617. In our opinion, Mr. Harris must necessarily have been aware of the pendency of this cross-complaint and of the nature of the relief therein prayed for. There was never any question about the debt due the First National Bank, and that debt has not been questioned even yet. The question of fact in the case was, to what extent was Harris indebted to the American Bank & Trust Company, and how much, if any, of that debt was secured by the mortgage from Harris and wife to the American Bank & Trust Company? Harris was called as a witness on several different occasions, and was examined at great length upon this subject, and must necessarily have known the purpose of this testimony. It is not certain, however, that Mrs. Harris was also advised of this cross-complaint against herself and her husband. The testimony shows that during this time Mr. Harris was in failing health, and, while it is not contended that he was *non compos,* it does appear that he was unable to give his business affairs the required attention. It appears that Harris' debt to the American Bank & Trust Company was for money borrowed with which to pay for an interest in a business of Harris' father-in-law, and on account of his failing health he resold the same interest to his father-in-law, and one of the principal questions of fact in the original case was whether the father-in-law had paid the bank this debt and the application to be made of the payments received

by the bank from Harris and his father-in-law. Mrs. Harris testified unequivocally that she knew nothing about the cross-complaint, although she was advised of the original complaint; that she and her husband filed no answer to the original complaint because they had no defense, but that she would have made defense against the cross-complaint, had she known that there was a suit of this character pending against her.

Without further recital of the testimony, we announce our conclusion to be that Mrs. Harris was not in fact aware of this cross-complaint, and also that she was not served with any process which had issued thereon.

It follows therefore that the decree in favor of the estate of Mr. Harris is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion. So much of the decree as affects Mrs. Harris personally is affirmed.

FERNANZO *v.* TEDFORD.

4-2757

Opinion delivered December 5, 1932.

Troy W. Lewis, for appellant.

John D. Shakelford, for appellee.

HUMPHREYS, J. This is an appeal from a refusal of the chancery court of Pulaski County to render a personal

judgment for $75 in favor of the estate of M. D. Fernanzo, deceased, and for $125 in favor of Alice Fernanzo, and costs against appellee, in a proceeding in said court to cancel the tax deed from the State of Arkansas to appellee and all deeds thereunder to lot 11, block 4, of Industrial Park addition to the city of Little Rock, Arkansas, in which proceeding, judgments were sought in the amounts set out above.

The facts are that, in the spring of 1926, M. D. Fernanzo and Alice Fernanzo purchased said property in entirety from W. E. Lenon, on the installment plan, for $264 with the understanding that the grantor would pay the taxes thereon during the period for the payment of installments if the purchasers kept up the payments. This they did. After purchasing the property, they built a house upon the lot and moved into and occupied same as their homestead. During their occupancy thereof, the lot was forfeited under a void tax proceeding for the taxes of 1925 and sold to the State in 1926. The property remained on the books in the State Land Office until after the passage of act 129 of the Acts of 1929, which provided for the sale of tax lands to applicants after personal service of a notice upon the owners thereof, unless such owners were nonresidents or unknown. W. W. Shepard and W. L. Tedford purchased said lot from the Commissioner of State Lands under said act without serving personal notice upon appellant and her husband, although they were residing thereon at the time. At the time of the purchase they did not inform the Commissioner of State Lands of this fact. On June 24, 1929, W. W. Shepard and his wife conveyed same by quitclaim deed to appellee. The weight of the evidence reflects that, after appellee obtained a quitclaim deed, he informed appellant and her husband, through his agents, that he had obtained a good title to the lot from the State, which was paramount to their title, and they must pay him rent or buy the property or move out. The weight of the evidence also shows that, under this misrepresentation and threat, appellee obtained a purchase contract for said lot

from appellant's husband, and that, after the payment to him of $75 by her husband and $125 by her, he executed a quitclaim deed to her husband. The payment of $125 by her was made at the urgent request and insistence of her husband, who feared he would have to move out of the property, and without any admission on her part that appellee was entitled thereto.

The rule is, as between vendor and vendee, in a conveyance by quitclaim deed, although the vendor makes no covenants which cover a defect in the title, the purchase money can be recovered by the vendee in case the vendor practiced fraud or its legal equivalent upon the vendee. *Tune* v. *Rector,* 21 Ark. 283; *Diggs* v. *Kirby,* 40 Ark. 420.

The refusal of the chancellor to render a personal judgment against appellee for $75 in favor of the administrator of the estate of M. D. Fernanzo, deceased, and for $125 in favor of Alice Fernanzo is reversed, and judgments for said amounts in favor of the respective appellants are rendered here, less a remittitur by appellants of $2.23.

SISK *v.* POINSETT LUMBER & MANUFACTURING COMPANY.

4-2763

Opinion delivered December 5, 1932.

C. T. Carpenter, for appellant.
Lamb & Adams, for appellee.

HUMPHREYS, J. Appellant brought suit in the circuit court of Poinsett County against appellees to recover damages for the benefit of her son's estate, for whom she was appointed administratrix, on the alleged ground that he was killed through the negligent operation of its link-belt used to load saw logs, which were piled or stacked on the right-of-way, on to cars. The allegation of negligence was as follows:

"The operator of the link-belt carelessly and negligently, and without any regard for the safety of deceased, put into operation the link-belt and lifted the log from its position, causing the logs on the pile to roll down on him and fatally injure him."

Appellees filed an answer, denying the allegation of negligence.

The cause was submitted on the 22d day of December, 1931, upon the pleadings and testimony adduced by the respective parties, at the conclusion of which appellees requested the court to instruct a verdict for them, which the court announced he would do unless appellant decided to take a nonsuit; whereupon appellant elected to take a nonsuit. The December, 1931, term of court was adjourned until February, 1932, at which time appellant filed a motion to vacate the judgment of nonsuit and continue the cause. The court vacated the judgment of nonsuit, reinstated the action, and dismissed same, to which dismissal appellant objected and excepted, and prayed and obtained an appeal to this court.

Appellant contends for a reversal of the judgment because the trial court dismissed the cause instead of granting her a continuance. No ground for a continuance appears in the record. We cannot therefore say that the court abused its discretion in refusing to continue the cause.

After sustaining the motion to vacate the judgment of nonsuit and reinstate the cause, the court proceeded to, and did, enter the judgment he would have entered had appellant not taken the nonsuit. As no ground for continuance was shown, this was the only thing left for

the court to do, if the undisputed testimony theretofore introduced tended to show no liability on the part of appellees.

Appellant relied upon the testimony of Delbert Turner to show that the operator of the link-belt applied power and raised the log in which appellant's deceased son had fastened the hooks before he had time to move out of the way, thereby causing a log to roll down from the top of the pile and fatally injure him. Delbert Turner testified that he did not see the log in which the hooks had been fastened by deceased either moved or raised. The most he said when pressed on the point was that he saw the operator apply power. Under the allegation of negligence, it was necessary to show that the operator applied power and raised or moved the log so as to cause a log from the top of the pile to roll down and injure appellant's deceased.

On account of the want of testimony tending to show liability, the trial court properly dismissed the cause of action.

The judgment is therefore affirmed.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA *v.* HARRISON.

4-2764

Opinion delivered December 5, 1932.

Duty & Duty and *Ollie Collins,* for appellant.

W. B. Foster, for appellee.

KIRBY, J. This appeal is prosecuted from a judgment against appellant company as surety on a bond guaranteeing the construction and installation of a gas system for furnishing gas to the people of the city of Harrison within 12 months from the date of the ordinance granting the franchise therefor.

The city of Harrison, by its council, passed an ordinance granting C. W. Murchison, trustee, a franchise to construct, maintain and operate a gas system in the city of Harrison to supply the inhabitants of said city natural gas, and fixing the rates to be charged for same.

The ordinance provided that it should not become effective until a bond in the sum of $2,500 had been posted, conditioned that the system would be completed within 12 months from the date of the passage of the ordinance. Such bond was executed in said sum by C. W. Murchison and appellant company, as surety, and filed with the city council. Default was made in the construction of the gas distributing system; in fact no attempt was made to construct it, and the city brought suit on the bond. Service was not had on Murchison, and judgment was not rendered against him.

Appellant denied any liability on the bond, that the ordinance granting the franchise had been duly passed, published or accepted by the grantee, and any liability under the bond, which it claimed was a penalty, except for damages, if any at all, none of which had been shown.

Upon the evidence adduced by the plaintiff, the issues were submitted under instructions not complained of to the jury, which returned a verdict for the city against the appellant company in the sum of the face of the bond. Judgment in that sum was entered, bearing six per cent. interest from date, against the Indemnity Insurance Company of North America, which now seeks by this appeal to reverse said judgment.

Appellant insists that the bond only provided a penalty, and that it was not liable thereunder for more

than actual damages, none of which was shown to have been suffered by the city. This case is ruled by the decision in *Cherokee Public Service Co.* v. *Helena,* 184 Ark. 38, 41 S. W. (2d) 773, where a provision in a contract obligating a utility company to pay $5,000 for breach of its undertaking to supply gas to a city in a specified time was held a provision for liquidated damages.

Section 14 of the ordinance granting the franchise provided it should take effect after its approval and publication upon the posting of a $2,500 surety bond approved by the city council, conditioned that the gas system be completed within 12 months from the date of the passage of the ordinance. The bond was conditioned as the ordinance required:

"Now, therefore, the condition of this obligation is such that, if the said C. W. Murchison, trustee, his successors, lessees and assigns, shall lay, construct, and equip a system of gas mains, pipes, conduits and feeders for the purpose of supplying and distributing natural gas for light, fuel, power and heat, and for any other purpose, to the residents and inhabitants of the city of Harrison, as provided in said franchise, within twelve months from the date of the passage of the ordinance granting said franchise, then this obligation shall be null and void; otherwise, it shall remain in full force and effect."

The terms of the ordinance and the provisions of the bond are of such a nature that the damage caused by its breach would be uncertain and difficult of proof, and the sum named by the parties was properly held to be liquidated damages; the form and language of the instrument not being unfavorable to such construction and the magnitude of that sum nor forbidding it. The parties must have known that it was impracticable to measure the damages of any actual loss, if any was contemplated, for a breach of the contract, since the city, in its corporate capacity, could not have suffered any injury by such breach of contract, and it was only reasonable to suppose it was intended to fix in the terms of

the contract the precise sum recoverable for its breach. See also 8 R. C. L., pages 575-576; *Sun Printing & Publishing Ass'n* v. *Moore,* 183 U. S. 642, 22 S. Ct. 240.

Appellant insists that the court erred in allowing parol testimony introduced to prove the ordinance granting the franchise, which it says could only be done by the production of a certified copy thereof. The city recorder testified that he was the custodian of the records of the city, was present when the ordinance granting the franchise was passed by the council, and made a copy thereof, and recorded it; that it had been attested by the signatures of the mayor and the recorder, and duly published. This testimony was admitted over objection, and later a printed copy of the ordinance was introduced with a certificate of publication. No error was committed in the proof of the ordinance in such manner without the production of a certified copy thereof made by the clerk or recorder. Sections 7497 and 7499, Crawford & Moses' Digest; *Heno* v. *Fayetteville,* 90 Ark. 292, 119 S. W. 287.

It is also claimed that the surety company was not bound to the payment of the bond, since it was not proved that the signature of the principal, Murchison, was genuine; but the city recorder stated he had written to Murchison at Dallas, Texas, after the passage of the ordinance calling for the posting of the bond in accordance with its terms, and that the bond sued on, signed by Murchison, as principal, was returned to the city with the signature of appellant as surety thereon, and by it accepted, in accordance with the terms of the contract. There was no statutory denial of the execution of the bond, and no claim whatever by appellant company that it had not executed the same regularly as surety.

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

HEMPSTEAD COUNTY *v.* STAR PUBLISHING COMPANY.

4-2765

Opinion delivered December 5, 1932.

Carrigan & Monroe, for appellant.

W. S. Atkins and *O. A. Graves,* for appellee.

MEHAFFY, J. The appellee, Star Publishing Company, filed its claim in the county court of Hempstead County for $1,211.50, which was 50 cents a tract for publishing delinquent tax list. The court disallowed the claim as filed, but did allow a claim of $605.75.

An appeal was prosecuted to the circuit court of Hempstead County, where it was tried, and the court instructed the jury to find for the plaintiff, Star Publishing Company, the full amount of $1,211.50. There was a verdict and judgment for that amount. The case is here on appeal.

The evidence tended to show that the county judge had refused to pay more than 25 cents for each separate tract of land.

Judge Higgason testified that Mr. Hawkins, the publisher of the Washington Telegraph, a paper published in Hempstead County, agreed to publish the list for 25 cents a tract, and Hawkins himself testified that he agreed to publish it for that amount. Several witnesses testified about conversations between the county judge and the publisher of the Star Publishing Company, and the publisher of the paper testified that he never did agree that he would publish the list in the Star Publishing Com-

pany for 25 cents a tract. The evidence shows that the county judge stated in all these conversations that he would not pay more than 25 cents a tract.

The evidence showed that the clerk delivered the list to the Star Publishing Company; that it was customary to do this, and that it was customary to publish the list in one paper one time, and the other paper the next time.

The law provides, in act 92 of the Acts of 1929, that the fees for advertising the sale of delinquent land shall be 50 cents for each tract or town lot advertised to be sold for delinquent taxes, which amount shall be added to the tax as cost of the sale. The act then provides how the fees shall be computed and paid, etc.

The effect of this act is to require the taxpayer to pay 50 cents for advertising, and that this 50 cents shall be added to the cost. We know of no law, however, which prohibits the county judge from making a contract with the publisher of a paper to advertise the list for a smaller sum, and, if such contract is made, it is binding between the parties to the contract, the publisher and the county.

There is some conflict in the evidence, and we think it was a question of fact as to whether there was a contract made between the Star Publishing Company and the county judge. This question should be submitted to and determined by the jury.

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

REED *v.* REA-PATTERSON MILLING COMPANY.

4-2766

Opinion delivered December 5, 1932.

Partain & Agee, for appellant.

Roy Gean, for appellee.

McHaney, J. Appellee sued appellants in one count of the complaint on open account in the sum of $847.88, and in another count on a promissory note in the sum of $1,276.85, for flour sold and delivered by it to them. Appellants do not dispute the amount of the indebtedness, but defend on the ground, first, that the last car of flour bought was damaged, unfit for use and was not of the quality expressly warranted by appellee, with the result that a part of the flour remained unsold and unsalable, and a part was returned by their customers, a total of less than fifty sacks of forty-eight pounds, worth, at retail, $1.15 per sack; and, second, that the flour they did sell, and which was not returned by their customers, was of such inferior quality that it caused them the loss of about thirty customers or more, entailing a consequent damage to them of $5,000 in loss of future profits, good will, etc., for which amount judgment was prayed in a cross-complaint. They also claimed damages to the amount of the purchase price of the flour because of its worthless condition, which they claimed in offset of their indebtedness.

The court sustained a demurrer to the cross-complaint for damages for loss of future profits on customers lost, and for damages to good will, and refused to permit any proof in support thereof. At the conclusion of the testimony, appellee offered to abate its claim to the extent of 50 sacks of flour at $1.15 per sack, and the court directed a verdict for it for the balance, all over the objections and exceptions of appellant.

It is undisputed that appellants had on hand less than 50 sacks of 24's and 48's of all flour bought from appellee that he either did not sell or that were returned to him. All the other flour had been sold at the full retail price, and no customer had asked for or been refunded the purchase price therefor. Appellants say the flour was expressly warranted to be absolutely satisfactory in every way. Mr. T. Guy Reed testified: "Mr. Roy Fornin, agent for this State, and Mr. Evans (meaning appellee's agents) stated in front of our store that any flour that was not absolutely satisfactory in every way could be returned." He further testified that it was with that understanding that he bought the flour. Since appellees have made good that warranty by giving credit for the fifty sacks of flour, it is difficult to perceive why it should be held liable for the difference between the value of the flour received and its value if it had been as warranted. Appellants did not return, or offer to return, any of the flour to appellee. No witness testified that the flour was damaged when received by appellants, but, assuming this to be the effect of the testimony, the express warranty, also assuming there was one, was that, if it was not satisfactory in every way, it might be returned. But appellants returned no flour to appellee, and made no complaint about the flour in any way until this suit was brought. They were buying from appellee and selling to their trade about one car per month. The last car, the one in controversy, was delivered February 9, 1931. The note which is the basis of the second count in the complaint was not executed until April 1, 1931, and in the meantime, and long after the flour had been sold, appel-

lants wrote appellee regarding their indebtedness to it, but no claim was made that the flour was unsatisfactory.

Moreover, this is a sale by one dealer to another, and, as said in *Nelson* v. *Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288: "In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness." But see exception to this rule in *Bunch* v. *Weil,* 72 Ark. 343, 80 S. W. 582. Appellants cannot therefore base their action on implied warranty. The only warranty attempted to be proved was an express one, as already stated, and, of course, there could not be both an express warranty and an implied warranty of fitness or satisfaction in the sale of the flour. "The reason is," said this court in *J. S. Elder Grocery Co.* v. *Applegate,* 151 Ark. 565, 237 S. W. 92, "that, if there was an express warranty upon this subject, it would govern as being the contract between the parties. There would be no room for an implied warranty if there was an express warranty on the same subject." Reliance is placed on *Hixon* v. *Cook,* 130 Ark. 401, 197 S. W. 698, but it has no application here. This is a sale from dealer to dealer.

For the same and other reasons appellants were not entitled to recover future profits, or loss of customers, or damage to their business or for loss of good will. The express warranty, assuming it to be established by the evidence, precludes it. Such damages were not in the contemplation of the parties. They were not included in the contract by the express warranty. Unsatisfactory goods might be returned for credit. This appellants have received, and they are in no position to claim more. Such damages are also too speculative, remote and uncertain. 55 C. J. 1190, § 1166; *Goodell* v. *Bluff City Lumber Co.,* 57 Ark. 203, 21 S. W. 104; *Bunch* v. *Weil,* 72 Ark. 343, 80 S. W. 582.

The court correctly instructed a verdict for appellee, and this judgment is accordingly affirmed.

BROOKFIELD *v.* HARAHAN VIADUCT IMPROVEMENT DISTRICT.

4-2768

Opinion delivered December 5, 1932.

J. F. Gautney and *J. C. Brookfield,* for appellant.

J. L. Shaver and *S. W. Ogan,* for appellee.

BUTLER, J. The Harahan Viaduct Improvement District was created by an act of the General Assembly of 1923 for the purpose of constructing and maintaining an approach to the Harahan bridge spanning the Mississippi River opposite the city of Memphis. This approach is in Crittenden County, and is known as the Harahan Viaduct. Shortly after the creation of the district, its commissioners met, and Renfrow Turner was elected chairman, and, on the first day of November, 1923, by resolution duly passed, it employed the appellant and M. B. Norfleet, Jr., attorneys, to represent the said district for an agreed sum of $7,500 and other necessary expenses while engaged in the discharge of their duties. Sixty per cent. of the fee was to be paid upon the completion of the transcript of the proceedings of said district for the bond issue, and the balance due and payable at the discretion

of the board. It developed that the commission was unable to function under the act, and the board met on October 28, 1924, for the purpose of arranging for the obligations it had incurred, which included some preliminary expenses for engineering and legal services. On that occasion the board passed the following resolution:

"In consideration of legal services performed to date by J. C. Brookfield and M. B. Norfleet, Jr., attorneys for the district, the district having heretofore issued to them certificates of indebtedness in the total sum of two thousand dollars ($2,000) on their fee, as provided by contract between the district and them, in the total sum of seventy-five hundred dollars ($7,500), it being now the purpose of said district to suspend further expenses for legal services until hereafter decided by a majority of the board of commissioners of the district. It is hereby ordered by the board that the president and secretary issue certificates of indebtedness of $500 each to said attorneys in consideration of their preliminary legal services to date.

"That this provision of the board shall not be deemed to effect said contract of said attorneys as to the cancellation thereof, but the board, in its best judgment, deems said attorneys fully paid to date for their services.

"It is agreed that, in the event said district does not operate further and function, that said legal services have been fully paid to date."

On the 24th of March, 1925, the board had a meeting and adopted a resolution reciting the fact that the district had been unable to function, and that certain necessary preliminary steps had been taken and expenses incident thereto incurred, including engineering, legal and incidental services, in a total amount of $15,698.59; that the Supreme Court had held that such preliminary expenses are binding liens upon all the real property within the district, and provided for the payment of these from tolls to be collected under the supervision of the county court of Crittenden County.

There were some other meetings of the board, the final meeting appearing to have been on the 16th of October, 1926, at which time the preliminary expenses referred to in the resolution of March 24, 1925, had been paid. The Harahan Viaduct, in the meantime, had been taken over and constructed by the State Highway Department, and the cost of constructing the same and the preliminary expenses had been paid out of tolls collected from the wooden structure, and the structure as finally completed became a part of the State Highway system, and, as such, is now maintained by the Highway Commission. It is undisputed that the appellant, Brookfield, has received the amount authorized by the resolution of October 28, 1924. The last payment of $500 was in the form of a voucher which was issued to him on October 28th, following. On the 27th day of November, 1929, the appellant filed suit against the improvement district in the chancery court of Crittenden County, Arkansas, (cause No. 3830) in which he sought to recover judgment against the defendant district in the sum of $2,366 as balance claimed by him under his contract of employment aforesaid. On March 17, 1930, the court rendered judgment by default against the district for the sum sued for and retained jurisdiction of the cause, for the purpose of fixing a lien and appointing a receiver to enforce the same if the judgment was not paid within sixty days, and for that purpose, continued the cause.

On the 14th day of July of the same year the appellant filed a separate complaint in the said court (cause No. 3939), setting up the judgment he had previously obtained, and asking for a receiver and that a tax be levied upon the lands to pay his judgment. Judgment was rendered on the supplemental complaint by the chancellor in vacation in conformity with its prayer. Various newspapers, having a circulation in eastern Arkansas, published the action of the court as a news item, and by this means it was brought to the attention of the interveners, who are landowners and taxpayers within the boundaries of the district and against whose lands the tax was to be

levied. This action was instituted by the St. Francis Levee Board, and two of its members, as taxpayers, to vacate the decrees aforesaid, on the grounds that they were rendered without notice, and that there was a valid defense to the claim of Brookfield. Testimony was taken, and, by agreement, this case was submitted to the chancellor on the pleadings and testimony adduced, who entered a decree finding that, at the time of the rendition of the decree in the case of *Brookfield* v. *Imp. Dist.*, cause No. 3830, the court was without jurisdiction of the defendant district, and appellees were without knowledge of the suit prior to the rendition of the decree, and that "the court was not correctly advised as to the service of summons on it and waivers by the commissioners of defendant district, and was not advised of the circumstances under which the defendant had paid to the plaintiff the sum of $1,500; that there is a valid defense to the original cause of action, as alleged, in which judgment was rendered herein, against said Harahan Viaduct Improvement District," and, in accordance with these findings, a decree was rendered cancelling and setting aside the judgment complained of and all subsequent proceedings had thereunder, and holding "that said original complaint be not dismissed, but left to the end that the said J. C. Brookfield may, if he so desires, cause proper service to be had upon said Harahan Viaduct Improvement District."

From that decree this appeal is prosecuted, and for a reversal it is contended, first, that the board of directors of St. Francis Levee District, J. L. Williams and H. N. Pharr, being strangers to the original suit, did not have the legal right to bring an action to set aside the judgment obtained by the appellant. The facts are that the St. Francis Levee District and the two individuals named are large landowners and taxpayers within the boundaries of the improvement district, and, while not parties to the original action by name, they are in fact the real parties in interest. In the pleading filed by them it is alleged, as a ground for the vacation of the decrees complained of, that they are such landowners and taxpayers,

and the facts alleged show that the burden sought to be placed upon their lands was an illegal exaction.

Section 13, article 16, of 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 enforcement of any illegal exactions whatever." Courts of chancery are vested with the jurisdiction in actions under this constitutional provision. *Harrison* v. *Norton,* 104 Ark. 16, 148 S. W. 497. And in *Seitz* v. *Merriwether,* 114 Ark. 299, 169 S. W. 1175, cited by appellee, we held: "That provision of the Constitution does not include improvement districts, but the principle is the same, and it is the duty of the court of equity to mold a remedy for taxpayers whose interests are involved in the operation of improvement districts." Therefore the appellees were justified in instituting suit to protect themselves and others from the alleged unlawful exaction.

It is next insisted that suits to set aside a judgment may only be for the causes mentioned in § 6290 of Crawford & Moses' Digest, and only in the manner provided in § 6292, *id.,* and that the allegations in the pleading filed by the appellees do not sufficiently allege the rendition of the decree for want of service of summons, and, because of that, the judgment is void. It is immaterial by what name the pleading be designated; if it contains the elements required by § 6290, it will be sufficient. The allegation of the complaint regarding the procurement of the decree without service is as follows:

"Your interveners allege that the judgment rendered in favor of the plaintiff and against the viaduct district is void for following reasons:

"1. That, although said judgment recites that service of personal process was had upon all of the commissioners of said district, said statement is false and untrue, and the true facts are that said commissioners of said district were not personally served with any personal process whatsoever, and that they, your interveners herein, had no knowledge that said cause of action was

pending in the chancery court until notices appeared in several papers stating that all the property in said district would be sold to satisfy said judgment."

Section 6238 of the Digest is as follows: "All judgments, orders, sentences and decrees made, rendered or pronounced by any of the courts of the State against any one without notice, actual or constructive, and all proceedings had under such judgments, orders, sentences or decrees, shall be absolutely null and void."

The proceeding in this case is for the purpose of vacating the decree complained of, and is therefore a direct attack. *Hall* v. *Huff,* 122 Ark. 67, 182 S. W. 535; *Morgan* v. *Leon,* 178 Ark. 769, 12 S. W. (2d) 404. And the allegation is sufficient to allege a fraud practiced by the successful party within the meaning of the statute. "A judgment by default, procured through the representation of plaintiff's attorney that there was a return of service of process, when in fact there had been no service and no return of service by the officer, is a judgment obtained through 'fraud practiced by the successful party,' within the meaning of the fourth subdivision of § 3909, Mansf. Digest, though the attorney acted under a mistake." *Chambliss* v. *Reppy,* 54 Ark. 539, 16 S. W. 571.

It is contended by the appellant that the proof was insufficient on the question of notice and the defense alleged, to justify the setting aside of the decree. The decree complained of, as to the service of summons, recited as follows: "And the defendant, although duly served with summons upon Renfrow Turner, chairman, and other members of its board of commissioners, as required by law, came not but made default." On the question of service of summons, a number of witnesses testified. Appellant testified that he had caused service of summons to be had upon Renfrow Turner as chairman of the board of commissioners, and upon J. T. Robinson and R. M. Barrett, two other members of the board, and that he obtained the waivers in writing of four other of the commissioners upon the back of copies of the summons. Renfrow Turner stated that he did not remember;

R. M. Barrett was not questioned about the service of summons; and the others disputed the testimony of the appellant. The officers, whose duty it was to serve the various summons, were not called, and did not testify. Appellant testified that he had taken all of the original papers to his office to prepare the decree, and, after the same had been approved by the chancellor, he had mailed the decree and exhibits back to the clerk, but none of the summons could be found in the files of the court. There was testimony also which tended to show that Renfrow Turner was not the chairman or a member of the board of commissioners at the time of the alleged service of summons upon him, and had not been for a considerable length of time, having resigned upon his appointment to the office of county judge, and Z. T. Bragg being appointed by the Governor in his stead. It therefore appears that the chancellor was justified in his finding that the court was without jurisdiction because of want of service.

There was also testimony tending to establish the defense alleged, but, as the chancellor did not dismiss the complaint, it would be premature to discuss that testimony or indicate our view of its weight, as under the decree appellant may proceed upon proper service obtained to have his claim adjudicated.

On the whole, we are of the opinion that the decree of the chancellor was correct, and it is therefore affirmed.

STATE NOTE BOARD *v.* STATE EX REL. ATTORNEY GENERAL.

4-2882

Opinion delivered December 5, 1932.

Coleman & Riddick, for appellant.

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

THOMAS C. TRIMBLE, JR., Special Justice. Appellee, State of Arkansas, through her Attorney General, filed suit against the State Note Board, attacking as unconstitutional § 17 of act No. 15, passed at the second extraordinary session of the Legislature of 1932, the same being in words and figures as follows, to-wit:

"Section 17. It shall be the duty of the State Note Board to issue short-term notes in lieu of all legal vouchers or warrants now or hereafter issued for work, labor, materials, or supplies, heretofore done or furnished by any contractor, subcontractor, materialman or laborer in the construction, maintenance or repair of the State Highways or for the State Highway Department upon request being made therefor by the legal holder or holders of any such obligations; such short-term notes to be in substantially the form of the short-term notes heretofore sold by said State Note Board for the State Highway Commission and executed in the same manner, bearing interest at the rate of 5 per cent. per annum from the

date of issuance, and not more than $750,000 worth of such notes shall mature on February 1, 1934, and the maturities of the balance thereof shall be equally divided, one-half to mature on February 1, 1935, and one-half to mature on February 1, 1936. The State Note Board shall use its discretion in arranging the maturity dates of the various notes issued so that any of such legal holders of said obligations shall not be given preference as to the maturity date of the notes issued to him. Said short-term notes shall be in denominations of $100, $500 and $1,000, and, if the amount due any of the legal holders of such obligations is less than the amount which can be paid by notes of those denominations, then such legal holder may pay the difference in cash and receive such note, or he may take from the State Highway Commission a voucher showing the balance that is due him and which cannot be paid in notes of that description, and which voucher shall be paid as soon as there shall be in the State Highway funds moneys available for the purpose; provided, this act shall not validate any claim, voucher, or warrant or other evidence of indebtedness issued under or pursuant to an illegal contract, and provided further that no note or notes shall be issued in lieu of any such claim in excess of $150, where such claim is based on a cost-plus contract or a contract not let on competitive bidding until such claim is approved and the issuance of such notes are authorized by the State Highway Audit Commission, or until the validity of such claim is finally adjudicated and determined by a court of competent jurisdiction. No additional highway bonds or highway notes shall be authorized, issued or sold in the calendar year of 1932, except those highway notes provided for in this section of this act to be issued in lieu of legal vouchers or warrants for work, labor, material or supplies heretofore done or furnished by any contractor, subcontractor, laborer or materialman in the construction, maintenance or repair of the State Highways, or for the State Highway Department, and not more than $1,750,000 worth of highway bonds shall be issued in the calendar year of 1933

or in any calendar year thereafter, this being the approximate amount necessary to match Federal aid and thereby prevent the loss of such aid; and no highway bonds shall hereafter be issued except with the approval of a majority of the State Note Board including the Governor, or with the approval of at least seven members of the State Note Board, nor shall any highway bonds be issued in any year in excess of the amount of Federal aid allotted to Arkansas under Acts of Congress for that particular year. No bonds or other evidences of indebtedness shall ever be sold under the provisions of this act for less than par."

The ground upon which the validity of the statute was assailed being that said section was not within the purview of the Governor's proclamation convening the General Assembly, and asking that the State Note Board, which met and adopted resolutions for the issuance of $2,100,000 in short-term State notes as provided under said section of said act No. 15, be forever enjoined and restrained from causing the printing or lithographing of said State notes and from issuing the same.

Appellant demurred to the complaint because it did not state a cause of action, and that the appellee was not entitled to the relief prayed for, and that the said State Note Board was acting within its authority in issuing the notes mentioned in the complaint.

The demurrer to the complaint was overruled, and the appellant elected to stand on its demurrer, and a decree was rendered perpetually enjoining the board from issuing said short-term notes.

The sole question involved is whether or not the provisions of § 17 of said act are reasonably within the purposes specified within the Governor's call.

The Constitution of 1874, in reference to extraordinary sessions of the General Assembly, contains the following provisions, to-wit: "The Governor may, by proclamation, on extraordinary occasion convene the General Assembly at the seat of government or at a different place, if that shall have become, since their last

adjournment, dangerous from any enemy or contagious disease, and he shall specify in his proclamation the purposes for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

The General Assembly of the State of Arkansas convened in special session on March 15, 1932, by proclamation of the Governor of the State of Arkansas, same having been issued on March 12, 1932, that part of the call affecting this suit being as follows, to-wit:

"First. To authorize the issuance of revenue bonds that will bring about an extension of the maturity dates of the road district bonds which the State is now paying under the Martineau road law and thereby prevent a default in the payment of such bonds, and render available sufficient funds for the maintenance of the State Highways and for matching Federal aid for new construction."

As will be observed from the proclamation of the Governor, and the act passed by the General Assembly, said call was made for the following reasons: First, to prevent a default in the payment of the road district bonds which the State was paying under the Martineau road law. Second, to render available sufficient funds for the maintenance of the State Highways. Third, to render available sufficient funds for matching Federal aid for new construction.

All of the above subjects are so closely connected and dependent upon each other that no one of them can be entirely segregated from the whole and treated by itself. Act No. 15 embraced all of the subjects and made provisions for each.

The rule announced in decisions of this court, in the cases of *Jones* v. *State,* 154 Ark. 288, 242 S. W. 377, and *Sims* v. *Weldon,* 165 Ark. 18, 263 S. W. 42, are to the effect that lawmakers when convened in extraordinary

session, "may act freely within the call and legislate upon any or all of the subjects specified, or upon any part of a subject; and every presumption will be made in favor of the regularity of its action," and that the provisions of the Constitution in question merely require the Governor "to confine legislation to particular subjects and not to restrict the details springing out of the subjects enumerated in the call," and is supported by many other authorities. 59 C. J. 527; *State* v. *Shores,* 7 S. E. 31 W. Va. 491, 413, 13 Am. St. Rep. 875; *Stockard* v. *Reid,* 57 Tex. Civ. App. 126, 121 S. W. 1144; In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530; In re Amendments of Legislative Bills, 19 Colo. 356, 35 Pac. 917; *McKee* v. *English,* 147 Ark. 449, 228 S. W. 43; *Road Imp. Dist.* v. *Sayle,* 154 Ark. 551, 243 S. W. 825.

The subject embraced in the call should be considered and construed in its entirety and not in subdivisions or detached parts, giving the language its ordinary meaning. *In re Likins,* 223 Pa. 456, 72 Atl. 858.

As has been observed, the purposes, as indicated in the proclamation, for the calling of said extraordinary session of the General Assembly, were for the three reasons above set forth. The use of the language authorizing the Legislature to issue revenue bonds was merely a suggestion as to how to dispose of the subject-matter designated in the call, and while the Governor may make such suggestions, such suggestions or directions are not binding on the Legislature or restrictive of the legislative power, and the action of the Governor in prescribing in his call the character of bonds to be issued to bring about the necessary legislation is treated as being merely advisory. 25 R. C. L. 805.

"It was never contemplated by the Constitution that the Governor should restrict the Legislature as to details, methods or manner in bringing about the end sought." Ex parte *Fulton,* 86 Tex. Cr. R. 149, 215 S. W. 331.

"Specific instructions on the subject-matter in the call can, at best, be regarded only as advisory and not as limiting the character of legislation that might be had

upon the general subject." *People* v. *Johnson*, 23 Colo. 150, 46 Pac. 681.

We are not unmindful of the fact that the construction of the Legislature is not conclusive upon the court, and too great a latitude might abrogate the restrictions of the Constitution, yet it is entitled to the highest consideration by the court. *Long* v. *State*, 58 Tex. Cr. R. 209, 127 S. W. 208.

In the case of *State* v. *Clancy*, 30 Mont. 529, 77 Pac. 314, the court said: "The Governor can not in advance tie the hands of the Legislature. Any enactment which will meet the ends sought to be accomplished in his call must be deemed to be embraced within the limits of the subjects submitted for consideration. That a liberal rule for interpretation of these proclamations has been generally applied, to the end that the legislation enacted in pursuance thereof be operative, is apparent from adjudicated cases."

We are therefore of the opinion that said § 17 of act No. 15 is within the purview of the Governor's call, and that a fair, reasonable and correct construction of the proclamation authorized the legislation in question. This case will therefore be reversed, remanded with directions to sustain the demurrer, and for further proceedings according to law and the principles of equity and not inconsistent with this opinion.

KIRBY and MEHAFFY, JJ., dissent.

HUMPHREYS, J., disqualified and not participating.

BUTLER *v.* ARKANSAS POWER & LIGHT COMPANY.

4-2779

Opinion delivered December 12, 1932.

Caviness & George, Sam T. & Tom Poe and *Donald Poe,* for appellant.

Rose, Hemingway, Cantrell & Loughborough and *Elmer Schoggen,* for appellee.

SMITH, J. This suit was brought by Mamie Butler to recover damages to compensate an injury alleged to have been sustained by her while she was a passenger on one of appellee's street cars in the city of Little Rock. Two grounds of negligence were alleged. The first was that, as the plaintiff was about to alight from the street car on which she had been a passenger, the motorman started the car prematurely, after having stopped it. But, as the plaintiff herself testified that she fell before the car was put in motion, this allegation of negligence passed out of the case.

The second ground of negligence alleged was that the motorman caused the step from which plaintiff alighted to fold up prematurely, and thus to trip her as she was alighting from the step, throwing her violently to the ground.

The defendant denied all the allegations of the complaint. The husband of the passenger was made a party plaintiff also.

The testimony on the part of plaintiffs as to the negligence was to the following effect: The street car stopped to permit two passengers, both colored women, to leave the car by the rear door. The car was stopped by the motorman applying air to the brake after he had cut off the electric current to the motor. The rear door was then opened and the rear step let down, by the motorman turning a small lever which automatically controlled the door. After the rear door was opened and the rear step unfolded downward, one of the colored women alighted

without mishap. As the other passenger, the plaintiff Mamie Butler, stepped down on the car step with her left foot, she held to an upright rod at the side of the door; then, turning the rod loose, she placed her right foot upon the pavement, and, before she had time to remove her left foot from the rear step, it started folding up.

It appears, from the facts stated, that the instant case is very similar to the cases of *Little Rock Traction & Electric Co.* v. *Kimbro,* 75 Ark. 211, 87 S. W. 644, and *Oliver* v. *Fort Smith Light & Traction Co.,* 89 Ark. 222, 116 S. W. 204. The legal principles applicable to the instant case and controlling here were announced in those cases, and the instructions given in the instant case correspond to those principles as to the duty of the carrier to its passengers.

There was a verdict for the defendant, and the only error assigned for the reversal of this judgment is in the instructions given to the jury.

We have said that the instructions given upon the care due the passenger by the carrier were correct, but there was given, at the request of the defendant and over the objection of the plaintiff, an instruction numbered 12, which we think was erroneous and prejudicial. It reads as follows: "You are instructed that in no event would the defendant be liable to the plaintiff because of any condition with which the plaintiff, Mamie Butler, may be suffering, if any, unless you further find from preponderance of the evidence that such condition was caused as a direct and proximate result of the accident alleged and on account of the negligence of the operator without the aid of any intervening cause."

In 45 C. J., page 926, chapter Negligence, § 489, discussing intervening efficient causes, it is said: "It is well-settled that the mere fact that other causes, conditions, or agencies have intervened between defendant's negligence and the injury for which recovery is sought is not sufficient in law to relieve defendant from liability. In other words, an intervening cause will not relieve from liability where the prior negligence was the

efficient cause of the injury. The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequences, and, if the injury is the natural and probable consequence of the original negligent act or omission, and is such as might reasonably have been foreseen as probable, the original wrongdoer is liable, notwithstanding the intervening act or event." The case of *Helena Gas Co.* v. *Rogers,* 104 Ark. 59, 147 S. W. 473, is cited in the note to the text quoted.

The law of the subject is well-settled. It was said, in the case of *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A. (N. S.) 905, that "it is a well-settled general rule that if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote. The difficulty arises in each case in applying the principle to a given state of facts."

Instruction numbered 12, set out above, does not thus declare the law. Its purport appears to be that the defendant would not be liable, even though it were negligent, unless this negligence was the sole cause of the injury, to which no other cause contributed or intervened. As said in the Horton case, *supra,* the author of the original negligent act is responsible for its consequences, unless thereafter a new cause has intervened, of itself sufficient to stand as the cause of the injury, in which event the original negligence would be too remote to be charged as the proximate cause. The instruction does not conform to this view of the law, and it was therefore erroneous.

It may be doubted whether there was sufficient testimony to warrant the submission of this question to the jury. The question of liability appears to turn upon the question whether the fall of the passenger was due to her own carelessness or to some unavoidable accident, on the one hand, or whether, on the other hand, the motor-

man caused the step to be prematurely folded up. In the latter case there would be liability; in the other there would not.

There was testimony tending to show that the passenger's condition had been made worse by her conduct and confinement since her fall. Such testimony might have some relevancy on the question of the measure of damages, but it could not affect the question of the negligence of the carrier. The negligence of the carrier either caused the passenger to fall, or it did not cause her to fall, and the question of its negligence in this respect cannot be determined by a consideration of the subsequent conduct of the injured party.

No other error appears, but for the error in giving the instruction numbered 12 the judgment must be reversed, and it is so ordered.

SOUTHERN GROCERY COMPANY *v.* MERCHANTS' & PLANTERS' TITLE & INVESTMENT COMPANY.

WILKINS *v.* MEAD.

4-2769-2770

Opinion delivered December 12, 1932.

Harry T. Wooldridge, for appellants.

Bridges, McGaughy & Bridges and *Rowell & Rowell,* for appellees.

SMITH, J. Separate suits were filed on January 17, 1931, to foreclose two different deeds of trust. An answer was filed in each case which confessed the debt and the liens securing it, but alleged the fact to be that the defendant debtors were earnestly endeavoring to sell the mortgaged property at private sale for the purpose of paying the debt. The depreciation of values of all kinds and everywhere was alleged, and it was prayed that the court defer and postpone the rendition of a decree condemning the mortgaged property to sale until there should be such recovery and restoration of values as would prevent the sacrifice of the property.

Without further pleadings having been filed, no decrees of sale were rendered by the court until January 20, 1932, at which time such decrees were rendered, and pursuant thereto the mortgaged property was sold by the commissioner of the court.

The commissioner made report of these sales, to which the mortgagors filed exceptions. Exceptors alleged that the property had sold for less than the debt secured and for less than half its normal value. It was prayed, therefore, that the court refuse to confirm the sales, and that the sales be set aside and that the property be ordered resold when financial conditions had improved and there had been some recovery in commodity prices generally and in land values in particular.

The reports of sale of the commissioner and the exceptions thereto were submitted to and heard by the court, and the exceptions were overruled and the reports confirmed, and appeals have been prosecuted from those orders, which have been briefed and submitted together.

The decrees must be affirmed, for two reasons, first, because the testimony taken at the hearing of the exceptions has not been brought into the record, and in the absence of this testimony it will be presumed that the

evidence heard by the court sustained its action. *Alger* v. *Beasley,* 180 Ark. 46, 20 S. W. (2d) 317; *Unionaid Life Ins. Co.* v. *Powers,* 180 Ark. 154, 20 S. W. (2d) 610; *McGowan* v. *Burns,* 182 Ark. 506, 31 S. W. (2d) 953.

But, if it were assumed that the testimony heard by the court sustained the allegations of the exceptions, we would, nevertheless, hold that the exceptions were properly overruled. The essence of the exceptions is that the sales were prematurely decreed, and should have been postponed until normal conditions had returned and normal values had been restored, and that because of the failure to postpone the rendition of the decrees of sale the mortgaged property had sold for much less than its value had been in normal times.

It appears that there was a delay of slightly more than a year in rendering the decrees of sale, although there was no denial of the allegations of the complaint praying foreclosure, and we are unwilling to hold that the court abused its discretion in refusing additional delay. It was held, in the case of *Federal Land Bank* v. *Blackshear,* 183 Ark. 648, 38 S. W. (2d) 30, that a decree allowing eleven months and thirty days to pay the mortgage indebtedness after foreclosure was unreasonable, and that the chancery practice requires the sale of mortgaged property, on default, within a limited time fixed by the court, which usually does not exceed six months and, in no event, extends beyond the beginning of the next ensuing term of court. The case of *Taylor* v. *O'Kane,* 185 Ark. 782, 49 S. W. (2d) 400, is to the same effect.

There was no allegation of fraud or other inequitable conduct relating to either sale, except only that the property did not sell for a sufficient price.

It is well settled, however, that mere inadequacy of consideration, however gross, unaccompanied by fraud, unfairness, or other inequitable conduct, in connection with a judicial sale, is, of itself, insufficient to justify the court in setting the sale aside and refusing confirmation thereof. *Federal Land Bank* v. *Ballentine, ante* p. 141.

The decrees are correct, and must be affirmed, and it is so ordered.

POCH *v.* TAYLOR.

4-2761

Opinion delivered December 12, 1932.

Tom F. Digby, for appellant.

Robinson, House & Moses and *W. H. Holmes,* for appellee.

Roberts & Stubblefield, amici curiae.

SMITH, J. Suits were brought by the Bank Commissioner (who alleged that he was liquidating the assets of the Federal Bank & Trust Company) against J. K. Poch, Jr., and E. O. Manees, Sr., to enforce an assessment against them as stockholders in said bank. The cases were consolidated and tried together.

Poch filed an answer, in which he denied all the material allegations of the complaint, and alleged that all of the assets of the insolvent bank had been sold and assigned before the Bank Commissioner had taken charge of said bank, and that the assets of said bank were being liquidated by trustees for said assignees before the plaintiff Bank Commissioner attempted to take charge of the affairs of said bank, and that said trustees have, since that date, continued to manage and liquidate said bank. Manees filed a similar answer, and alleged, in addition, that he had sold his stock in the bank and the same had been transferred upon the books of that corporation before the Bank Commissioner had taken charge thereof. It is undisputed that prior to December 1, 1930, Poch owned stock in the bank of the par value of $2,000, and Manees owned stock of the par value of $8,000.

On November 18, 1930, an agreement was entered into between the directors of the Federal Bank & Trust Company, as parties of the first part, and the other banks in the cities of Little Rock and North Little Rock, comprising the Little Rock Clearing House Association, as parties of the second part, to the following effect: It was recited that the Federal Bank was experiencing a heavy withdrawal of deposits, which endangered its ability to continue in business, and that it had applied to the clearing house for assistance to enable it to remain open.

In consideration of the terms recited, it was agreed that:

"(1) First parties will cause Federal Bank & Trust Company to pledge to second parties all of its assets for the security of second parties' undertakings herein.

"(2) Second parties hereby severally guarantee and promise each in the proportion hereinafter set out,

to advance to Federal Bank & Trust Company sufficient funds as a loan, if necessary, so that each depositor of said company, as of the close of business on November 18, 1930, (except depositors of public funds or other deposits now secured as provided by law) may be paid upon demand."

The third paragraph names the proportionate parts of the advances which each of the member banks of the clearing house agreed to make.

"(4) The loans herein provided for to be made to Federal Bank & Trust Company by second parties will be evidenced by notes of Federal Bank & Trust Company executed to T. W. Kirkwood, as trustee, payable upon demand, at six per cent. (6%) interest, and specially secured by collateral from the general assets, acceptable to second parties. The collection of the proceeds of such collateral will be held in a separate account to the credit of T. W. Kirkwood, trustee, and applied as payment to second parties or loaned as approved by second parties for their account. Second parties will nominate an agent to serve with the executive committee of Federal Bank & Trust Company for that purpose.

"(5) This guarantee and promise shall continue in force as to such deposits, as of the close of business on November 18, 1930, for a period of ninety days (90) from this date. Each of first parties hereby guarantees second parties, up to the amount set opposite his signature, against any loss on account of such loans. It is expressly agreed, however, that the amount of the respective guarantees of the parties of the first part hereto is for the use and benefit of all of said parties of the second part collectively, to be prorated among them in proportion to the amount that each of said second parties shall loan to Federal Bank & Trust Company, as provided for herein.

"(6) It is further agreed that, if said Federal Bank & Trust Company shall be forced to suspend business and liquidate its affairs, such liquidation shall take place according to the laws of Arkansas, and that the parties

of the second part shall be paid, first, out of the assets so pledged; second, out of the general assets of said bank; third, out of the statutory liability of all of its stockholders, including the first parties; and fourth, by recourse upon this guaranty of the signers hereto and according to its terms.

"(7) First parties agree that all due proceedings will be taken at all times by the board of directors of the Federal Bank & Trust Company for the due authority for such loans and for securing second parties according to the terms hereof.

"(8) It is agreed that this document is prepared in an emergency, and the first parties hereto agree to execute such supplements, additions and redrafts hereof as may be required by second parties as necessary to more fully express and carry out the intentions of the parties hereto, and execute such instruments in such number as may be necessary to supply each of second parties with a signed copy hereof."

This eighth paragraph contains the names of the directors and stockholders contracting as parties of the first part, and opposite each name was written: "Amount of the respective guaranties of the parties of the first part hereto." Opposite the name of Manees was written $2,500, while $2,000 was written opposite that of Poch. Both were directors of the Federal Bank & Trust Company.

Upon the execution of this agreement the lending banks made the advances contemplated therein. The "run" on the Federal Bank & Trust Company continued in increasing volume until finally its officers decided to close its doors and to pay all depositors in full. This was done on or about January 15, 1931, and all depositors were invited to withdraw their deposits, and the lending banks furnished the money required for that purpose. Practically all of the deposits were withdrawn.

In order to secure the advances made by the lending banks, the assets of the Federal Bank & Trust Company were pledged to five trustees, two being named by

the parties of the first part, two by the parties of the second part, and these four trustees selected the fifth.

Although the Federal Bank & Trust Company ceased to function as a bank after January 15, 1931, it proceeded to liquidate its affairs through the five trustees. This method of liquidation continued until August 10, 1931, at which time the State Bank Commissioner took over its assets for the purpose of liquidation, and levied the assessment against the stockholders which culminated in this lawsuit.

Judgment was rendered against both Poch and Manees for the amounts sued for. For the reversal of this judgment, it is first insisted that the suit is, in effect, one by the assignees of the assigned liability of the stockholders, and that such suits cannot be maintained, as such suits can be maintained only by the State Bank Commissioner, and cases are cited to that effect.

We think, however, that the undisputed testimony shows that there was no sale of any of the assets of the insolvent bank. The transaction was not a sale, but a loan of money, with a pledge, as security therefor, of the bank's assets, including the respective amounts guaranteed by the directors and stockholders who signed the original contract pledging the assets.

No one questions the good faith of the transaction. It was an attempt to keep afloat a sinking corporation, and there is nothing about the transaction which operated to discharge the stockholders from the liability imposed upon them by law. Depositors appear to have been paid, but they were paid with borrowed money, and there appears to be other creditors. In any event it is definitely settled that the action of the Bank Commissioner in levying an assessment against the stockholders is conclusive as to the necessity for the call and the amount to be assessed against the stockholders. *Davis* v. *Moore,* 130 Ark. 128, 197 S. W. 295; *Aber* v. *Maxwell,* 140 Ark. 203, 215 S. W. 389.

The liability of stockholders is not confined to recompensing depositors. By § 702, Crawford & Moses'

Digest, it is provided that "the stockholders of every bank doing business in this State shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock."

It is our opinion that, under the facts stated, the lending banks were not purchasers, but were creditors. The greatest advantage promised the lending banks under the contract was the return of their money, with six per cent. for its use, and as creditors they are entitled to participate in the proceeds of any money derived from the stockholders under the Bank Commissioner's assessments.

It appears that on December 15, 1930, E. O. Manees transferred $7,500 worth of his stock to his son, E. O. Manees, Jr., and that new stock was issued by the officers of the Federal Bank & Trust Company to the transferee, and the bank paid a dividend to him in January, 1931. In support of the validity of this transaction, Manees offered to prove that Solon Humphreys, as his representative, discussed with a Deputy Bank Commissioner the question whether the Banking Department would approve the transfer of stock owned by Manees to his son, and was assured by the Deputy Bank Commissioner that such transfer would be approved by the State Banking Department. This proffered testimony was excluded, for the reason, no doubt, that, although the Commissioner or his deputy had stated the transfer would be approved, it had not been approved, certainly not in the manner provided by law.

By § 2 of act 102 of the Acts of 1929 (Acts 1929, page 510), it is provided that "whenever any stockholder may wish to transfer his stock, certificates in duplicate of such transfer, signed by the president and cashier or secretary, and setting forth the name and residence of the transferrer and transferee, shall first be sent to the Bank Commissioner," and that officer is required to in-

dorse thereon his approval or disapproval of the transfer, and to forward the certificate bearing his indorsement to the bank, and the bank files the certificate "with the clerk of the county in which the bank is located" for record. The statute further provides that: "If a transfer is not approved by the Bank Commissioner as above provided, the transferrer's liability as a stockholder under § 702 of Crawford & Moses' Digest of the Statutes of Arkansas shall continue for one year, notwithstanding the transfer; but a transfer may be effectual to transfer title to the stock (and may, if filed with the county clerk as aforesaid, be effectual as against creditors of the transferrer) notwithstanding the Commissioner's disapproval of the transfer."

As the excluded testimony did not propose to show a compliance with this statute, no error was committed in excluding it.

In a brief filed by *amici curiae,* it is insisted that so much of § 2 of act 102 of the Acts of 1929, above quoted, as extends for a period of one year the double liability of the holder of bank stock under § 702, Crawford & Moses' Digest, who transfers such stock without the approval of the Bank Commissioner, is violative of § 23 of article 5 of the Constitution. This section reads as follows: "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

The portion of § 2 of the act 102 of the Acts of 1929 which is said to offend against the section of the Constitution, above quoted, is set out above, and we do not think it is violative of the inhibition of the Constitution.

In the case of *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889, it was said: "This court has often considered the application and effect of this provision of the Constitution, and in each instance has adhered to the rule that 'when a new right is conferred or cause of action given, the provisions of the Constitution quoted require

the whole law governing the remedy to be re-enacted in order to enable the court to effect its enforcement,' but that if the statute 'is original in form, and by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some other existing statute for the purpose of pointing out the procedure in executing the power, enforcing the right, or discharging the burden.' (Citing cases)." See also *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41.

We have not copied § 2 of act 102 of the Acts of 1929 in full, but it suffices to say that it is original in form and prescribes the manner in which bank stock must be transferred and continues the burden or obligation of a stockholder upon one who sells his stock without complying with its provisions, this obligation being defined in an existing statute, to which reference was made. Section 702, Crawford & Moses' Digest, was not affected by the act of 1929, except that the burden of double liability imposed by it was made to continue for a year against stockholders transferring their stock without complying with the act of 1929. Section 2 of act 102 of 1929 is therefore valid legislation. *Davis* v. *Moore, supra; Karraken* v. *Ernest,* 4 Fed. (2d) 404.

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

BOULLIOUN *v.* CONSTANTINE.

4-2786

Opinion delivered December 12, 1932.

Isgrig & Morrow, for appellant.

G. E. McCloud and *Edward B. Downie,* for appellee.

BUTLER, J. Block No. 17, Faust's Addition to the city of Little Rock, is a square parcel of land bounded on the north by Sixth Street, on the east by Summit, on the south by Seventh Street, and on the west by Schiller. It is laid off in lots, lots Nos. 1, 2 and 3 comprising the northwest quarter of said block, lots Nos. 4, 5 and 6 the southwest quarter, lots Nos. 7, 8 and 9 the southeast quarter, and lots Nos. 10, 11 and 12 the northeast quarter. John D. Constantine owns and occupies the east 50 feet of lots 1, 2 and 3; P. W. Crawford is the owner of the east one hundred feet of lots 4, 5 and 6; W. H. Henson owns the west fifty feet of lots 7, 8 and 9; and the appellant, Boullioun, is the owner of the northeast quarter of said block, the same being lots 10, 11 and 12.

Many years ago Constantine, Crawford and Henson established their respective residences on the property owned by them, Constantine's residence facing on Sixth Street and Crawford's and Henson's facing on Seventh Street. The lots on which these houses were erected were practically on a level with the streets upon which they faced, but afterwards the grade of the streets was changed, and they were cut much lower than the lots, so that now, in order to reach the properties from Sixth or Seventh streets, a steep embankment must be ascended, making access by any vehicle quite difficult. Lots 10, 11 and 12 have had no structure erected thereon, and for all time have remained, and are now, vacant and uninclosed. When the grade of the streets was changed, the owners of the several residences mentioned began to enter their prop-

erties with their vehicles to the rear from Summit Street on the east and across a part of the uninclosed northeast quarter of the said block.

At that time Mrs. W. S. Mitchell was the owner of the uninclosed portion of the block, and remained such until a short time ago, when the property was sold under the description of lots 10, 11 and 12, block 17, to George H. Boullioun. Shortly after this purchase he began to take steps to close the passageways across his property, which resulted in the bringing of this action by the adjoining owners, who had been using the same, seeking to restrain Boullioun from interfering with their use of the right-of-way across his property. There was a decree adjudging to the appellees a right-of-way ten feet wide across the property, providing that it should be the south ten feet of lots 10, 11 and 12, but, as suggested by the appellees, it was evidently intended that the right-of-way should be the strip of land ten feet wide along the southern boundary of appellant's property from Summit Street to the center of block 17.

The question as stated by the appellees is as follows: "Did the appellees have a right to appropriate for their own use the property of the appellant, and use the same for their convenience in going to their garages?" Appellees contend that the use of the property for passage across it was justified as a way of necessity, and that right has become vested in them under the general rule that, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for the full period of seven years, a right to the continued user thereof is acquired by prescription, even though the public travel may have somewhere slightly deviated from the original track by reason of any obstacle that may have been placed in it. In support of this proposition, they rely upon the cases of *Balmat* v. *Argenta,* 123 Ark. 175, 184 S. W. 445, and *McCracken* v. *State,* 146 Ark. 300, 227 S. W. 8, 228 S. W. 739. It nowhere appears in the evidence that Boullioun or his grantor was also the grantor under whom the appellees

hold title, and therefore, so far as they are concerned, appellant is a stranger to their title and a private way of necessity cannot be claimed by them, as there can be no private way of necessity over the lands of a stranger. The rule is laid down by Chancellor Kent in his Commentaries in speaking of a way of necessity that "it is either created by express words or it is created by operation of law as incident to the grant, so that in both cases the grant is the foundation of the title"; and Washburn, in his Treatise on Real Property, says: "A way of necessity can only be raised out of land granted or reserved by the grantor, but not out of land of a stranger, for, if one owns land to which he has no access except over the lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own." See also *Vassar* v. *Mitchell,* 169 Ark. 792, 276 S. W. 605.

It remains to be seen whether or not the facts bring this case within the doctrine that a private way may be acquired by prescription. That such an easement may be established is well settled (*Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705; *Medlock* v. *Owen,* 105 Ark. 460, 151 S. W. 995), but it must appear that a definite way was continuously used without interruption for a time which would presuppose an original grant, which in this State is held to be seven years; and also that the way used was under a claim of right which was known to the owner of the soil and assented to by him. *Johnson* v. *Lewis,* 47 Ark. 66, 2 S. W. 329; *Kell* v. *Butler,* 147 Ark. 521, 227 S. W. 774.

While not universally recognized, the prevailing rule seems to be that, where the claimant has openly made continuous use of the way over occupied lands unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right; but where the easement enjoyed is across property that is uninclosed, it will be deemed to be by permission of the owner, and not to be adverse to his title.

The evidence in this case fully establishes the fact that the appellees have continuously used a passageway across the lands of the appellant for a period of time well

in excess of seven years with no protest or hindrance on the part of the owner of the soil and with his knowledge; and that the way used was fairly definite, although varying slightly because of natural obstacles, but that at no time was the particular way which was decreed to appellees used, for it was obstructed so as to make its use inconvenient. We are inclined to the opinion that these facts are not sufficient to create such an easement by prescription as can now be asserted against the wishes of the owner of the soil. There is no evidence that any of the persons using the land were claiming to do so as of right and adverse to the title of the owner, nor any circumstance proved which would put the owner upon notice that the use of the way was under such claim and hostile to his ownership. During all this time, as well as now, the lands were uninclosed, and we do not think it was the duty of the owner, in order to preserve his title intact, to be continuously on his guard or to forbid his neighbors from using the property for their convenience. A number of cases are cited in the 5th note to § 39, 9 R. C. L., chapter on Easements, which support this view, and the rule that the use of uninclosed lands for passage is to be presumed permissive and not adverse is stated to be that supported by the weight of authority and based on the fact that it is not the custom in this country, or the habit of the people, to object to persons enjoying such privilege until there is a desire to inclose. Were the rule otherwise, there would be but few vacant lots in our cities and towns and uninclosed property in the country which might not be burdened by easements of passageways, as it is a matter of common knowledge that by the indulgence and good nature of the owners people are allowed to go across these uninclosed properties at will and until such time as the owners may desire to inclose them.

Cases might, and do, arise where those using a private way over uninclosed lands may, by their conduct, openly and notoriously pursued, apprise the owner that they are claiming the way as of right and thus make their possession adverse, but there were no such circumstances

in this case, and therefore the user must be deemed to have been by consent of the owner, and, being permissive, could not ripen into a legal right.

In no case to which our attention has been called, or which we have been able to discover, in the decisions of our own court, is there any real diversity of opinion, but, as we interpret them, all sustain the rules we have heretofore announced. There is nothing to the contrary in the cases cited by appellee. *McCracken* v. *State, supra,* merely held that the proved facts justified the conclusion that a public road had been used under circumstances manifesting a claim to the use adverse to the owner and for a sufficient time to ripen into a legal right. The case of *Balmat* v. *Argenta,* we think, is not in point, for the testimony relative to the right of the property owners to open an alley through the center of the block from north to south is unimportant as beside the real point in issue.

On the question of the presumption arising from the use for a way over unoccupied lands, the only case we have discovered which might be construed to be contrary to the doctrine we have announced is the case of *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932. In the first paragraph of the opinion, on page 394, this language is used: "It is true that the use originated as a permissive right and not upon any consideration, but the length of time it was used without objection is sufficient to show that the use was made of the alley by the owners of the adjoining property as a matter of right and not as a matter of permission." But this statement is qualified by the sentence immediately following, and when all the language of the opinion, the nature of the property on which the easement was located, and the point decided, is considered, it is clear the writer merely intended to say that the length of time the way was used was a circumstance in connection with other circumstances in proof, sufficient to support the trial court's finding that the way was used as of right and in hostility to the landowner's title.

As we have seen, the claim is made by the appellee that the right to the way is not based "upon a mere accommodation, but is based upon a necessity." We have given a reason why that claim is not tenable: *i. e.,* that there is no testimony that appellant or his predecessors in title were appellees' grantors, but, if that was not a fact, the claim as a way of necessity must fail, because there existed no necessity for a way over appellant's land when appellees first purchased and built residences on their respective properties. Whatever necessity may now exist arose subsequently and was created by an agency independent of appellant or of those under whom he claims.

If there be in fact a controlling necessity for an easement on and over appellant's land, appellees are not without a remedy; ample provision is made in our statutes (§ 5250 *et seq.,* Crawford & Moses' Digest) for securing the way and for compensation to the owner.

For the reasons assigned, the case is remanded with directions to set aside the decree and dismiss the complaint for want of equity.

MISSOURI PACIFIC RAILROAD COMPANY *v.* SWAFFORD.

4-2729

Opinion delivered November 14, 1932.

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

V. D. Willis, for appellee.

MEHAFFY, J. In 1903 the railroad company, at that time the St. Louis, Iron Mountain & Southern Railway Company obtained a right-of-way deed from John Swafford and his wife, Roxie Swafford, to a right-of-way over certain lands in Boone County, Arkansas. It afterwards built its railroad across the Swafford land, but the evidence does not show at what date. In building its railroad it made a cut of about 100 feet deep and, appellees allege, 300 feet wide. The evidence does not show the width of the cut, but it does show that it is 125 feet deep in some places, and it would necessarily be very wide.

The cut divided the land belonging to Swafford so that 50 or 60 acres was on one side of the road, and the balance on the other. This was the home of the Swaffords, and it was necessary to get to portions of the farm, to cross the railroad tracks where this cut was made.

The railroad company, at the time it made the cut and built its road, built a viaduct on a public road which crossed the railroad tracks immediately in front of the Swafford home. This viaduct was maintained and used by the St. Louis, Iron Mountain & Southern Railway Company, and its successor, the appellant, until 1930. In 1930 the State Highway Department made some changes in State Highway No. 43, and built a concrete viaduct across the railroad tracks a considerable distance from

the place where the old wooden viaduct crossed the track. When the concrete viaduct was built, the appellant destroyed the wooden viaduct, thereby making it practically impossible for the Swaffords to get from their home to the land which was on the other side of the railroad track, without travelling two or three miles.

This suit was brought by appellees to recover for damages to their land caused by the destruction of the wooden viaduct.

The appellant answered denying all the material allegations of the complaint, alleging that the county court of Boone County had ordered a destruction of the viaduct, and that it acted in obedience to that order, and that it had entered into a contract with the Highway Department, which contract was introduced in evidence.

The appellees introduced evidence as to the destruction of the viaduct and the damage caused to their farm. They claim the farm was damaged in the sum of $2,000. There was a verdict and judgment for $1,000, and the case is here on appeal.

At the time the viaduct was built, the road leading across the track to appellees' house was a public road. The evidence shows that it is a county road. It has never been, and is not now, according to the evidence, a part of the State highway system. The Highway Department has never had any jurisdiction or control over it.

Section 6681 of Kirby's Digest, which is now section 8483 of Crawford & Moses' Digest, provides that whenever any railroad company has constructed or shall hereafter construct a railroad across any public road or highway of this State, now established or hereafter to be established, such railroad company or corporation shall be required to so construct the railroad crossing that the approaches of the railroad bed shall be kept at no greater than a certain elevation, and further provides that at any crossing of any public highway such railroad may be crossed by a good and safe bridge, to be built and maintained in good repair by the railroad company or corporation owning or operating such railroad. It was

therefore the duty of the railroad company, when it built its road and made the cut, to build a good and safe bridge, and maintain it in good repair. It did this and maintained the bridge until 1930, when it destroyed it.

The law provides for the bridge over the tracks at crossings like this, and no order of the county court or contract with the Highway Department would affect appellees' right to recover if they had been damaged by the destruction of the bridge by appellant.

Section 22 of article 2 of the Constitution of Arkansas 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."

Our Constitution provides that the owner of property may recover, although his property has not been taken nor appropriated, if it has been damaged.

It was the duty of the appellant under the law to maintain the bridge, and the destruction of it, according to the evidence, necessarily damaged the appellees.

Appellant filed motions for continuances because, while it relied on the order of the county court, it discovered that there had been an appeal taken to the circuit court, and the circuit court had held that the order of the county court for the destruction of the bridge was void. The appeal was taken without notice to appellant, and it did not discover the order of the circuit court, it alleged, in time to prepare for its trial.

The court did not err in refusing to grant a continuance, because neither the order of the county court nor circuit court could deprive the appellees of the right to damages if their property had been injured, and no order that any court would make would render ineffective the provision of the Constitution above quoted.

It is therefore unnecessary to set out the order of the county and circuit courts, and the evidence with reference thereto. No matter what the order might have been, if appellees' property was damaged by the appellant's destruction of the bridge, they had a right to recover.

Appellees contend that at the time they conveyed the right-of-way to the railroad company it was agreed that the bridge would be built and maintained, and that this was a part of the consideration for the right-of-way.

Mrs. Swafford testified that the bridge had been maintained for many years, she thought ever since 1908, and that the cut was 75 feet deep, and at some places 125 feet deep. It had been so maintained for many years when appellees spent considerable money improving their house, with the understanding and belief that said bridge would continue to be maintained.

On cross-examination appellant's attorney asked Mrs. Swafford: "You allege in your complaint that when the railroad company purchased the right-of-way, they agreed to build the bridge, is that true?" Answer: "Yes." She also testified that she had always understood it that way. Swafford himself died before the trial, and, of course, they could not have his testimony.

The undisputed facts show that this was a county road, running right up to appellees' house; that the bridge was built when the cut was made; that it was constantly maintained for many years, and the jury had a right to believe Mrs. Swafford when she testified that the building and maintaining of the bridge was a part of the consideration for the right-of-way.

As a general rule, parol evidence is inadmissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the written instrument. To this rule, however, there are exceptions. We recently quoted with approval, as stating the rule, the following: "It seems, according to the American cases, that the only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose, it is open to explanation, and may be varied by parol proof." *Whitlock* v. *Barham and Duncan,* 172 Ark. 198, 288 S. W. 4; *Texas Co.* v. *Snow,* 172 Ark. 128, 291 S. W. 826; *Rowland* v. *Ward,* 178 Ark. 851, 12 S. W. (2d) 785; *Jackson County Gin Co.* v. *Mc-*

Quistion, 177 Ark. 60, 5 S. W. (2d) 729; *Vinson* v. *Wooten,* 163 Ark. 170, 259 S. W. 366; *Newell Contracting Co.* v. *Elkins,* 161 Ark. 625, 257 S. W. 54.

But, even if there were no evidence of a consideration other than that expressed in the deed, the fact that the law, at the time, required them to build the bridge; that it was built and maintained for many years, and that it is still the duty under the law to maintain a bridge on a public road, would make it liable for the destruction of the bridge if such destruction damaged the property of the appellees.

In the view we take of the matter, it is wholly immaterial whether the railroad company had notice of appeal to the circuit court, and it is also true that appellees' rights could not be affected by any order of the court or any order or contract with the Highway Department.

Finding no error, the judgment is affirmed.

[redacted]

HOME INDEMNITY COMPANY OF NEW YORK *v.* BOBO.

4-2756

Opinion delivered November 28, 1932.

[redacted]

Buzbee, Pugh & Harrison, for appellant.

Coleman & Gantt, for appellee.

McHANEY, J. Appellee secured a judgment in the Jefferson Circuit Court against C. A. Webkes and wife in the sum of $5,000, for injuries sustained by her in an automobile accident while a guest in their car. After execution was returned *nulla bona,* suit was brought against the Southern Surety Company, because of a policy of liability insurance issued by it to the Webkes, and

against appellant, the Home Indemnity Company of New York, hereinafter referred to as appellant (the other appellants being garnishees holding money belonging to it), as surety on the bond of the Southern Surety Company to enable it to do business in this State. The complaint in this action, after alleging the judgment against the Webkes, the issuance of execution thereon, its return unsatisfied, and that appellee was entitled to judgment against the Southern Surety Company in said sum, further alleged as to appellant the following: "That, as a prerequisite to its right to do business in the State of Arkansas, the defendant, Southern Surety Company of New York, gave a bond to the State of Arkansas in the sum of $50,000, conditioned for the prompt payment of all claims and obligations arising or accruing in this State to any person during the term of said bond, by virtue of any policy or contract issued by said principal, Southern Surety Company of New York, such as the claim or obligation now sued on, which bond was in full force and effect on and at all times after the 29th day of December, 1930, the time of plaintiff's injuries, and was signed by the defendant, the Home Indemnity Company of New York, as surety for the said Southern Surety Company of New York. A certified copy of said bond is attached to this complaint, and made a part thereof."

The bond executed by appellant and exhibited follows: "Know all men by these presents: That we, Southern Surety Company of New York, as principal, and the Home Indemnity Company, a corporation organized under the laws of the State of New York, as surety, are held and firmly bound unto the State of Arkansas in the sum of fifty thousand and 00/100 ($50,000) dollars, lawful money of the United States, for the payment of which well and truly to be made, we hereby bind ourselves, our successors and assigns, jointly, severally and firmly by these presents.

"The conditions of the above obligation are such that:

"Whereas: The said principal has filed its charter and statement and in other respects conformed to the requirements of the statutes for the transaction of a guaranty and surety insurance business in Arkansas; and,

"Whereas: The said company proposes to enter this State (or continue in this State) for the purpose of transacting a guaranty and surety insurance business.

"Now, therefore, if the said principal shall promptly pay, when due, all claims and obligations arising or accruing in this State by virtue of any bond or contract made by said principal; and all amounts due the State of Arkansas, by virtue of any statute, and in all respects comply with the laws of the said State, then this obligation shall become void, otherwise to remain in full force and effect.

"Witness our hands and seals this 17th day of December, 1930."

The prayer was for judgment and interest. Neither the Southern Surety Company nor appellant answered, although duly served, and judgment was taken by default against them after an agreement to settle had proved abortive.

This is an appeal from a default judgment, and the only question for our decision is, does appellee's complaint state a cause of action in her favor against appellant? As said by this court in *Thompson* v. *Hickman,* 164 Ark. 472, 262 S. W. 20: "The rendition of a judgment by default upon a complaint which fails to state facts sufficient to constitute a cause of action is an error for which the judgment should be reversed on appeal." See also *Wilson* v. *Overturff,* 157 Ark. 389, 248 S. W. 898. It is conceded that the complaint without the exhibit states a cause of action, but it is insisted that the exhibit is a part of the complaint, and, when so considered, it contradicts the allegation above quoted and shows that there is no liability as to appellant on this bond, when read in connection with act 493, Acts 1921, paragraphs 5 and 7 of § 1 and § 6, for the reason that it covers only the guaranty and surety lines written by the principal

and not its liability lines of insurance, for which another bond or certificate of deposit was given. We do not copy these provisions of the statute, for, in the view we take of the matter, they become unimportant.

By § 138 of the Civil Code it was provided that, "If the action * * * is founded on a note, bond, * * * the original, or a copy thereof, must be filed as a part of the pleading." Under this statute this court several times held that, if the instrument sued on was the basis of the action, it should be looked to in determining the sufficiency of the complaint. See *Sorrels* v. *McHenry,* 38 Ark. 134; *Euper* v. *State,* 85 Ark. 223, 107 S. W. 179; *Security Ins. Co.* v. *Jaggers,* 120 Ark. 472, 179 S. W. 1008. But the above section was amended by the act of March 27, 1871, p. 231, and is carried *verbatim* into Crawford & Moses' Digest as § 1222 as follows: "In an action or defense founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims." By inadvertence, the amendment of 1871 was omitted from both Sandel & Hill's Digest (§ 5752) and Kirby's Digest (§ 6128), and the opinion in *Security Ins. Co.* v. *Jaggers, supra,* erroneously cites § *6128* of Kirby's Digest as sustaining this statement: "The action is founded on the bond of appellees, which was filed as exhibit to the complaint and may be considered upon demurrer to the pleadings."

The cases holding that exhibits to the complaint in suits at law may be considered on demurrer or on appeals after default are now without statutory foundation, and we think the recent case of *American Ins. Co. of Newark, N. J.,* v. *Dutton,* 183 Ark. 495, 37 S. W. (2d) 875, definitely settles the question. We there said: "Counsel for appellant, in its motion for a rehearing, claims that the court did not take into consideration a clause of the insurance policy which is set out in the brief on the motion on rehearing. We do not deem it necessary to set out this provision of the policy, for, under our settled rule of

practice, we cannot consider it. It is true that the policy was made an exhibit to the complaint, but this court has uniformly held that in actions at law exhibits to the complaint can only be used as explanatory of the allegations of the complaint and not for the purpose of contradicting them."

We are therefore of the opinion that the complaint states a cause of action sufficient to support a judgment on appeal after default.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* DODGE.

4-2888

Opinion delivered November 28, 1932.

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

Coleman & Riddick, for respondent.

BUTLER, J. The respondent has made a concise statement of the case, which we adopt and set out as follows:

"R. J. Lynch and H. Levinson, doing business as R. J. Lynch & Company, brought a suit in the Pulaski Chancery Court against the chairman and members of the Arkansas State Highway Commission seeking to recover, as upon a *quantum meruit*, the value of labor and materials furnished the commission in the construction of certain roads and bridges in the State highway system. The highway commission filed a demurrer to the complaint upon the ground that the Pulaski Chancery Court was without jurisdiction of the case because it is one against the State of Arkansas. The demurrer was overruled. The Commission thereupon filed in this court a petition for a writ of prohibition to prevent the chancery court from proceeding with the case.

"In the case in the Pulaski Chancery Court it is alleged and admitted by the demurrer that the plaintiffs performed the work for the highway commission under certain written contracts requiring the construction of roads and bridges in the State highway system, and, further, that the work performed, labor done and materials furnished were in every respect in accordance with the plans and specifications of the State Highway Commission applicable to such construction work; that, after performance, the Highway Commission accepted the work, labor and materials furnished by plaintiffs; and that the roads and bridges built are now in use by the public as a part of the State highway system.

"The suit in the chancery court is brought to recover upon a *quantum meruit* for the reasonable and fair value of materials and labor furnished, because, though the work was done under written contracts, let after competitive bidding, there was no previous advertisement of the work as required by the statutes of this State."

It is conceded that, if the petitioners are correct in the position taken, and that the court improperly overruled the demurrer, prohibition is the proper remedy. Section 4, art. 7, of the Constitution; *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59; *Roberts* v. *Tatum,* 171 Ark. 148, 283 S. W. 45; *Ark. State Highway*

Commission v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879. It is insisted by the petitioner that this is a suit against the State, differing in essential particulars from *Ark. State Highway Commission* v. *Dodge, supra,* and that this suit cannot be maintained because of § 20, art. 5, of the Constitution, which provides: "The State of Arkansas shall never be made a defendant in any of her courts."

It is secondly insisted that, even though the suit might be maintained, the State is under no liability to Lynch & Company, and that, if there is a moral obligation, the General Assembly is the only source of relief. It seems to us that a consideration and discussion of the second point raised would at this time be premature and improper. The question we should now determine is, has the court below jurisdiction to hear and determine the case? and, if so, the question of liability would be first for its decision. Therefore, we proceed to a consideration of the question whether the suit can be maintained against the petitioner.

In *Ark. State Highway Comm.* v. *Dodge, supra,* where the right to maintain a suit against the Highway Commission was upheld, the case of *Grable* v. *Blackwood,* 180 Ark. 311, 26 S. W. (2d) 41, was cited in support of that holding. That was a suit brought against the State Highway Commission to enforce the payment of outstanding indebtedness incurred prior to January 1, 1927, against a road improvement district under act No. 153 of the Acts of 1929, which provided for the ascertainment of valid outstanding indebtedness incurred prior to the date mentioned against any road district, and for the payment thereof by the Highway Commission out of appropriations provided for the payment of road district bonds and interest obligations. Act No. 153 and the right of the plaintiffs to maintain the action was attacked on various constitutional grounds, but § 20, art. 5, was not invoked. It was held that the act did not violate the Constitution, and that the suit might be maintained against the Highway Commission. The case of *Urquhart* v. *State,* 180 Ark. 937, 23 S. W. (2d) 963, was also cited

in the majority opinion in support of the conclusion reached by the writer. That case was really an issue as to the extent of the liability of the State for interest upon a contract to purchase a State convict farm and the sufficiency of the appropriation to discharge the obligation, when its extent was adjudged by the courts of Pulaski County, the agencies created for that purpose. The following quotation was made from *Urquhart* v. *State, supra*: "The Legislature itself might have ascertained the amount, both of principal and interest, and have made an appropriation accordingly, but it elected to constitute another agency to make this finding of fact, and made an appropriation in what was assumed to be a sufficient amount to pay both the principal and interest, and, under the *remittitur* which has been entered, the appropriation is sufficient," and the court said: "It is true that suit was brought by the State, as the act provided it should be, but the act also provided that the State's vendor might litigate his claim for interest, and that either party should have the right to appeal from an unfavorable decision."

Mr. Justice SMITH and Mr. Justice MEHAFFY adopted the reasoning of Mr. Justice GRAVES in the case of *State, etc.,* v. *Bates,* 317 Mo. 696, 296 S. W. 419, and quoted with approval from that opinion as follows: "It (State Highway Commission) is an entity, with powers of a corporation, established and controlled by the State for a specific public purpose, but that does not make this legal entity the sovereign State. No contract it is authorized to make is made in the name of the State, but in the name of the Commission. The sovereign State could have contracted for the building of its public highways in its own name, but it chose to create a legal entity for this work. This act gave to this legal entity no part of the State's sovereignty, but authorized it to proceed to do certain work which the State could have done by private contract made direct with the State. Thus it has been well said in 14 C. J., at page 75: 'Although a corporation may be public, and not private, because established and controlled by

the State for public purposes, it does not necessarily follow that such a corporation is in effect the State, and so not subject to the rules of law governing other corporations, for the State may, by engaging in a particular business through the instrumentality of a corporation, divest itself *pro hac vice* of its sovereign character, so as to render the corporation subject to the rules of law governing private corporations. Thus, although incorporated banks, established by the State for its own public purposes and owned and controlled entirely by the State, are undoubtedly public corporations, it has been held that they are not for that reason invested with the attributes of sovereignty, but are mere corporations, and subject generally to the rules of law governing other corporations.' ''

The conclusion was that the Highway Commission, as created and functioning, was in effect a *quasi* corporation clothed with the power to make contracts in its own name, and to discharge obligations out of moneys appropriated for the purpose of enabling it to carry out the duties prescribed by law, and that it was therefore an entity or juristic person, and suits against it arising out of an alleged default in its obligations in the conduct of the business intrusted to it would not be suits against the State, and that the action was authorized. Chief Justice HART and Mr. Justice HUMPHREYS, concurring, were of the opinion that the Highway Commission was but an agency of the State. They held, however, that § 20, art. 5, of the Constitution, properly interpreted, was merely a declaration of the general rule that a State may not be sued without its consent, but that the State had consented that suit be maintained against this agency, and said: "We can perceive no good reason why a State should not consent to being sued in her own courts upon such terms and conditions as her Legislature might prescribe. We do not think that the consent can be given except by the Legislature, which alone can declare the public policy of the State. If the State is to exercise its sovereign power in building roads, and in constructing bridges

across navigable streams, it would seem that there should be a tribunal somewhere which might pass upon the claims of those with whom the agency of the State had contracted with reference to the matter, and what tribunal could be a more appropriate and safe guaranty of the equal protection of the laws than the courts established by the State for the protection of its citizens, and for such citizens who might come within its borders for pleasure or gain. * * * It seems to us that the State's sovereignty will be better preserved and protected by holding that a State may through its Legislature waive its immunity from suit and select the forum and prescribe the terms and conditions upon which it may be sued than to allow the Legislature to parcel out the State's sovereign functions to various bodies, by whatever name called, and allow them to be sued, thereby accomplishing by indirection what they say the State may not do directly."

The writer, Mr. Justice KIRBY, and Mr. Justice MCHANEY, dissented from the reasoning and conclusions reached by the other members of the court for the reason, as stated in our concurring opinion, in the case of *Baer* v. *Ark. State Highway Commission,* 185 Ark. 590, 48 S. W. (2d) 842, that, in our opinion, the Highway Commission was merely the agent through which the State acted, and, construing art. 5, § 20, as mandatory, we thought that under no circumstances could suits against the State Highway Commission be maintained. That case was decided also by a divided court, one view being that the suit which sounded *in tort* might be maintained under the authority of the Dodge case, *supra,* but that there was no legislation authorizing such character of suit. The Chief Justice, dissenting, insisted, as in the Dodge case, that there was no constitutional inhibition against the power of the State to consent to being sued in its courts, and very justly argued that, since it is recognized that the Legislature might establish commissions to pass upon the validity of claims and for their establishment, it would be unreasonable to deny it the right to designate

the courts as forums for such investigation, and said: "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. * * * 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." To this construction of the statute, Mr. Justice MEHAFFY agreed.

It will be seen that, out of the conflicting views of a majority of the several members of the court, a very definite result has been reached, *i. e.,* that in a proper case the Highway Commission may be sued when authority for the bringing of the suit may be found in the statute. Since this is the effect of the holding in both the Dodge and Baer cases, *supra,* we think it more important that this question be definitely settled than a too firm insistence be held to our individual views, and we now hold that, in all cases where the statute authorizes a suit, it may be maintained against the Highway Commission, whether it be thought to be a juristic person or whether § 20, art. 5, be merely declaratory of the general doctrine that the State may not be sued in her courts unless she has consented thereto.

The question remains, is this suit authorized by the statute? There are a number of statutes which authorize suits against the Highway Commission and which were considered by the court in previous cases, including the

Grable, Dodge and Baer cases, *supra.* We have held that suits *ex contractu* and for damages to property taken or injured in its exercise of the right of eminent domain are authorized by statute, and three of the justices have thought the statutes broad enough to include actions for recovery of damages for personal injuries. In that view, certainly, a suit upon *quantum meruit,* which is a contract the law implies, would come within the purview of the statute. One of the acts authorizing the bringing of suits against the Highway Commission is act No. 2 of the special session of 1928, but which the office of the Attorney General, in its able brief, contends was not within the purview of the Governor's call, and, because of that, invalid. It is argued that, since the call was "to enact a statute to require bonds in certain suits against the Highway Commission," this related only to suits of such a character as were then pending or threatened in the courts, and the authority to sue given by the act must be limited to suits of that nature. We do not think the language used justifies that narrow construction. It did not say in so many words that it related only to suits then pending, and this was not the way in which the Legislature construed the call. We must therefore, under well-settled rules, where the question is doubtful, place the same interpretation on the call as the Legislature. As we have seen, the Legislature in a number of acts has signified the State's assent to suits against the Highway Commission, and again registered that assent by § 17 of act 15 of the special session of 1932. The question of the validity of this act is now pending, but, whether valid or not, it is an indication of the Legislative will, but without it the authority sufficiently appears, and; if the act be upheld, it of itself makes absolute that intention.

In *Leonard* v. *State,* 185 Ark. 998, 50 S. W. (2d) 598, in holding that the Commission was required to let contracts for the construction and maintenance of highways in conformity with the requirements of the statutes, and that its neglect to do so rendered such contracts void, where it was argued that, although the contracts be held

void, the contractors should not be precluded from setting up whatever rights they might have, based upon *quantum meruit*, we said: "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"; and, in response to the argument that there might be contractors who, by reason of having furnished labor and materials to the Commission in the construction and repair of roads, and who had certain personal defenses or rights, ought to recover, even though the contracts might be void, we further said: "We are not undertaking to adjudicate any such rights in this opinion."

The result of our views is that the court below has jurisdiction to hear and determine the question of liability of the Commission, and its extent, for the work and material of which it has received the benefit. It follows therefore that the writ is denied.

TAYLOR *v.* STATE USE SEVIER COUNTY.

4-2784

Opinion delivered December 5, 1932.

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

J. M. Jackson, E. K. Edwards, Abe Collins, Lake, Lake & Carlton and *B. E. Isbell,* for appellee.

HUMPHREYS, J. Appellee intervened in the proceeding to liquidate the assets of the American Exchange Trust Company of Little Rock pending in the chancery court of Pulaski County to obtain judgment for $34,506.40 against the Bank Commissioner and liquidating agent, in their official capacities, for an alleged trust fund derived from the sale of bonds of Sevier County issued for the purpose of building a courthouse, and to have the amount allowed as a preferred claim.

Appellant filed a response, denying the alleged indebtedness and the right of appellee to have any amount allowed as a general or preferred claim.

The cause was submitted upon the pleadings and testimony, which resulted in a finding and decree against appellants in their respective capacities as State Bank Commissioner and liquidating agent of the American Exchange Trust Company for the total sum of $33,649.67 as a preferred claim to be paid out of any funds in their hands for the payment of preferred claims, and that bonds substituted for Sevier County bonds and delivered to appellees should be returned to appellants, from which findings and decree, adverse to the respective parties, each appealed.

The following facts are reflected by the record:

Bonds legally voted and issued in the sum of $110,000, to obtain money with which to build a new courthouse in Sevier County, were sold on June 2, 1930, to M. W. Elkins & Company, of Little Rock, Arkansas, which sale was confirmed and approved by the county court of Sevier County. The county judge addressed a

letter to the American Exchange Trust Company in the following words and figures:

"De Queen, Arkansas.

"June 14, 1930.

"Mr. J. B. Webster, Trust Officer, American Exchange Trust Company, Little Rock, Arkansas.

"Dear Sir:

"We are shipping to you $110,000 Sevier County, Arkansas, 5 per cent. courthouse and jail bonds to be delivered to M. W. Elkins & Company at par flat, as the full purchase price of the issue is $110,000 flat. The bonds are to be delivered to M. W. Elkins & Company as follows:

"When they receive the approving opinion of B. H. Charles, St. Louis, they agree to take up $3,000 of the bonds and balance on architect's monthly estimates for work done. You are further authorized and instructed to deliver, all or any part, any maturities, of the bonds to M. W. Elkins & Company at the above price from time to time, as they may request. You are to allow M. W. Elkins & Company to substitute this account with bonds of the county or other municipal bonds of equal par value.

"When you have received the first cash payment, please deposit same in your bank. The balance of the funds are to be drawn out on architect's estimates for work done by drafts on M. W. Elkins & Company, care of your bank, signed by the county judge, with a copy of the architect's estimate attached, once each month, beginning thirty days from the date the work starts.

"Yours very truly,

"J. C. Arnold,

"County Judge of Sevier County, Arkansas."

This letter of instructions was enclosed in a letter from the attorney employed by Sevier County to the American Exchange Trust Company and mailed to it on June 16, 1930. The letter of the attorney is as follows:

"American Exchange Trust Company,
"Little Rock, Arkansas.
"Dear Sir:

"Attention, Mr. J. B. Webster, Trust Officer.

"I am shipping you under separate cover, by prepaid express, $110,000 of Sevier County, Arkansas, 5 per cent. courthouse and jail bonds, and I am handing you herewith a letter of instructions, signed by the county judge, a nonlitigation certificate and a treasurer's receipt. You will note in the letter of instructions that you are requested to deposit the cash payment of $3,000 in your bank. Please advise me promptly as soon as this money is deposited.

"Very truly yours,
"Abe Collins."

Elkins & Company sold the Sevier County bonds from time to time and deposited the cash received from them in the trust department of the American Exchange Trust Company, under an agreement with it that the money might be withdrawn by substituting other bonds for the amounts drawn out. Some of the money was paid out on the county judge's drafts drawn on Elkins & Company with architect's estimates attached. The result was that, when the American Exchange Trust Company closed its doors, practically all the money derived from the sale of the Sevier County bonds which had not been expended for the construction of the courthouse and to pay the fiscal agent's fee to Elkins & Company had been converted by Elkins & Company into bonds of little value, some of which were entirely worthless. Later, the Bank Commissioner and liquidating agent of the American Exchange Trust Company refused to act further in collecting the bonds which had been substituted for the money derived from the sale of the Sevier County bonds, and, by agreement, said substituted bonds were transferred to a depository bank in Sevier County, where a portion of them were sold. The original Sevier County bonds were sold to Elkins & Company, supposedly at par, but a fiscal agent's fee was allowed to a man by the name of Toland,

and was paid to Elkins & Company out of the funds derived from the sale of the bonds, so that in fact they were sold to and purchased by Elkins & Company below par. On the day the defunct bank closed its doors, there was enough cash on hand to pay all preferred claims, and also to pay the balance due Sevier County, if classed as a preferred claim.

The trial court found that the letter of instructions only authorized the substitution of other bonds for Sevier County bonds by Elkins & Company, and did not authorize Elkins & Company to substitute other bonds for money derived from the sale of the Sevier County bonds, and we agree with the court's interpretation of the letter of instructions. The only object in selling the Sevier County bonds was to obtain money with which to build a courthouse. Such purpose was accomplished when the Sevier County bonds were converted into money. It would have been beside and beyond the object and purpose to be attained if the letter of instructions meant that Elkins & Company might purchase other bonds with the money derived from the sale of the Sevier County bonds. Such interpretation would have permitted Elkins & Company to use Sevier County money derived from the sale of its bonds to speculate in the bond market. The only authority in the law for handling the proceeds from the sale of the Sevier County bonds was to pay the public fund thus derived to the treasurer of Sevier County for the purpose of placing it in the county depository, all in accordance with the provisions of act 163 of the Acts of 1927 and act 139 of the Acts of 1931.

We also agree with the chancellor that appellants were entitled to an accounting for the amount of the fiscal agent's fee paid indirectly to Elkins & Company out of the funds derived from the sale of the bonds of Sevier County. The constitutional amendment under which the bonds were issued and sold inhibited a sale of them below par, and to deduct and pay a fiscal agent's fee indirectly would permit a sale of them below par.

We also agree with the chancellor that the amount of the public fund derived from the sale of the Sevier County bonds was and is a trust fund. The trust department of the American Exchange Trust Company accepted the bonds for collection and thereby agreed in writing to pay over the fund collected to the county judge of Sevier County on his drafts, in such amounts as were needed, monthly, to pay for the construction work on the courthouse as it progressed, according to architect's estimates attached to drafts. No authority was given in the letter of instructions to deposit more than the $3,000 first collected to the credit of Sevier County, which amount was drawn out long before the doors of the American Exchange Trust Company were closed. According to the authority in the letter of instructions, the balance of the fund was to be held to pay drafts drawn on Elkins & Company with architect's estimates attached. This fund therefore was necessarily a trust fund in the hands of a trustee for a particular purpose, evidenced by writing, and was not to be mingled with the general funds of the American Exchange Trust Company. Under subdivision 5 of § 1, act 107 of the Acts of 1927, the fund became an express trust to which appellees were entitled to the exclusion of general creditors.

We also agree with the chancellor that the transfer of the substituted bonds by agreement to the depository in Sevier County and a sale of a part of them did not estop the county from claiming the balance of the trust fund rightly belonging to it. The fund was a public trust fund, and there was no authority in the law for the county judge or any other public official to waive the county's right to it.

It follows, as a matter of course, that the county has no right or title to the substituted bonds. The chancellor correctly ordered that they be returned to appellants.

The decree is affirmed on both the appeal and cross-appeal.

SMITH and MCHANEY, JJ., dissent.

DOZIER *v.* RAGSDALE.

4-2881

Opinion delivered December 5, 1932.

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

Coulter & Coulter, for appellee.

MEHAFFY, J. A number of citizens of Union County, Arkansas, filed their petition to initiate a local or special statute for the purpose of fixing the compensations and expenses of certain officials of Union County, Arkansas, and fixing the number of their deputies, assistants and clerks, and their salaries, and of fixing the manner in

which such compensations and salaries shall be paid, and for the purpose of effecting economies in the expense of government in said county.

The Initiative and Referendum Amendment to the Constitution provides: "The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.

The amendment further provides that in counties the number of signatures required upon any petition shall be computed upon the total vote cast for the circuit clerk. The time for filing the petition is then fixed by the Amendment.

Act 356 of the Acts of 1927 provides that the petition shall be filed with the county judge at least 60 days before the election, and that the county judge shall submit all such petitions to the county election commissioners, who shall place the matters petitioned for in the proper form on the tickets provided for the next general election of county officers, stating plainly and separately the matters initiated or referred, with the words "for" and "against" each measure.

The act further provides that, when any measure initiated or referred shall receive a majority of the votes in the county cast upon the subject, it shall immediately become a law.

In 1910 the people of Arkansas adopted a constitutional amendment reserving the right and power to themselves to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly. That amendment undertook to provide for local legislation, but it read: "The people of each municipality, each county and of the State reserve to themselves power to

propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly,'' etc.

No one doubted at the time, and no one doubts now, that the people, in adopting this amendment, thought they were providing for local legislation in counties by initiating acts. But it will be observed that the reservation of power and authority to initiate and enact laws was in the same paragraph that the power was reserved to enact constitutional amendments, and this court held that that part of the amendment adopted in 1910 was meaningless.

The court said that the people of municipalities and counties, never having possessed the sovereign legislative power apart from the other people of the State, could not reserve the power to counties and municipalities to adopt constitutional amendments. The court further said that courts cannot supply legislative defects and omissions; that, whenever a provision is left out of a statute, either by design or mistake of the Legislature, the courts have no power to supply it.

It was held by this court that the question for the interpreter is not what the Legislature meant, but what its language means. *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S. W. 656.

It will be remembered that the amendment construed by this court in the case of *Hodges* v. *Dawdy, supra,* was adopted in 1910. Thereafter the present amendment was adopted, and, in submitting the present amendment to be voted upon, the provision for the Initiative and Referendum Amendment as to counties was in a separate paragraph, in which the amendment was not mentioned. It simply provided for local, special and municipal legislation of every character in and for their respective municipalities and counties. The fact that the people adopted this provision a second time, and having written it in such plain language that it cannot be misunderstood by any one, shows clearly that they intended to reserve to themselves the right to pass all local laws affecting

the counties. In addition to this, in 1926 the people initiated and adopted an amendment to the Constitution which reads as follows:

"The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

It is therefore seen, not only that the people reserve to themselves the power to legislate as to the local affairs of the county, but they adopted an amendment expressly prohibiting the Legislature from passing any local or special law.

The appellant, however, contends that the measure adopted by the people of Union County is contrary to the general law of the State, and therefore violative of the constitutional amendment which prohibits counties from enacting local legislation contrary to any general law of the State.

Appellant cites and relies on act 216 of the Acts of 1931. That, however, is not a general law fixing the fees of the county officers of the State, but that law provides that the Legislature has determined and declared that the fees now being drawn by the different county officers, according to the provisions of general statutes of the State, and special and local acts, are based on proper classification, and that they shall continue to receive the salaries and fees under said local and special acts. Therefore the act itself provides that they are still receiving the fees and salaries under special acts, and not under general acts. We do not think the people had in mind legislation of this character in adopting the amendment which provided that no local law shall be enacted contrary to a general law.

Under this amendment the people of the county could not enact a law contrary to a general law which operated uniformly throughout the State, like the criminal laws of the State, but the fixing of fees and salaries of the county officers is purely a local matter, and is not of interest to persons except the taxpayers in the particular county where the law is enacted. The fixing of salaries

and compensations to be paid county officers is of peculiar interest to the taxpayers of the county, and it was legislation of this kind that the people intended to provide for. No local matter could be more important to them.

The Legislature passed a law fixing the fees to be collected by the sheriff of Crawford County, and we said: "The trial court ruled that the act was void because the enactment thereof was prohibited by Amendment No. 14 to the Constitution of the State of Arkansas, which is as fallows: 'The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of any local or special act.' " *Smalley* v. *Bushmiaer,* 181 Ark. 874, 31 S. W. (2d) 292. The court cites a number of cases, among others, *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617. In that case the court held that the exclusion of a single county from the operation of the law makes it local, and the court said: "It cannot be both a general and a local statute." See also *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. (2d) 991; *Street Imp. Dists. Nos. 481 and 485* v. *Hadfield,* 184 Ark. 598, 43 S. W. (2d) 62; *Smith* v. *Plant,* 179 Ark. 1024, 19 S. W. (2d) 1022.

It is a well-settled principle of statutory construction that statutes should receive a common-sense construction, and, when this whole amendment is construed together as it should be, and a common-sense construction placed upon it, the conclusion that fixing compensation for county officers is a local act cannot be escaped. We have also held that an act which provided for open and closed seasons for killing squirrels, which exempted certain counties from its operation, was a local act. *Dupree* v. *State,* 184 Ark. 1120, 44 S. W. (2d) 1097.

We have also held, under these amendments, that an act placing the treasurer and clerk of the county and probate courts on a salary is a local act, and not within the power of the Legislature. *Cannon* v. *May,* 183 Ark. 107, 35 S. W. (2d) 70; *Board Com'rs of Red River Bridge Dist.* v. *Wood,* 183 Ark. 1082, 40 S. W. (2d) 435.

That this act is local is beyond question. Moreover, we think it the very kind of local legislation that the people intended to provide for.

It is next contended that the Initiative and Referendum Amendment to the Constitution is not self-executing. However, this court said in the case of *Hodges* v. *Dawdy, supra*: "We have already held that the amendment is in force, and is self-executing as to general laws initiated by or referred to the people of the whole State. *Arkansas Tax Commission* v. *Moore,* 103 Ark. 48, 145 S. W. 199."

There is no difference, as to the amendment being self-executing, between that part of it providing for general laws and that part providing for local laws. After the provision for municipalities and counties and in the same section, the amendment provides that it shall be self-executing, but that laws may be enacted to facilitate its operation. We have also held that the amendment is self-executing with reference to municipal ordinances. *Wright* v. *Ward,* 170 Ark. 464, 280 S. W. 369.

However, the Legislature, in 1927, passed a law to carry out the initiative and referendum in the counties. It provides that the petition shall be filed with the county judge at least 60 days before the election in which they are to be voted. It provides that the county judge shall submit the petition to the county election commissioners, who shall place the matters petitioned for in proper form on the tickets provided for the next general election of county officers. It is also provided in said act that, when any measure initiated shall receive a majority of the votes cast in that county upon that subject, it shall immediately become a law.

Therefore, if a majority of the votes were cast in favor of the act, it immediately became a law. It might be well to have somebody to certify the matter, but the fact that there is no provision for that does not prevent it from becoming a law. It may be certified as other questions are under the general election law.

The result of the election on candidates and all questions submitted is announced by the proper officers in each county, and everybody may know from that whether an act has been adopted. But, whether they know or not,

the law provides that, if it receives a majority of the votes, it immediately becomes law.

It is next contended by the appellant that the constitutional amendment requires publication, and that there was no publication as required by law. It is not contended that the act was not published. In fact, it is conceded that it was published, but the manner of its publication is not shown by the record.

When any duty is required of a public officer, unless there is something to indicate the contrary, it will be presumed that he performed the duty according to law. The law does not require that a person must, at his peril, find out whether an officer has honestly and in good faith performed the duties of his office. He is not required to inquire into the honesty and good faith of the officer, the presumption being that the officer has performed his duty according to law. *Waters-Pierce Oil Co.* v. *Bridwell*, 103 Ark. 345, 147 S. W. 64.

The decree of the chancery court is affirmed.

FERGUSON *v.* LESSER COTTON COMPANY.

4-2760

Opinion delivered December 5, 1932.

Rowell & Rowell, for appellant.

Reinberger & Reinberger and *Hooker & Hooker,* for appellee.

BUTLER, J. The question in dispute in this case is the ownership of nine bales of cotton which the appellees had purchased in open market and which they claim by reason of that purchase. The claim of the appellants was based on a mortgage given by Case, appellees' vendor, which included "all crops of cotton, corn, cotton seed, hay, and all other crops grown by the party of the first part (J. H. Case), or grown by his tenants and share-croppers for him; or caused to be grown by the party of the first part on any of the above places owned or rented by him in Cleveland and Lincoln counties, or other places during the year 1928. Also, all amounts due to the parties of the first part on account of rents and accounts for supplies furnished to tenants and share-croppers during the year 1928 or theretofore."

Case, the mortgagor, at or about the close of the cotton season 1928-1929, being heavily involved, left the country, and, on the application of the mortgagees (appellants), a receiver was appointed to take charge of the crops of Case included in the mortgage. The receiver, in the discharge of his duties, took charge of the nine bales of cotton then in the custody of the compress in Pine Bluff which he claimed was cotton upon which the appellants had a mortgage. The appellees intervened, and it was, and is, the contention of the appellants that the burden was upon the appellees to establish their claim to the cotton. In this they are doubtless correct, but the burden was discharged by the undisputed testimony which established the fact that the appellees had bought the cotton in open market from Case and paid full value for it. The burden then shifted to the appellants to show that the cotton was included in the mortgage given by Case to them. It is also true that the sale of property mortgaged will not divest the mortgagee of its title, although the property is sold in another county than the county in which the mortgage is executed and recorded

and to a purchaser who had no knowledge of such mortgage.

These principles of law seem to have been applied by the court, and the question before it for determination was whether or not the mortgage covered this particular cotton. There was little conflict in the testimony, all of which was more or less vague as to how Case came into possession of the cotton that was sold by him to the appellees. Case was a public ginner and had a small store. He would sometimes buy cotton for resale and also had tenants on his farm who grew cotton and some customers whom he furnished, but it is uncertain who grew the cotton in question or from whom it was procured. We are inclined to the opinion that the preponderance of the evidence justified the conclusion reached by the chancellor that the cotton was not included in the mortgage. This being our view, we deem it unnecessary to review the testimony in detail.

Decree affirmed.

[redacted]

KNIGHT *v.* WILSON.

4-2772

Opinion delivered December 12, 1932.

[redacted]

H. B. Means and *D. M. Halbert,* for appellant.

John L. McClellan, for appellee.

HUMPHREYS, J. Appellee instituted action in replevin against appellant, W. L. Knight, in the circuit

court of Hot Spring County to recover possession of a brown Jersey heifer, alleging that he was the rightful owner of the heifer and that appellant was wrongfully detaining her under a false claim of ownership.

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

The cause was submitted upon the pleadings and testimony adduced by the respective parties and instructions of the court, which resulted in a verdict and judgment in favor of appellee, from which is this appeal.

During the progress of the trial, the court made T. C. White a party defendant after he appeared voluntarily and testified that he and his wife owned an undivided interest with W. L. Knight in the heifer, to which action neither appellant objected and excepted at the time.

The action of the court in making T. C. White a party is urged here as a ground for the reversal of the verdict and judgment. No proper exception having been saved to the action of the court at the time in making him a party, that question cannot be raised on appeal. It was too late to raise the question the first time in appellant's motion for a new trial.

The only other question raised for a reversal of the verdict and judgment is that the court erred in admitting the testimony of witnesses, Benson Wheat and Porter Harper, relative to what was said and done in the presence of W. L. Knight and appellee in an effort to show which of the two owned the heifer in question. At the time appellee found and claimed the heifer, he was informed by W. L. Knight that he had purchased her from J. M. Greer and Mr. ..... Mays over at Okolona. Appellee then went after Greer and Mays, who came back with him for the purpose of identifying the yearling they let Knight have. Knight was present, and they identified a red yearling with white spots on its flanks and not the yearling in question as the one Knight got from them. The objection made to the introduction of

the testimony was that it was hearsay. We do not think so. The parties had agreed, without assistance from either, for Greer and Mays to select from the yearlings in the pasture the one they had let Knight have. They selected a different yearling from the one in controversy as the one they had let Knight have, and this circumstance tended to throw light on the issue being litigated as to the ownership of the heifer. The testimony was properly admitted.

No error appearing, the judgment is affirmed.

NATIONAL SURETY COMPANY *v.* STANDARD LUMBER COMPANY.

4-2780

Opinion delivered December 12, 1932.

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

Rowell & Rowell and *W. B. Alexander,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered in the circuit court of Jefferson County against appellant for $454.60 and interest on its surety bond conditioned for the payment of all labor materials to whomsoever due used in the construction of a school building in Fordyce Special School District No. 39 of Fordyce, Arkansas, provided suit be brought thereon within twelve months from the day on which the final payment under the contract falls due. The bond made the basis of the action is as follows:

"KNOW ALL MEN; that we, Tom Wilmoth, of Camden, Ark., hereinafter called the principal, and the National Surety Company, a New York corporation with its principal office located at No. 115 Broadway, in the city and State of New York, hereinafter called the surety or sureties, are held and firmly bound unto Fordyce Special School District No. 39 of Fordyce, Ark., hereinafter called the owner, in the sum of seven thousand eight hundred sixty-four dollars ($7,864) for the payment whereof the principal and the surety or sureties bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

"Whereas, the principal has, by means of a written agreement, dated September 25, 1930, entered into a contract with the owner for erection of a one-story brick veneer school building at Fordyce, Arkansas, a copy of which agreement is by reference made a part hereof;

"Now therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, and shall pay all persons who have contracts directly with the principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

"Provided, however, that no suit, action or proceeding by reason of any default whatever shall be brought on this bond after twelve months from the day on which the final payment under the contract falls due.

"And provided, that any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the owner of any extension of time for the performance of the contract, or any other forbearance on the part of either the owner or the principal to the other shall not in any way release the

principal and the surety or sureties, or either or any of them, their heirs, executors, administrators, successors, or assigns, from their liability hereunder, notice to the surety or sureties of any such alteration, extension, or forbearance being hereby waived.

"Signed and sealed this 1st day of October, 1930.

"In presence of "as to Tom Wilmoth
R. E. Wait, Jr. "as to National Surety Company
"Attest Artie Lee. "By Wm. E. Silliman,
"Agent & Atty. in fact."

The cause was submitted to the court, sitting as a jury, on the bond and under the following agreed statement of facts:

"That the amount of the account alleged to be due by Tom Wilmoth to the Standard Lumber Company is correct;

"That it is a balance due upon an account for material furnished and actually used in the school building in the town of Fordyce, Arkansas, under a contract entered into by the Fordyce Special School District No. 39, and Tom Wilmoth;

"That the bond was executed for the purpose of securing the faithful performance of said contract as set out in the bond;

"That said bond was not filed in the office of the circuit clerk of Dallas County, Arkansas, where said school building was located, until the 17th day of July, 1931, but that it was so filed on said date;

"That the complaint filed herein was not filed within the period of six months from the date of the completion of said job, but was filed within one year from the date of the execution of said bond, and within one year from the date of the completion of the job."

The only question presented by the appeal is whether the bond sued on was executed pursuant to and in accordance with §§ 1913 and 1914 of Crawford & Moses' Digest, which provides, among other things, that laborers and materialmen shall bring their suits within six months from the completion of the public improvement

or buildings; or whether executed independent of and without reference thereto. If a statutory bond, then appellee's suit was barred when instituted. If not a statutory bond, then the suit was brought within the time specified in the bond and was not barred.

There is nothing in the language of the bond indicating that it was intended to be a statutory bond, and nothing in the stipulation of facts so indicated. The requirements of the statute were not incorporated in the bond. It was ruled in the case of *Ætna Casualty & Surety Company* v. *Big Rock Stone & Material Company,* 180 Ark. 1, 20 S. W. (2d) 180, that a bond which did not indicate by its terms that it was intended to be in compliance with the statute could not be treated as a statutory bond.

This court also ruled in the case of *Mansfield Lumber Company* v. *National Surety Company,* 176 Ark. 1035, 5 S. W. (2d) 294, that a bond identical in form with the bond involved in the instant case, except as to names, dates, and amounts, was not a statutory bond.

This suit was brought within twelve months after the completion of the building and was not barred under the terms of the bond when brought.

The judgment therefore is affirmed.

DEAN *v.* BLACK & WHITE STORES, INC.

4-2774

Opinion delivered December 12, 1932.

Alonzo D. Camp, for appellant.

Owens & Ehrman, for appellee.

MEHAFFY, J. The appellant brought suit against the appellee in the Pulaski Circuit Court alleging that appellant was a corporation operating under the laws of the State of Arkansas, and that on May 2, 1931, said defendant, through its agents, servants and employees, unlawfully, forcibly, and falsely restrained the plaintiff of her liberty, and imprisoned her against her will at 308 West 5th Street, Little Rock, Pulaski County, Arkansas. She alleged that she was greatly injured, and prayed for damages in the sum of $1,000.

The second count of her complaint alleged that on May 2, 1931, in the city of Little Rock, Pulaski County, Arkansas, and in the presence of divers persons, the defendant, through its agents, servants and employees, falsely and maliciously spoke of and concerning the plaintiff the following false, malicious, and defamatory words: "Hey, you," addressing Mrs. Leonard Dean, "you took a pound of butter from us which you did not pay for," charging plaintiff with the crime of stealing a pound of butter from the Black & White Stores, Inc., the defendant; that said words were spoken and published with the malicious intent of impeaching plaintiff's honesty, integrity, veracity and reputation, and to expose her to public hate, contempt, and ridicule; damaged plaintiff in her reputation and caused and occasioned her personal injuries and injury to her feelings; that, by reason of said false arrest, imprisonment, slanderous and false accusation, and by reason of the shock and fright caused thereby, plaintiff suffered a severe heart attack, and was confined to her bed under the care of doctors for several days.

She alleged that she had suffered actual damages in the sum of $5,000; that she should recover compensatory damages in the sum of $3,000, and punitive damages in the sum of $1,000.

Defendant filed answer denying that its agents, servants and employees, unlawfully, forcibly and falsely restrained the plaintiff of her liberty, and defendant denied that, through its agents, servants and employees, it falsely and maliciously spoke and published of and concerning the plaintiff the words complained of, or any other words, or imputed to her the stealing of a pound of butter or the crime of petit larceny, or said or did anything with the intent of impeaching the honesty of the plaintiff; denied that plaintiff was caused to be confined to her bed, or that she suffered a nervous shock or fright, or any other damages.

A jury was impaneled to try the case, and the appellant testified substantially that she was married, living with her husband, and had two children; that she did all the house work and the shopping; that on May 2, 1931, in the afternoon, she and her two children went into Woolworth's Store and purchased some small articles and placed them in her personal shopping bag; that they then went down the street to the Black & White Store where she had traded many different times.

When she went in, she picked up a basket that they use in there, and had her shopping bag and purse and the basket in one hand. She spoke to Mr. Ford about the kind of butter, and he told her which was the best seller, and she put the box of butter in the basket, not her shopping bag, and walked right out by Mr. Ford where the eggs were, put two dozen of them in her basket, and went to the meat counter, where she purchased some meat, and put this in the basket, not in her bag. She then went to the cashier's desk where the things she purchased were checked, paid for the articles purchased, and received the change to which she was entitled.

After she had checked the groceries, the sack boy put everything that she bought there in a brown paper

sack. She did not put any of the groceries in her shopping bag.

After she had walked out of the store and was almost to the Spot Cash Store, suddenly some one came up behind her and grabbed her shopping bag, and said: "Hey, you took a pound of butter you did not pay for," and jerked the bag completely out of her hand, and she told him he was mistaken. The man that ran up behind her was Mr. Ford, out of the Black & White Store.

When he made the statement above quoted, she was with her two little children. She stated to Mr. Ford: "Here are the groceries. What was in my shopping bag when I went into the store came from Woolworth's store." Ford said he did not want her groceries; that he meant her personal shopping bag, and when he saw there was nothing in that, he said she could go.

There is considerably more testimony, but it is unnecessary to set it out here. Some other witnesses testified corroborating appellant, and at the close of appellant's testimony the court directed the jury to return a verdict in favor of the defendant, which was done, and judgment was entered accordingly. The case is here on appeal.

The court, in directing a verdict for defendant, stated: "The proof shows that a representative of the Black & White Stores, Inc., told Mrs. Dean that she had butter, or had taken butter for which she had not paid. Now, before a recovery can be had for slander, the words spoken must of themselves charge a crime; and, as the court sees, the words: 'You have butter for which you have not paid,' does not charge a crime of stealing."

The court then states that, before recovery can be had, the person charged must be charged with the crime of stealing or of some other crime.

We think the trial court was in error. Under our statute it is slander to charge one with a crime, but in addition to that the statute provides: "Or to charge any person with having been guilty of any dishonest business, * * * the effect of which charge would be to injure the

credit or business standing, or the good name or character of such person so slandered. Crawford & Moses' Digest, § 2396.

But where the charge is a crime, the words themselves do not necessarily have to show that a crime is charged. "But if it appears from the connection in which the charge was made, or the circumstances attending its utterance, that it was intended or understood to impute the crime of larceny, it will be regarded as actionable *per se.*" 36 C. J. 1208.

The allegation in the complaint is that the employee of appellant overtook appellee on the street after she had left the store, and stated that she had taken a pound of butter that she had not paid for.

Appellee testified that she had purchased the articles, went right by Mr. Ford, the employee who made the charge, and that the purchases at the Black & White Store were, by another employee, placed in a paper bag. Ford must have known this, because, when he overtook appellee, he told her that it was not the paper bag which he wanted to see, but her personal shopping bag, and that he jerked this personal bag from her hand.

Whether the charge he made, together with the attending circumstances, amounted to charging the crime of larceny, was a question of fact for the jury, and not the court.

In this case the allegation was made that appellee was charged with a crime, and the facts proved tended to show that appellee was charged with the crime of stealing a pound of butter, because the charge was that she had taken a pound of butter that she had not paid for, and the employee stated he did not want her paper bag, but her personal shopping bag, which would indicate that she had purposely taken a pound of butter and put it in her personal bag, and, of course, if she did this, she was intending to steal it.

The words do not have to be actionable in themselves, but, if the words, together with the attendant circumstances, amount to a charge of larceny, this is suffi-

cient. *Hays* v. *Mitchell,* 7 Ind. 117; *Morgan* v. *Livingston,* 2 Richardson's Reports, 573.

This court has held that, under our statute, charging a white man with being a negro is actionable, although, of course, it does not charge a crime. *Morris* v. *State,* 109 Ark. 530, 160 S. W. 387; *Flood* v. *News & Courier Co.,* 4 A. & E. Ann. Cases 685; *Spotorno* v. *Fourichon,* 40 La. 423.

Where the words, together with the attendant circumstances, are alleged to charge a crime, they are actionable, and whether the words charged, together with the attendant circumstances in this case, amounted to the charge of crime was a question of fact for the jury.

We said in a recent case: "That a grandfather was educating a grandson is a thing so common that such a statement considered by itself is apparently innocuous. But the testimony in Thompson's behalf is to the effect that this is not the meaning appellant meant to convey, and did convey. The innuendo was that the young man was being educated with money stolen by Thompson from the young man's grandfather, and this charge was actionable." *Collier* v. *Thompson,* 180 Ark. 695, 22 S. W. (2d) 562.

So in this case the testimony in behalf of appellee is to the effect that the words spoken by the employee of the appellee meant to convey, and did convey, that appellant was guilty of larceny.

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

MISSOURI STATE LIFE INSURANCE COMPANY v. HOLT.

4-2782

Opinion delivered December 12, 1932.

Carmichael & Hendricks, Ingram & Moher, Joseph Morrison and *Rose, Hemingway, Cantrell & Loughborough* and *Allen May,* for appellants.

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

MEHAFFY, J. Mrs. Edith Sutton Holt, guardian, brought suit in the Arkansas Circuit Court against the Security Life Insurance Company of America, and also brought suit against the Missouri State Life Insurance Company. The cases were consolidated by agreement, tried together, and there was a verdict and judgment against each of the appellants for the sum of $3,000, and, to reverse said judgment, the appellants prosecute this appeal.

The complaint alleged that Robert Earl Holt had been duly adjudged incompetent, of unsound mind, and mentally incapable of managing his affairs; that Edith S. Holt had been duly appointed as guardian for R. E. Holt by order of the probate court of Arkansas County. The

complaint alleged that the defendant, Security Life Insurance Company of America, issued to R. E. Holt its policy of life and disability insurance, and that premiums thereon were paid to the sixth day of October, 1926.

While said policy was in force, the insured suffered a bodily injury, and, while the premiums were being paid, and while the policy was in force, the said R. E. Holt became permanently and totally disabled. His permanent and total disability was both mental and physical. The policy provided that, after receipt and approval and due proof that, by reason of bodily injury or disease occurring while the policy was in full force, and showing that the insured has been for one year, and will be thereafter permanently and continuously, prevented from engaging in any occupation whatever for remuneration and profit, the provision requiring the payment of premiums will be waived.

The policy also provided that the company would pay to the insured the amount of $100 upon the date of the approval of the proofs, and upon the same date of each month thereafter during the remainder of the endowment period, while the insured is disabled.

It was alleged that notice had been given to, and demand made of, the defendant, Security Life Insurance Company of America, pursuant to the provisions of the contract, and that defendant had denied liability on the alleged ground that the insured failed to notify it of his total and permanent disability.

It was further alleged that, at the time the insured became totally and permanently disabled, he was mentally incompetent, and incapable of managing his own affairs; that there was now due and matured upon the policy an unpaid balance of $3,000.

An amendment was filed to the complaint, alleging that R. E. Holt suffered a bodily and physical injury in 1922; that he was mentally incompetent and incapacitated in the year 1925, and said mental incompetence was total and permanent. Said disability resulted from a mental disease, and was such as to prevent him from engaging

in any occupation whatever for remuneration or profit; that the defendant, during the year 1925, was advised both in writing and orally of the existence of the total, permanent disability; that, because the disability complained of was mental incompetency and incapacity, Holt was excused from giving notice.

The complaint against the Missouri State Life Insurance Company contained the same allegations as the complaint against the Security Life Insurance Company of America, and alleged that the Missouri State Life Insurance Company had taken over all the policies and assumed all the liabilities of the other defendant.

Each defendant filed answer denying all the material allegations in the complaint.

The undisputed evidence shows that R. E. Holt was injured in an automobile accident in 1922, and it also shows that he had Huntington's chorea.

Many witnesses testified that prior to Holt's injury in 1922 he had a brilliant mind, and had a very high sense of honor. The evidence shows that he was a graduate of two universities; that he was practicing law in Stuttgart and had a good practice, and about these facts there is no dispute. Numbers of these witnesses testified that after the automobile accident his condition grew steadily worse, and some of these witnesses testified that after the accident, and in 1925, he was wholly incompetent to attend to business, and was, in fact, insane.

Competent physicians testified that the disease from which Holt was suffering manifested itself by jerky movements, and that it has a tendency to cause complete loss of reasoning power; that it is incurable; that he was incompetent in February, 1925.

Dr. Ponder testified that he based his answers on both the personal examination that he made of Holt and the hypothetical question. He said that to have reached the point that the disease has now reached indicated that it had been going on for a long time; that the physical and mental conditions go hand in hand. The doctors testifying for the appellee testified at length, giving their

reasons for their conclusions, and testified that in their opinion he was insane early in 1925.

Competent doctors also testified for the appellants, and testified that in their opinion Holt was not insane. Dr. Pat Murphy testified that a man could conduct his business and carry on his business affairs for a long number of years after he develops chorea; that the mental deterioration comes by slow process; that he did not think an incompetent man could do the things that Holt had done. Doctor Murphy was corroborated by other expert witnesses.

There was also introduced in evidence numerous complaints which had been filed in the courts signed by Holt, and correspondence between Holt and his clients, which tended to show that he was not insane. However, the evidence shows that some of the complaints introduced were written by other parties, and that Holt simply signed his name. Whether the other complaints introduced in evidence were written by Holt, the evidence does not show.

Judge Harvey R. Lucas, chancellor of the district, testified that he met Holt, and that Holt was in his court in 1925 and 1926; that he considered Holt peculiar, but did not think about the question of sanity or insanity, but that he was different from an ordinary man. He did not try any cases in Judge Lucas' court, but called attention to certain cases and asked for decrees.

Numbers of witnesses were introduced by appellant showing correspondence with Holt, and that Holt attended to business in the ordinary way after 1925, and as late as 1929. It will therefore be seen that the evidence as to Holt's incapacity and incompetency after his automobile accident in 1922 is in conflict. Arguments have been made for both appellants.

There was substantial evidence to the effect that Holt was incompetent after the automobile accident, and that his condition grew worse from that time on.

It is earnestly insisted by appellants that the court should have directed a verdict in their favor. As we have many times held 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, it must be sustained. *Mo. Pac. Rd. Co.* v. *Harville,* 185 Ark. 47, 46 S. W. (2d) 17; *B. & O. Rd. Co.* v. *McGill Bros. Rice Mill,* 185 Ark. 108, 46 S. W. (2d) 651; *Altman-Rodgers Co.* v. *Rogers,* 185 Ark. 561, 48 S. W. (2d) 239; *Halbrook* v. *Williams,* 185 Ark. 885, 50 S. W. (2d) 243; *Ark. P. & L. Co.* v. *Connely,* 185 Ark. 693, 49 S. W. (2d) 387; *C. R. I. & P. Ry. Co.* v. *Matthews,* 185 Ark. 724, 49 S. W. (2d) 392.

There are many decisions of this court holding that, if there is any substantial evidence to support the verdict of the jury, it will not be disturbed. There are also numerous decisions to the effect that we do not pass upon the credibility of the witnesses nor the weight to be given to their testimony. If there is substantial evidence to support the verdict, this court cannot set it aside, even though we believe the verdict is contrary to the preponderance of the evidence. We cannot do it for the reason that it is the province of the jury to determine the credibility of the witnesses and the weight to be given to their testimony.

The appellants, however, contend that the evidence does not show total disability. They cite and discuss many authorities to support their contention, and they also rely on the evidence tending to show that Holt was practicing law and dealing and corresponding with clients, and apparently capable of attending to business. This evidence, however, is contradicted by numerous witnesses who testify that Holt was wholly incompetent in 1925.

If the appellants' evidence was without contradiction, the appellee, of course, could not recover, because no notice was given, and the premium after February 6, 1926, was not paid, but, if he was insane, no notice was necessary, and it was not necessary to pay the premium.

Several cases decided by this court have discussed these questions and reviewed the authorities, and we do not deem it necessary to review them here. We call at-

tention to *Pfeifer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847; *Old Colony Life Ins. Co.* v. *Julian,* 175 Ark. 359, 299 S. W. 366; *Mo. State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Mutual Benefit Health & Accident Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812; *Travelers' Pro. Ass'n of America* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 99, 254 S. W. 335; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 497, 32 S. W. (2d) 310; *Missouri State Life Ins. Co.* v. *Johnson,* ms. op. November 14, 1932.

Questions of notice and total disability are reviewed in the authorities on these subjects above quoted, and it would be useless to review them here. We are of the opinion that, under the evidence in this case, the jury could find that Holt was totally disabled as defined by the decisions above referred to.

It is next contended that appellee was not the legally appointed guardian of R. E. Holt. Whether Holt was present at the time of the appointment as required by statute, we think, is now immaterial. In the case of *Scott* v. *Stephenson,* 168 Ark. 763, 271 S. W. 714, this court said: "We deem it unnecessary, however, to enter upon a discussion of the question of the validity or invalidity of the original order of the probate court, for the validity of the decree of the chancery court could not be assailed on the ground that the order appointing the guardian was void. The invalidity of the order did not affect the jurisdiction of the chancery court. An action brought by a guardian or a next friend of a person under disability is in effect a suit by such person under disability, and a change in the character of the representative does not operate as a change of parties, for, as above stated, the person under disability is the real party, and not the representative."

Our statute provides: "The action of a person judicially found to be of unsound mind must be brought by his guardian, or, if he has none, by his next friend. When brought by his next friend, the action is subject to the power of the court in the same manner as the action of an infant so brought." Crawford & Moses' Digest, § 1116.

This court has said: "An insane person not under guardianship can sue and be sued the same as a sane person, and the foregoing provision of the Constitution [art. 7, § 34] does not exclude the jurisdiction of other courts to hear and determine suits by or against insane persons whether under guardianship or not. * * * The statutes of this State confer ample protection to the rights of insane litigants, either plaintiff or defendant, by requiring the court in which the action by or against such person is pending to see that he is represented by a next friend or guardian. An action by such person must be brought by guardian or next friend, and the defense of such person must be by his regular guardian or guardian appointed by the court." *Peters* v. *Townsend,* 93 Ark. 103, 124 S. W. 255.

The court also said in the last case: "The statute refers in express words only to persons judicially found to be of unsound mind; but it is not doubted that the Legislature intended to give equal protection to persons of unsound mind in actions by or against them, though not judicially declared to be such."

Section 1116 of Crawford & Moses' Digest above referred to states that, when an action is brought by next friend, the action is subject to the power of the court in the same manner as the action of an infant so brought.

"It is the infant, and not the next friend, who is the real and proper party. The next friend by whom the suit is brought on behalf of the infant is neither technically nor substantially the party, but resembles an attorney or a guardian *ad litem* by whom a suit is brought or defended in behalf of another." *St. L. I. M. & S. R. Co.* v. *Haist,* 71 Ark. 258, 72 S. W. 893; *Morgan* v. *Patter,* 157 U. S. 195, S. Ct.

Appellants objected to the introduction of the petition and order of the probate court, and they contend that the order was void, and that the court could not properly proceed with the case; that there was no proper party plaintiff. We have already shown that the guar-

dian is not the party, but that the insane person is the real party.

In the case of *Peters* v. *Townsend, supra,* we said: "If the insanity of a defendant in a pending suit was suggested, but had not been judicially ascertained, the court gave opportunity for an inquisition to be held, or took the necessary steps to determine the question for itself; and, having ascertained that the defendant was mentally incapable of making his defense, appointed a guardian *ad litem* for him, and thereafter imposed upon him the restraints of infancy."

In this case, even if the appointment of a guardian had been void, the proper party was the insane person, and it was the duty of the court to proceed with the case permitting the appellee to continue as next friend, or it could have appointed her guardian *ad litem.*

The court heard the evidence as to insanity, and knew the condition of Holt's mind at the time of the trial; knew he was insane, and it was the court's duty to proceed with the trial of the case, and not turn the insane person out of court. There was no error therefore in proceeding with the trial as the circuit court did.

The appellant argues that two instructions given by the court at the request of the appellee were erroneous, and that the judgment should be reversed for that reason.

The first instruction objected to reads as follows: "Total disability as used in the policy does not necessarily require or mean that the assured must be absolutely disabled from transacting any kind of work or business, but such a disability is meant which renders him wholly unable to perform or execute the necessary substantial and material things and acts in usual or customary way of any business employment or occupation. But, if the assured was able to perform or execute in the usual or customary way any of the substantial or material things necessary to be done in the prosecution of any business, employment, or occupation whatever, he was then not totally disabled under the law."

Appellant's specific objection to this instruction was to the first paragraph of it, ending with "occupation," but when the entire instruction is read, it is certainly as favorable to the appellant as it was entitled to. Moreover, the appellant requested, and the court gave, the following instruction:

"The plaintiff is not entitled to recover merely by showing that there was an impairment in the ability of R. E. Holt on August 8, 1925, but it is necessary that the plaintiff show by a preponderance of the evidence that he was disabled to the point where he could not perform any of the material and substantial duties of a gainful occupation."

The court also, at the request of the appellant, gave the following instruction: "You are instructed that the fact that R. E. Holt is now totally and permanently disabled does not entitle him to the benefits of the policy, but the burden is upon the plaintiff to show by a preponderance of the evidence that he was wholly and permanently disabled prior to August 8, 1925."

Other instructions were given at the request of the appellee, and also others at the request of the appellants, but no objections are urged to them. We think, when the instructions on the question of permanent and total disability are read together, they correctly state the law.

It is also contended that the court erred in not sustaining appellant's objection to the hypothetical question propounded to mental experts. However, we do not find that this question is mentioned in appellant's motion for a new trial.

We are unable to say whether the appellee was legally appointed guardian.

"Under this statute any person may bring suit as the next friend of an infant without giving bond, and to allow the next friend to receive the money of the infant collected upon the judgment recovered in such actions would subject the estates of the infants to spoliation by irresponsible parties appearing as the next friend. We have seen that the statute does not permit even the father

or mother of an infant to take charge of his estate without first giving bond as guardian of the infant. There is nothing in the statute that confers such authority upon the next friend of an infant, and we are of opinion that he has no such authority." *Wood* v. *Claiborne,* 82 Ark. 514, 102 S. W. 219. Therefore the appellee, if she has not already been appointed legal guardian, must be legally appointed and give bond before she can receive the money.

It is contended by appellants that the verdict is excessive. It is undisputed that on November 10, 1924, R. E. Holt borrowed the sum of $160 on the policy as security, and that this loan has never been repaid. This indebtedness of $160 should be deducted from the judgment for $3,000. The judgment will be modified by deducting $160 and, as modified, affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* FOWLER.

4-2776

Opinion delivered December 12, 1932.

Thos. S. Buzbee, H. T. Harrison and *Edward L. Wright,* for appellant.

D. M. Halbert, for appellee.

McHANEY, J. Appellees sued, and recovered judgment against appellant in the sum of $210 damages, $210 penalty and $50 attorney's fee on account of the killing of a mule owned by them by the operation of a passenger motor car by appellant. At the conclusion of the testimony, appellant requested the court to direct a verdict in

its favor, which was refused, and this is the only assignment of error we find it necessary to consider, as we are of the opinion the request should have been granted.

Only two witnesses testified to the circumstances and conditions attending the killing of the mule, Tom Harris, for appellees, and C. L. McDonald, appellant's engineer on the electric motor car, for appellant. Harris testified on cross-examination that he saw the mule killed while sitting on his front porch, about five or six hundred feet from the point of the accident; that the ringing of the bell and blowing of the whistle attracted his attention; that his house is on the west side of the track, and the motor car was going south; that he heard the bell and whistle, looked up and saw the mule struck, but did not see where it came from; could have seen it had it been on the track; that the motor car was running fifteen or twenty miles per hour when it struck the mule; and that there was a pile of stacking strips alongside of the loading track, parallel to the passenger track, about as high as his head. McDonald, the engineer, testified that, as he was coming into the village of Link, running at about 50 miles per hour, and keeping a constant lookout, he saw the mule come running out from behind a pile of strips in an old lumber yard toward the track; that he immediately started the automatic bell ringing and the whistle working; that the mule was thirty or forty feet from the track when he saw him at a distance of about 300 feet; that he shut off the power, applied the brakes and had slowed down to about 15 miles per hour when the corner of the motor struck the mule on the rump; that the mule never did get on the track, but ran up to it and turned back just as the car struck it; that it was a clear day, and the track was straight; and that he did everything possible to avoid the collision.

This testimony stands undisputed. There is no conflicting evidence, and there is no internal conflict, contradiction or controversy therein. Of course, the mule being killed by the operation of a train, the statute makes appellant *prima facie* negligent, but this presumption is

overcome when evidence contradicting such inference is offered by the railroad company, and the presumption thereafter cannot be considered as evidence by the jury. *St. L. S. F. Ry. Co.* v. *Cole,* 181 Ark. 780, 27 S. W. (2d) 992.

We think the undisputed testimony of McDonald, which was corroborated by Harris, shows that everything was done that was reasonably possible to avoid the accident, and that appellant was not negligent in any respect. The case is therefore ruled by the recent case of *St. L. S. F. Ry. Co.* v. *Harmon,* 179 Ark. 248, 15 S. W. (2d) 310, where a great many of the former cases are collected and cited, and by the Cole case, *supra.*

The learned trial court should have directed a verdict for appellant. The case will therefore be reversed, and, as it appears to have been fully developed, the cause will be dismissed. It is so ordered.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* BRIM.

4-2783

Opinion delivered December 12, 1932.

Bevens & Mundt, for appellant.

A. M. Coates, for appellee.

McHaney, J. November 16, 1931, appellant issued to Turner Madden, colored, a policy of life insurance in the sum of $375, in which appellee, cousin of the insured, was named beneficiary. Madden died January 30, 1932, with all premiums paid. Thereafter, in apt time, proof of death was made and payment demanded, which was refused, and this suit followed. Appellant defended on two grounds, first, that the deceased was not the insured; and, second, that, if he were, he was afflicted with tuberculosis, and was not in sound health at the date of the policy, in violation of one of its express provisions. A trial resulted in a verdict and judgment against appellant in the sum sued for, and the court allowed an attorney's fee of $100 for appellee's attorney, without hearing testimony, and in the absence of attorneys for appellant.

Only a question of fact is presented by this appeal as to appellant's liability, the question of the identity of the insured being waived or abandoned. Did the insured have tuberculosis, or was he otherwise not in sound health at the date of the policy, no medical examination being required? The court submitted these questions to the jury at appellant's request in instruction No. 2, and also the identity of the insured in instruction No. 4. The jury has decided by its verdict all questions of fact against appellant. On appeal this court will not reverse on the insufficiency of the evidence if there is any substantial evidence to support the verdict, and, in determining this question, we must view the evidence in the light most favorable to the appellee, giving it its strongest probative value. When so considered, we find the evidence amply sufficient and of a very substantial nature to show that at the date of the policy the insured was in sound health. In addition to the testimony of the widow, a number of friends and acquaintances, and the appellee, the agent who took the application of the insured, recommended the applicant for insurance, and in

his testimony at the trial stated: "He was as fine a looking specimen as I ever saw, he was a man about 25 or 26 years old and would weigh about 140 or 150 pounds and about 5 feet 6 or 7 inches." In addition he testified: "Q. Tell the jury whether or not he was in good sound health when he got this policy? A. Yes, sir, he was in good health." In addition to all this, Dr. Rogers, who attended him in his last illness, testified that he found no symptoms of tuberculosis, but that he died of pneumonia. Contradictory of all this is the testimony of Dr. Butts, that the insured was brought to his office by Mr. Tappan in September, 1931, and that he found him suffering with tuberculosis in the advanced stage. Appellant insists that Dr. Butt's testimony is undisputed that the insured had tuberculosis at the date of the policy, in violation of its provisions, and that therefore the court should have directed a verdict for it. While Dr. Rogers' testimony was of a negative character as to whether Madden had tuberculosis, he testified positively that he died of pneumonia. This evidence alone was sufficient to make a question of fact for the jury, and, while the lay-witnesses were not asked as to whether he was so afflicted, a number of them testified to his good health, and, of course, if he were in good health at the date of the policy, he was not in the advanced stage of tuberculosis. The court did not err therefore in refusing to direct a verdict for appellant at its request.

As to the allowance of $100 attorney's fee, we cannot agree with appellant that it is excessive, or that the court erred in so doing without hearing evidence in the absence of counsel for appellant, as the only matter raised in the motion for a new trial was that the allowance was excessive, and its alleged excessiveness is the only question we can consider. While the amount involved is small, only $375, yet the work involved and skill required were the same as if the amount had been much larger. In effect, it amounts to $50 in each court, there and here. We cannot say that the allowance is excessive or arbitrary.

Affirmed.

BLAIR *v.* ASKEW-JONES LUMBER COMPANY.

4-2787

Opinion delivered December 19, 1932.

A. M. Coates, for appellant.

W. G. Dinning, for appellee.

SMITH, J. Appellees, under the firm name of Askew-Jones Lumber Company, filed suit on September 9, 1931, against appellant, Harrison Blair, in which they alleged that, during the period of time from March 29, 1930, to May 5, 1930, they had sold and delivered to Blair certain lumber and building material, of the value of $833.81, which were used by him in the erection of a combination store and residence in the city of West Helena.

The complaint alleged that, the bill not having been paid, plaintiffs, "within the time prescribed by law, filed a duly verified itemized statement of said account, together with a description of the property upon which the said building was erected, with the clerk of the circuit court of Phillips County, Arkansas, and has continued to be on file with said clerk until the date of the filing of this suit."

The defendant, Blair, employed counsel, who, after investigation of the facts, concluded that there was no defense to the suit, and consented that a decree might

be entered for the debt, and that a lien be declared upon the land to secure it. After the expiration of the term at which the decree was rendered, a motion was filed to vacate the decree, upon the ground that its rendition had been procured through fraud practiced upon the court, in that more than fifteen months had expired after filing the lien claimed with the circuit clerk before instituting suit to enforce it, and this fact had not been disclosed to the court.

There is no intimation of collusion between the attorneys for the respective parties. The attorney employed to represent appellant in the original suit candidly stated that he was under a misapprehension as to the time within which suit could be brought after filing a lien claim with the circuit court clerk. But counsel for plaintiffs was not responsible for this misapprehension.

Testimony was heard upon the motion to vacate the decree, and it was conflicting as to the date of the last item for building material, although it appears that the date of filing the account with the circuit clerk was more than fifteen months prior to the date on which the complaint in this suit was filed.

In denying the motion to vacate the decree, the court made the finding that there was no collusion or wrongful act on the part of the attorney for the defendant in consenting to the rendition of the decree; indeed, no such charge was made. The court also found "* * * that no fraud, deceit or collusion was practiced upon the court for the purpose of procuring the original decree fixing a lien upon the land described therein to secure the payment of the indebtedness due the plaintiff, and the court doth further find that the amount of the indebtedness therein found to be due is correct and should be adjudged a lien upon the land there described in accordance with the provisions of said decree * * *."

The instant case, like that of *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. (2d) 517, was brought under § 6290, Crawford & Moses' Digest, to vacate a decree after the expiration of the term at which it had been rendered. It was

there said: "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. (Citing numerous cases.)"

As much as can be said of the testimony offered in support of the motion to vacate the decree is that it was to the effect that more than fifteen months had expired after the claim for lien had been filed before the suit thereon was filed, whereas the statute provides that such suit must be brought within fifteen months of the date on which the claim for lien is filed, and not thereafter. Section 6926, Crawford & Moses' Digest. In other words, it would have been a complete defense to the original suit to show that the suit had not been commenced within the time limited by § 6926, Crawford & Moses' Digest. But, as was said in the case of *Gosnell Special School District No. 6* v. *Daggett,* 172 Ark. 684, 290 S. W. 577: " 'The rule has been often announced in this court that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which could have been interposed in the former suit'."

We think the decree of the court here appealed from, refusing to vacate the original decree is correct, and it is therefore affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MORRISON.

4-2752

Opinion delivered December 19, 1932.

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

John L. McClellan and *Tom J. Terral,* for appellee.

SMITH, J. Appellee recovered judgment in the sum of $30,000, to compensate an injury sustained by him while riding as a passenger on one of appellant's passenger trains. It was alleged that the train made a sudden stop, which threw appellee off his feet as he was returning to his seat from the toilet, throwing him across the arm of a seat and severely injuring him. The railroad company defended upon the ground that the train did not make any violent or unusual or negligent stop, and denied that appellee had sustained any serious injury.

These questions of fact were submitted to the jury under instructions correctly declaring the law, and are concluded by the verdict of the jury in appellee's favor.

There was a motion for a new trial upon the ground of newly discovered evidence. But, without reviewing this testimony and the circumstances of its production,

we announce our conclusion to be that this testimony appears to be cumulative of other testimony offered at the trial which tended to corroborate certain testimony offered by appellant or to contradict other testimony offered by appellee, and the rule is well settled that new trials are not granted for newly discovered evidence that is merely cumulative. *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. (2d) 20.

It is essential also that due diligence be shown in discovering the new testimony, and the circumstances of this case are such that we would not hold that the trial court had abused its discretion in refusing a new trial for the newly discovered evidence, on account of the lack of proper diligence in the discovery and production of this testimony. *Forsgren* v. *Massey, supra.*

The engineer in charge of the locomotive pulling the train on which appellee was injured was made a party defendant, but the jury returned a verdict in his favor. It is very earnestly insisted, for the reversal of the judgment against the railroad company that, inasmuch as a verdict was returned in favor of its employee whose negligence is said to have occasioned the injury, a verdict should have been directed in its favor after the jury had found in favor of the employee.

This question was considered by the court in the cases of *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468; *Davis* v. *Hareford,* 156 Ark. 67, 245 S. W. 833; and *Mississippi River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255.

The effect of those decisions is that it does not necessarily follow that a corporation is discharged from liability for an injury occasioned by the negligence of its employee because a jury refused to assess damages against that employee when sued in conjunction with the employer. The theory is that the doctrine of comparative negligence obtains in the suit against a railroad company or other corporation, whereas contributory negligence is an absolute defense to the suit against the servant or employee himself.

It is true also, as is pointed out in the cases above cited, that, in suits against railroad companies for damages arising out of the operation of trains, the injured party has the benefit of the statutory presumption of negligence which arises upon proof being made that one was injured by the operation of a train, whereas there is no such presumption against the servant or employee himself.

These distinctions are fully discussed in the opinions cited and need not be further reviewed. It will suffice to say that the instructions given in the trial of the cause in the court below were correct declarations of the law.

We find no error in the record except that, in our opinion, the judgment was for an excessive amount, and this error may be cured by a remittitur, unless appellee shall elect to have the cause remanded for a new trial.

The testimony on the part of the railroad company was to the effect that appellee could not have sustained any serious injury on the train, as there was no such sudden stopping of the train as to have thrown him down violently, and that the present physical condition of appellee is due to injuries received both before and subsequent to the injury for the compensation of which he here sues. But we must view the testimony on this branch of the case, as well as upon the question of negligence itself, in the light most favorable to appellee, and, when so viewed, the facts may be summarized as follows: Appellee was thrown very violently across a seat. He thought at the time that his back was broken and so stated to the porter upon leaving the train. He was able to get home unaccompanied after reaching Little Rock, his destination, about 11 P. M. He stopped on his way home for a cup of coffee and a sandwich, although he was suffering greatly. After reaching home he was confined to his bed for twenty-seven days. He requested the railroad company to send its claim agent and a physician to see him. X-ray pictures were later made at the hospital of the railroad company in Little Rock, which were offered in

evidence. Appellee went to Hot Springs after his injury and made that place his headquarters for some months. He was not examined for purposes of treatment by any physician in that city. He was examined by Doctors H. E. Ruff and A. G. McGill, both of Little Rock. These doctors expressed the opinion that appellee had been severely injured. Dr. McGill was the principal witness for appellee on the questions of the extent and character of the injury. He testified that he made X-ray pictures of appellee, but he had made them upon the order of the Brotherhood of Railway Trainmen, and, for that reason, had not brought them to the trial, which did not occur in Little Rock the place where witness maintained his office. Dr. McGill testified as follows: "Q. Aside from whatever the X-ray may have shown, tell the jury what was the result of your physical examination you made, what you learned from that. A. Well, he was swollen over the spine, and there was some swelling over his twelfth rib on the left side, and there was a tender spot on his spine in the upper lumbar region on the other side, on the right side. Q. Tell the jury whether or not from the physical examination, aside from the X-ray, if you could see he was permanently injured. A. I thought he was. Q. How long and in what way will he be affected by this condition? A. Well, he will suffer from pain, and he will have a weak back and stiff back and always be nervous. Q. In what way are the nerves affected? A. From the shock of the injury and possibly from the inflammatory products that were thrown out at the seat of his injuries."

Appellee testified that his pain was so constant and severe that he had difficulty sleeping, and that he was compelled to leave his bed at all hours of the night in order to obtain relief. When asked how he suffered, he answered: "Well, with pain and my nerves, and when I walk a little I will get light headed, and if I get in an argument my nerves are completely gone."

The clerk of the hotel where appellee resided in Hot Springs testified that he had frequently seen appellee at various hours of the night walking around the hotel lobby.

Appellee testified that he could not walk except with the aid of a cane or a crutch, but he did walk with their aid.

Appellee was 47 years old at the time of his injury. He had been a railroad switchman for twenty-four years, from which employment he earned from one hundred to two hundred dollars per month, but he was not thus employed at the time of his injury. After leaving the railroad service, he wrote insurance, and in one month earned over $500. His earnings did not average this amount. Upon this question he testified as follows: "Q. How much did it amount to when you were selling insurance? A. One month I made $560. I was the third out of 560 agents of the United States; they put on a contest for cash premiums of $100 for the man that sells the most stuff, and I sold $5,510 of the premium business in 1924." It was not explained what portion of the $5,510 premiums were paid appellee as his compensation. He testified that since his injury he had been unable to obtain employment or to render any service by which he could earn money.

Certain X-ray pictures were offered in evidence by the railroad company, which, it is said, show no injury to appellee's spine or vertebrae, these being the pictures taken at the railroad company's hospital. But it is answered that these pictures do not show the vertebrae which were injured according to the testimony of appellee.

We must assume, in view of the testimony on appellee's behalf and the verdict of the jury, that appellee has sustained a serious and a permanent injury, and that the fall sustained on the train is the cause thereof. But, even so, appellee is not a paralyzed helpless man. Dr. McGill stated: "A. Well, he will suffer from pain, and he will have a weak back and a stiff back, and always be nervous." In answer to the question, "When, in your opinion, doctor, will he ever recover?" Dr. Ruff said: "It is my opinion that he will never be entirely well."

Viewing the testimony in the light most favorable to appellee, we have concluded that a judgment for any sum above $15,000 will be excessive, and that it was preju-

dicial error to render judgment for a larger sum, but the error may be cured by reducing the judgment to that amount, and it is so ordered unless appellee shall elect, within fifteen days, to have the cause remanded for a new trial.

BEESON-MOORE STAVE COMPANY *v.* ANDERSON-JEFFERS.

4-2714

Opinion delivered December 19, 1932.

Chas. W. Mehaffy, for appellant.

J. P. Clayton and *G. C. Carter,* for appellee.

HUMPHREYS, J. This is an appeal from a decree overruling exceptions to the final report of the receiver filed in the cause in the chancery court of Franklin County, Ozark District. The report was filed subsequent to the final decree in the case on the merits rendered on the 30th day of March, 1931. Exceptions to the final report of the receiver were filed July 17, 1931, and were heard and overruled by the court on December 18, 1931. The transcript of the record necessary to determine the correctness of the trial court in overruling the exceptions to the final report of the receiver, from which ruling an appeal was prayed out of this court, was lodged with the clerk of the Supreme Court on June 8, 1932.

Appellee has filed a motion to dismiss the appeal because not perfected within six months after the final decree overruling the exceptions to the receiver's report. This motion is not well taken, for the transcript was lodged here on June 8, 1932, or within six months from December 18, 1931, the day on which the exceptions were overruled by the trial court.

Appellee also has filed a motion to dismiss the appeal because the transcript does not contain the entire record made in the case below. It was only necessary to embrace in the transcript all the record relating to and bearing upon the correctness of the court's decree in overruling the exceptions to the final report of the receiver.

The exceptions challenged allowances made to the receiver by the former chancellor at chambers at Fort Smith in vacation without notice to appellant or without having taken the matter of such allowances under consideration in term time for determination in vacation.

The record reflects that the receiver was appointed on application of parties who had no interest in or claim to the property he took into his possession, and that appellants intervened, and on the trial of the intervention on the merits obtained a decree for the property or the proceeds thereof in the hands of the receiver. In accounting for the funds in his final report, the receiver claimed and requested the court to allow him credits for the amounts allowed him by the former chancellor at chambers at Ft. Smith, which items or allowances were excepted to by appellant. The court overruled appellant's exceptions and allowed the receiver credit for the items claimed, consisting of a fee to himself and to the attorneys who secured his appointment and certain court costs. The authority under which the chancellor made the order herein involved is said to be conferred by §§ 2190 and 2191 of Crawford & Moses' Digest, but such authority is not given by said sections. If the claim for these allowances be treated as an application to the chancery court for them, it was improper to make the allow-

ances out of the fund in the hands of the receiver, for the fund had been adjudged to appellant in the trial of the intervention. To make such allowances would amount to paying debts incurred by one party out of the property belonging to another.

On account of the error indicated, the judgment is reversed, and the cause remanded with directions to sustain the exceptions and disallow the claim of the receiver.

WHITE *v.* WILLIAMS.

4-2788

Opinion delivered December 19, 1932.

Cravens & Cravens, for appellant.

Roy Gean, for appellee.

HUMPHREYS, J. This is an appeal from a verdict and judgment in favor of appellees in the circuit court of Sebastian County, Fort Smith District, in a replevin suit for an automobile upon which appellee had levied an execution issued on a judgment obtained by Barton-Kellogg Lumber Company against Viola Earls. The Barton-Kellogg Lumber Company intervened and became a party to the suit. This was the second execution issued on the Barton-Kellogg Lumber Company judgment

against Viola Earls and levied on the automobile in controversy. When the first execution was levied on said automobile, appellant intervened and claimed title thereto, and, on the trial of the intervention on October 9, 1929, it was found and adjudged that she was the owner and entitled to the possession of the automobile. At that time, appellant herein was a single woman, residing with her mother, Viola Earls. Subsequently she married a man by the name of White. About two years elapsed between the first and second executions.

In order to sustain her title and right to possession of the automobile, appellant introduced the judgment of date October 9, 1929, finding her to be the owner and entitled to the possession of the automobile in the same character of proceeding between herself and appellees herein. She relied upon the judgment, and, in order to overcome the effect thereof, appellees attempted to show that she had parted with her title after the rendition thereof either to her mother or Will Rigney.

Over the objection and exception of appellant, they introduced testimony to the effect that appellant married after the rendition of the judgment and remained most of the time for two years in Oklahoma without taking the automobile with her and that during the time, it was housed in her mother's garage and used by her mother and Rigney.

Over the objection and exception of appellant, they introduced a bill of sale or invoice of tires purchased by her mother on credit from Armstrong Tire & Service Company, for which Barton-Kellogg Lumber Company paid after the levy of the second execution. It does not appear from the record whether the tires on the automobile when seized were the ones purchased from the Armstrong Tire & Service Company by Viola Earls.

Over the objection and exception of appellant, appellees introduce a judgment in a replevin suit brought by Will Rigney against them for the automobile in which he testified that he purchased same from appellant for $500 after October 9, 1929. Appellant was not a party to

that suit, and, so far as the record discloses, had nothing to do with it. Will Rigney testified on cross-examination in the instant case that he had purchased the automobile from appellant after the rendition of the judgment of date October 9, 1929.

Over the objection and exception of appellant, appellees introduced testimony to the effect that Will Rigney mortgaged the automobile to E. O. Trent and J. H. Barch to indemnify them against loss for signing his replevin bond when he brought suit to recover the automobile from appellees.

Appellant contends for a reversal of the judgment upon two grounds: First, that there was no competent evidence tending to show that she had parted with her title to the automobile after she was adjudged to be the owner thereof in the trial of the first suit on October 9, 1929, between the same parties; and, second, that the court admitted incompetent evidence to which she objected and excepted.

(1) The extended absence of appellant from the State and the use of the car by her mother and the testimony of Will Rigney to the effect that he had purchased the automobile for $500 from appellant, together with his use of it for a part of the time, was competent testimony tending to show that appellant had parted with the title thereto at the time the second execution was issued and levied upon the automobile. In view of the rule that this court will not disturb verdicts of juries if sustained by any substantial evidence, we would affirm this judgment if incompetent testimony had not been admitted which was prejudicial to appellant.

(2) The fact that Will Rigney brought a replevin suit for the automobile, and what he testified to in that case, and the further fact that he gave a mortgage on the automobile to E. O. Trent and J. H. Barch to get them to sign his replevin bond, were inadmissible and prejudicial. Appellant was not a party to the suit and, so far as the record shows, did not encourage it and did not acquiesce in the proceedings or know what tes-

timony was introduced therein, nor is it disclosed that she had any knowledge of or suggested or participated in the execution of the mortgage.

The introduction of the bill of sale for tires purchased by Viola Earls from the Armstrong Tire & Service Company was also inadmissible and prejudicial, for there was no showing made that they were purchased for and used on the car in controversy.

On account of the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

POCH *v.* TAYLOR.

4-2789

Opinion delivered December 19, 1932.

Tom F. Digby, for appellant.

Robinson, House & Moses, for appellee.

KIRBY, J., (after stating the facts). Appellant first contends that the court erred in holding the State Bank Bank & Trust Company, insolvent, of which the note sued on constituted a part, but this question has been determined against him in a former suit wherein he was a party against the Bank Commissioner, *ante* p. 618.

He insists also that the court erred in not holding the note was executed without consideration and void upon the assurance of the officers of the bank that he would never have to pay it. He admits, however, that he executed the note, and the money was loaned him by the bank with which to purchase stock of an ancillary or auxiliary corporation, of which the bank officials were officers, and who assured him that he would never have to pay the note, and that the dividends from the stock of the new company would take care of the loan. The stock was issued to him upon his purchase thereof, and he continued to renew the old note and pay the interest thereon until the execution of the note sued on herein, the last renewal of the note given. He borrowed the money, however, and admitted that he had never repaid it, and there could be no failure of consideration, so far as the loan of the money upon the note discounted was concerned, since he got the value of the money for which the note was executed. The fact that the stock purchased with the money he received on the note finally proved to be without value did not constitute failure of consideration for the note executed for the loan; and, even if it

were true, which is not shown, that the bank officials made fraudulent representations to him to induce him to take stock in the ancillary company and loaned him the bank's money for that purpose, he would still be bound to the payment of the money loaned upon this note, since the bank officers had no authority, and could have none, to lend the bank's money to enable persons, who desired to do so, to buy stock in the ancilliary corporation, of which they were also officials. This could not be done even though they had attempted to guarantee, which was not done, sufficient returns upon the stock purchased to take care of the repayment of the money loaned. *Clements* v. *Citizens' Bank of Booneville,* 177 Ark. 1085, 9 S. W. (2d) 569.

No error therefore was committed in directing the verdict, the evidence being virtually undisputed.

The judgment is affirmed.

HAYS *v.* MCGUIRT.

4-2754

Opinion delivered December 19, 1932.

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McElhannon & Callaway, for appellant.

J. H. Lookadoo and *Bush & Bush,* for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in instructing the jury that if they found "that there was no valuable consideration moving to the plaintiff from the defendant for the execution of the release," it should be disregarded. This instruction was erroneous, misleading and prejudicial. It cannot be said there was no valuable consideration for the execution of the release, whether it was moving to the plaintiff from the defendant or not. The testimony on appellant's part conduced to show that the plaintiff herself received no consideration for the execution of said release, although she virtually admitted or at least did not deny that the things agreed to be done by the defendant in the release had all been done. The consideration could be a valuable one, whether it moved to her or not, as it

might be of benefit to the party promising or a loss or detriment to the party to whom the promise was made; it does not have to be both; it may be either. The court said in *Phoenix Sidewalk Co.* v. *Russellville Water & Light Co.,* 101 Ark. 22, 140 S. W. 996, "that a consideration was a benefit moving to the promisor or a detriment agreed to be suffered by the promisee." The consideration does not have to move to the party promising, but may move from a promisor to a third person.

"As has been noted, the consideration need not move to the mortgagor. Hence the debt may be the debt of another and the consideration, for example, may consist in a loan to a third person, or a satisfaction of a debt due the mortgagee from a third person or in the release of a mortgage of a third person, or forbearance or extension to a third person debtor." 41 C. J. 387. See also 13 C. J. 324-25; *Jonesboro Hardware Co.* v. *Western Tie & Timber Co.,* 134 Ark. 543, 204 S. W. 418; *Rockafellow* v. *Peay,* 40 Ark. 69; *Reynolds* v. *Winship,* 175 Ark. 352, 299 S. W. 16; *Margruder* v. *State Bank,* 18 Ark. 9.

The compromise of a disputed claim furnishes sufficient consideration to uphold a settlement, even though the asserted claim is without merit. *Gerdner* v. *Ward,* 99 Ark. 588, 138 S. W. 981; *Lee* v. *Swilling,* 68 Ark. 82, 56 S. W. 447; *Texas Co.* v. *Williams,* 178 Ark. 1110, 13 S. W. (2d) 309.

The release purported to be in settlement of all claims between the parties, and, as already said, the testimony tended strongly to show its terms were performed by the parties to the release.

It follows from what we have said that the court erred in giving the instruction complained about, and it was apparent from the testimony introduced that the erroneous instruction was prejudicial, and the judgment must be reversed on account of same. Under this view it is unnecessary to determine whether the verdict is excessive. For the error designated the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

MEHAFFY, J., dissents.

BURDEN *v.* HUGHES.

4-2790

Opinion delivered December 19, 1932.

Cockrill & Armistead and *R. E. Wiley,* for appellant.

Beaumont & Beaumont, J. A. Watkins and *T. N. Robertson,* for appellee.

MEHAFFY, J. The appellant, George H. Burden, is a contractor, and had the contract to tear down and remove an old building at Fourth and Louisiana streets and to erect a new building. The old building had to be taken down before the new one could be built. He had had experience in wrecking buildings and doing work of this kind. At the time he was tearing down the building on Fourth and Louisiana streets he had several jobs going on, and was therefore at this job only occasionally, something like once a day. He was on the job when the accident happened, and had been there fifteen or twenty minutes. The appellee, C. C. Hughes, is 37 years old, and was in the employ of appellant working under Mr. Harry Haws, who was the foreman for the appellant. The roof had been torn off by the laborers, and, when Hughes came to work Monday morning, he was put to work cleaning up lumber. He went to work about the center of the north side of the wall that fell. He worked there cleaning up that lumber all day except for a few minutes when he was called away by the foreman to clean some 2 x 6's. At the time of the accident, appellee was working north of the wall, pulling nails and cleaning lumber there, and, while he was stooped over picking up some lumber, the wall fell on him and injured him. There is no dispute about the injury or its extent.

Appellee brought suit in the Pulaski Circuit Court alleging that appellant was a contractor and engaged in construction work at the southwest corner of Fourth and Louisiana streets in the city of Little Rock on the 3d day of August, 1931. That on that day about 4 o'clock in the afternoon appellant directed all work to cease in tearing down the building which was then being removed. After said work had been stopped by orders of the foreman, appellee with two other employes were directed by the foreman to pick up pieces of timber and clean them and pick up trash near one of the walls of said building. While so engaged and while acting under the immediate orders of the foreman in charge of said

work, said wall fell upon appellee, breaking his collar bone in two places, breaking eleven ribs, puncturing his lungs, crushing and breaking his right elbow, pelvis, chest and stomach, injuring him internally, inflicting numerous cuts and bruises on his body, hands and legs, from which he suffered pain and from which he will so continue to suffer. That the injuries are permanent, and that he will not be able to do any kind of work again. Appellee was 37 years old and earned from $5 to $8 per day, and he had lost in earnings $4,600 and had been damaged in the further sum of $50,000 on account of his pain and suffering. It was alleged that his injuries were due to the negligence of appellant as follows: (1) It was the duty of the defendant to use reasonable care to provide for plaintiff a reasonably safe place in which to work. In this he negligently failed, in that he negligently and carelessly removed the I-beam and the window frame and all other supports of the wall which fell upon plaintiff and injured him, thereby caused said wall to fall and result in injury to the plaintiff above described. (2) The foreman of defendant negligently and carelessly directed plaintiff to perform work near said wall, both he and the defendant being present, looking on, directing and supervising the work done by the plaintiff, when they knew or by the exercise of ordinary care could have known that said wall was dangerous and likely to fall.

Appellant filed answer denying all the material allegations in the complaint and pleading contributory negligence and assumption of risk.

There was a jury trial, and a verdict and judgment in favor of plaintiff for $5,000. The case is here on appeal.

The appellant concedes that the master must exercise ordinary care to furnish a safe place to work, but contends that this rule is not applicable here because appellee was a member of a wrecking crew which was demolishing a building, and the work itself which he engaged to do constantly changed the working place and created hazards, and these were ordinary risks incident to his employment, which he assumed. In other words,

the contention is that the appellee assumed the risk because he was a member of the wrecking crew which was constantly changing the working place. The undisputed evidence is that the appellee was not working on or about the wall at all, but was 12 or 14 feet away from the wall cleaning up lumber and had nothing to do with tearing down the wall. The appellee testified that he did not help take the joists down because Haws, the foreman, saw him there and told him after he got the paper off to go ahead and take the sheeting off. That Haws was there directing the detail work. Hughes testified that he thought he was in a safe place, and was working under the direction of the foreman Haws, and there was nothing to cause him to believe there was any danger. The appellant and Haws, the foreman, both testified that the posts were rotten at the bottom and this caused the wall to fall. Neither of them had investigated to see if there was any danger, and Haws testified that the laborers must make their own place safe as they go and guard against pitfalls. He did not advise any of the laborers that there was any danger of the walls falling. He said he did not know it. He did not make any investigation, but testified that what happened showed that an investigation should have been made. Numerous authorities are referred to, but this question has been settled by decisions of this court, and we deem it unnecessary to review or discuss all the authorities referred to by appellant. The undisputed evidence in this case shows that the appellant was tearing away the building, and that the work was under the direction and control of Mr. Haws, the foreman, and, at the time the wall fell and injured appellee, both appellant and the foreman were present, and both of them admitted in their testimony that the rotten posts were the cause of the wall falling, and they both admitted that no investigation had been made to determine whether the posts were rotten or whether there was any danger of the wall falling. We have said: "The master is required to exercise ordinary care in discovering defects and in repairing them and

in discovering dangers and obviating them. And this care and prudence must be tested by the business in which the master is engaged and the circumstances surrounding it and commensurate with its requirements." *Bryant Lbr. Co.* v. *Stastney,* 87 Ark. 321, 112 S. W. 740.

"Although the defense of assumption of risk is established as a part of the law and will be applied in all cases fairly within the rule, it is nevertheless not a favored doctrine, but at best is artificial and harsh and should not be extended beyond its reasonable limits." 39 C. J. p. 689.

Where the injured employee provides the place to work himself or where his work so changes the place as the work progresses as to make it dangerous and this changing of the work causes injury without the negligence of the master, the injured employee cannot recover. In other words, he assumes this risk, but here the master was directing the work, and the injured employee had nothing to do with its direction and no knowledge of any danger, and it was not his duty to inspect the wall to determine whether there was danger. It was, however, the duty of the master to take such precautions as a person of ordinary prudence would have taken under the circumstances to protect the employee.

"Where there is any evidence justifying an inference that the defect or danger was known or ought to have been known by the defendant, the question whether he took reasonable precautions to guard against the defect or danger is generally a question for the jury." 45 C. J. p. 1325.

In this case the appellee was not changing the place in any way, but the place was being changed at some distance from appellee under the direction of the foreman himself. The rule contended for by appellant, if adopted, would relieve the master from all liability for injury to servants tearing down a building, no matter how negligent the master himself might be. Such a rule has never been adopted by the courts. It is the duty of the master to make inspection for all latent or concealed

defects beyond the knowledge of the employee. It is the duty of the master to make proper tests and inspections to discover dangers, and the employee has a right to assume that this duty has been performed by the master, and whether in any particular case the employer has discharged his duty with respect to making proper test and inspections is ordinarily a question for the jury.

The appellant earnestly insists that the progress of the work in which the appellee and his co-laborers were engaged was constantly changing and that the appellee therefore assumed the risk. The evidence shows that in the progress of the work which the appellee was doing there was no change, and it was simply a question whether the master was guilty of negligence causing the injury.

It is next contended that the court erred in admitting testimony as to the unsound condition of the studding and floor joists because he says there was no allegation in the complaint that the floor joists were rotten. Any evidence tending to show the cause of the wall falling was competent. Moreover, both the appellant and the foreman testifying for the appellant said that the posts were rotten, and that this caused the wall to fall.

It is next contended that the court erred in giving instruction No. 1 requested by appellee, because the complaint does not ask a recovery for failure to warn appellee. This is not an independent ground for recovery in any sense. It was the duty of the master to exercise proper care to prevent injury to the appellee, and the foreman and appellee testified about warning without objection.

Objection is made to instruction No. 7 and No. 10 also. The objection to No. 7 was that it was misleading in telling the jury that it was the employer's duty to refrain from any act which would render the employee's working place more insecure, and that, even though the master did not furnish a safe place, it was his duty to contribute towards making it a safe place. An objection was made to No. 10 because it repeated the alleged error of submitting the failure to warn as a ground for re-

covery. We do not think the court erred in giving either of these instructions. As we have already shown, it was the duty of the master not only to exercise reasonable care to furnish a safe place to work, but it was his duty to exercise ordinary care in discovering defects and in repairing them and in discovering dangers and obviating them. *Bryant Lbr. Co.* v. *Stastney, supra.*

It is next contended by appellant that it was a mere accident which ordinary foresight could not anticipate, and that no negligence was proved. The evidence shows conclusively that, by the exercise of ordinary care and proper inspection, it could and would have been discovered that the posts were rotten, and this precaution was not taken. The negligence of the appellant was a question of fact properly submitted to the jury, as was also the question of assumed risk and contributory negligence of appellee.

We find no error, and the judgment is affirmed.

CLAYTON *v.* STATE.

Crim. 3823

Opinion delivered December 19, 1932.

Tom Kidd, for appellant.

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

MEHAFFY, J. Paul Clayton was indicted, tried and convicted in the Howard Circuit Court for causing an abortion. The indictment, omitting the formal part, reads as follows: "The said Paul Clayton in the county and State aforesaid, on the 30th day of June, 1932, did unlawfully and feloniously administer and prescribe to one Eunice Burk, a woman with child, before the period of quickening, a quantity of drugs and medicine with intent then and there and thereby to produce an abortion, against the peace and dignity of the State of Arkansas."

Mrs. Nona Burk, the mother of Eunice Burk, testified that Eunice was 17 years old at the time of her death. Paul Clayton was paying her attention. Witness did not know that her daughter was sick until Saturday after she had gotten sick on Friday. She had left home and had gone to another daughter of witness at Center Point. Witness testified that she had physicians to attend her; that Paul Clayton came on Sunday evening and brought some medicine. Dr. Roberts wrote a prescription, and Paul Clayton had it filled and brought it up there. Witness said that Clayton asked her if the

doctor told her what he had written the prescription for, and witness told him that he had not. Clayton said your daughter has blood poison, and that he had some medicine that might do her good. He stayed all night, and said he would take her to the hospital. Her daughter said she was going to die. Did not see the medicine he fixed up, but was in the room when he attempted to give it to her. This was after the abortion had occurred. The medicine which was brought had been prescribed by Dr. Roberts and Dr. Storey. Witness did not know of any medicine that Clayton had there.

Veda Kelley, a sister of Eunice Burk, testified that she lived at Center Point in June and July; that Eunice Burk was her sister and 16 years old. Eunice died at witness' home. She came there on the 7th day of June and died on the 17th of July. Paul Clayton came there while she was there and stayed ten or fifteen minutes. Eunice was in bed. He came up two weeks before she was taken sick and carried her off and was gone about an hour. He gave her some medicine on the porch and told her to take it if what he did didn't do her any good. Witness saw him give her the medicine; did not hear him say anything else. This was about two weeks before she got sick. Eunice left witness' house and came back on June 7. She ate supper and went to bed. The foetus passed Saturday evening and night. Clayton stated that he was responsible for her condition. She was on the porch when Paul gave her the medicine, and witness was standing in the front room. She could see them, but they could not see her. There was a little morphine tablet colored green and white about the size of an aspirin tablet. She got in a car and went off with Clayton about two weeks before she got sick. We went to see Dr. Storey. She came back on Friday and took her bed, and on Saturday evening gave birth to the child. Dr. Storey treated her about a week and then Dr. Roberts was called. They had a consultation and prepared the prescription, that is the medicine which Clayton brought up there. There was a bottle and some tablets Dr. Roberts prescribed. Clayton had some more.

Dr. Storey testified that he had been practicing medicine for 27 years; had occasion to treat women with child; was a graduate of the School of Medicine of Memphis. Treated Eunice Burk on June 10 at his office. Examined her and found a mess or something inside her womb and it was soft doughy, and made a vaginal examination and introduced a speculum and found there a condition of puss and bloody water coming from the womb; took a syringe, washed it out and sterilized it with iodine. She was with child and the foetus was dead. He was called to see her Saturday and was back Monday, and the foetus had passed. In his opinion the foetus had been dead about a month or six weeks. There is a drug which will produce the death of the foetus. Witness continued to treat the girl until about two weeks before her death. Dr. Roberts and Dr. Chambers and his son were there. Witness testified that there is a drug which will produce an abortion, and that he could name and describe it. Witness had been treating Mrs. Kelley for two or three years, but saw Eunice Burk the first time on June 9. He had never treated Eunice before this time.

Mrs. Joe Head testified in substance that she had known Eunice Burk prior to her death; had known her about four weeks; that Mr. Sheffield carried her to the home, and she remained there until Eunice died. She went there on Sunday, and part of the foetus was removed by Dr. Roberts and Dr. Chambers on Monday. Clayton came up there to bring some medicine which Dr. Roberts had prescribed. Clayton told witness he was responsible for the girl's condition; he did not say he was responsible for the abortion. Witness is not a registered nurse.

Dr. Roberts testified that he lives in Nashville, and is a graduate of the University of Arkansas, and has practiced medicine 34 years; he was called to see Eunice Burk Sunday evening June 19, and found an incomplete abortion; administered to her for blood poisoning; went back Monday and made an examination and found that

part of the bones of the skull had not passed and removed them; did not attend her any more. It is a very rare thing that medicine administered to a mother will cause abortion. There is a drug, supposed to be, when administered in enormous doses will produce an abortion, but the chances are it will kill the mother. If it causes sufficient pain to rupture the membrane, the foetus would die and pass out, and, if it did not pass out, it would become decomposed. If an abortion had been caused by the use of instruments and the foetus had failed to pass, a condition would be like witness found there. An abortion is usually done by dilating the mouth of the uterus and introducing instruments. Witness received information that the foetus passed about eight days before he performed the operation.

Dr. W. H. Chambers testified substantially to the same facts as the other physicians.

There was some evidence introduced as to the credibility of the witnesses.

Sheriff Wilson testified about making a search of the home of Roy Ferguson, where Eunice Burk's mother lived.

Harold Cornish testified that he carried the mail from Dierks to Nashville, and that he remembered carrying Eunice Burk from Center Point to Dierks.

Dr. W. B. Simpson testified in substance that he lives in Nashville, been practicing medicine 33 years; graduate of Tulane University, New Orleans; had treated women for female diseases; did not know of any drug which would cause an abortion. Medical science does not teach there is a drug that will cause an abortion. Any doctor knows that when a woman is four or five months pregnant there is no drug that will cause an abortion.

Mrs. Nora Burk was recalled and testified that she knew an abortion had been caused on her girl.

There was some evidence introduced by the State in rebuttal. The case is here on appeal.

There was a verdict of guilty fixing punishment of appellant at a fine of $50 and one year in the penitentiary, and judgment was entered accordingly.

Appellant first contends that the court erred in not granting his motion to require the State to elect upon which charge it would prosecute, that is, for procuring medicine or prescribing medicine. He alleges that the indictment charged two offenses, and cites and relies on *Gramlich* v. *State,* 135 Ark. 243, 204 S. W. 848. In that case appellant had been indicted for the crime of manufacturing intoxicating liquor and being interested in the manufacture of liquor. The court in that case, however, did not hold that the indictment charged two offenses, but held that it was not defective because it charged two offenses conjunctively. The indictment in the case at bar does not charge two offenses. It charges one offense, but charges that the crime was committed by administering and prescribing. It was proper to charge the offense as it is charged in this indictment, and proof of either administering or prescribing would sustain the charge. An indictment in the same language here used was upheld in the case of *State* v. *Reed,* 45 Ark. 333. One might be charged with administering and prescribing, and it might be shown in evidence that he did both. The statute provides that it shall be unlawful for any one to administer or prescribe any medicine, etc., and it was proper to charge the offense as having been committed by prescribing and administering.

It is next contended that the court erred in refusing to permit Dr. Storey to testify and to tell the name of the drug which would cause an abortion. The appellant could not have been prejudiced by failure to name the drug because all that he claims that he could have shown by other physicians is, that there is no such drug, and, if the physician had been permitted to name the drug, still the physician testifying for the appellant could only have said it could not produce it; but the appellant argues that, if witness had been permitted to answer the question telling the kind of medicine, he could have shown that this was different medicine from the kind which was used to cause an abortion, but his witnesses testified that there was no such drug, and therefore, if in their opinion

there was no such drug, they could not have shown that the medicine named by the State's doctors was different from the medicine which would produce abortion. The real question was whether there was such a drug, and the State's witnesses testified that there is such a drug and the doctors testifying for appellant said that there was no such drug. We therefore think that the refusal of the court to permit the witness to state on cross-examination the name of the drug was not prejudicial.

Reversal is also urged on the ground that the court refused to let Mrs. Burk testify, or let the defendant show by her, that she had committed an affirmative act, and tried to conceal the matter of the abortion from the officers at the time it was inquired into, and it is argued that, if she did this, she was an accomplice. This testimony was urged by the defense for the purpose of proving that she was an accomplice. The record however shows that the question was asked, and the witness answered it, stating that she did not make the statements which she is asked if she made.

It is next urged that the court erred in refusing to permit appellant to show by Mrs. Burk that she tried to conceal the matter from the officers, and therefore was an accomplice. The record, however, shows that the attorney for appellant asked the following question: "I just want to get it in the record. We offer to show by this witness that she committed an affirmative act and tried to conceal the matter of the abortion from the officers." The witness answered: "I did not do it." There is therefore no evidence in the record tending to show that Mrs. Burk was an accomplice. On the contrary, the evidence conclusively shows that she was not an accomplice.

The appellant next contends that the court erred in refusing to give certain instructions requested by him. Instruction No. 6 requested by appellant told the jury that the burden was upon the State to show: (1) That the defendant did administer and prescribe medicine to cause Eunice Burk to have an abortion: (2) That it oc-

curred within Howard County within three years next of the day of the returning of the indictment. No error was committed by the court in refusing to give this instruction. The statute itself provides that it shall be unlawful for one to administer or prescribe. Therefore, if he did either, it would be a violation of the statute, and the burden was not on the State to show that he did both. Proof of either would be sufficient, and it would have been error to tell the jury that the State must prove both.

Instruction No. 2, given at the request of the State, correctly tells the jury that the State must show that he either administered or prescribed the medicine, and that it must have been done within three years prior to the finding of the indictment.

Instruction No. 7, requested by the appellant, stated that he could not be convicted unless the evidence showed beyond a reasonable doubt that he was present at the time and place the alleged crime was committed, and assisting or ready and consenting to aid and abet the one who did commit the crime, etc. It was not necessary that appellant be present in order to commit the crime. The statute makes it unlawful for any person to prescribe or administer, and, of course, he could do this without being present. This court said: "The well-known meaning of these words, as given by any of the standard lexicographers, shows that the presence of defendant in person at the time the medicine is delivered to or taken by the prosecutrix is not necessarily contemplated. The conduct of the appellant in sending medicine used to bring about abortion to the prosecutrix to be taken by her and his direction to her in person or by letter, and how to take it come clearly within the meaning of the words 'administer' or 'prescribe' as used in the statute." *Burris* v. *State,* 73 Ark. 453, 84 S. W. 723.

It is next contended by appellant that the court erred in refusing to give his instruction No. 9. That instruction told the jury that they must find the defendant not guilty if they found that the abortion was caused by the use of or employment of any instrument or other means

except use of medicine. This instruction was erroneous, because, under the statute, if appellant either prescribed or administered the medicine, he would be guilty, although the medicine was never taken. As said in *Burris* v. *State, supra,* "if the defendant procured and gave or sent medicine or drugs to said Nela Burris with the intention of producing an abortion before the period of quickening, it is no defense that the medicine was not taken, or, if taken, that it failed to produce abortion or premature delivery."

The appellant next complains because the court refused to give instructions No. 15 and No. 16 asked by him. These instructions were on the theory that Veda Kelley was an accomplice. There is no evidence in the record tending to show that she was an accomplice, and therefore there was no error in refusing to give these instructions.

Appellant urges a reversal on the ground that the evidence is not legally sufficient to sustain the verdict. It is argued that the evidence of Veda Kelley must be corroborated because she was an accomplice. If she were an accomplice that would be true, but we have already stated that there was no evidence tending to show that she was an accomplice.

It is finally contended that the judgment should be reversed on the ground of newly discovered evidence. Veda Kelley, a witness for the State, signed an affidavit repudiating some portions of her testimony given at the trial. She states that she did not see the defendant give her sister the medicine, and did not hear him make the statement she testified to in connection with giving her the medicine. She states in her affidavit that she was mistaken about seeing Paul Clayton give her sister the medicine and that she did not hear him make the above statement as testified in the trial. She does not state in her affidavit that any other part of the evidence given at the trial was not true. She testified at the trial that Clayton came up there two weeks before she was taken sick and carried her off and was gone about an

hour. She testified at the trial that Clayton said he was responsible for the condition she was in; she also testified on cross-examination that she had told the attorney that all she knew about medicine was what her sister told her; that she was standing in the front room and they were at the steps; they could not see her but she could see them, and she testified on cross-examination that appellant brought the medicine up there; the medicine that was prescribed by Storey and Roberts.

Mrs. Joe Head also made affidavit about some statements that Veda Kelley had made to her, and that Veda Kelley had stated that certain testimony which she gave in the trial was untrue. We think there was sufficient evidence to justify a conviction without the statements of Veda Kelley, which she says in her affidavit were untrue, or rather she says she was mistaken. Of course, she could not have been mistaken, she either saw and heard what she testified to, or she did not see and hear those things.

Granting or denying a new trial on the ground of newly discovered evidence is largely within the discretion of the trial court; unless this discretion is manifestly abused, the cause will not be reversed for not granting a new trial on the ground of newly discovered evidence. This court said: "A material error or misstatement in the testimony of a witness for the prosecution may constitute grounds for a new trial. Where, therefore, it appears that on a new trial the witness will change his testimony to such an extent as to render probable a different verdict, the new trial will be granted; but recantation by witnesses called on behalf of the prosecution does not necessarily entitle defendant to a new trial. The question whether a new trial shall be granted on this ground depends on all the circumstances of the case, including the testimony of the witnesses submitted on the motion for new trial. Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where the recant-

ation involves a confession of perjury." *Little* v. *State,* 161 Ark. 245, 255, S. W. 892; 16 C. J. 1188.

We do not think the trial court abused its discretion, and the judgment is affirmed.

MAGNOLIA PETROLEUM CO. *v.* BELL.

4-2777

Opinion delivered December 19, 1932.

Cockrill, Armistead & Rector and *Patterson & Patterson,* for appellant.

Cravens & Cravens, Reynolds & Maze and *J. H. Brock,* for appellee.

BUTLER, J. On July 23, 1929, Mrs. O. E. Bell was severely burned by an explosion which occurred while she was endeavoring to start a fire in her kitchen stove by applying a lighted match to a pile of kindling and wood upon which she had poured coal oil. From the fire resulting from this explosion the dwelling in which Mr. and Mrs. Bell were living and the household belongings therein were destroyed. This suit was brought to recover damages resulting from the explosion and fire.

There was a trial and judgment for plaintiffs in the trial court, from which is this appeal.

The liability of the appellant, Magnolia Petroleum Company, is based on the contention that the coal oil or

kerosene used in starting the fire was purchased by the appellee, O. E. Bell, from a retail dealer in gasoline and kerosene, who had purchased the same from the appellant, which fluid was not kerosene, but a mixture of kerosene and gasoline; that this mixture was highly inflammable and explosive, and that the explosion occurred because it was such mixture. The appellees depended upon circumstances to establish the charge of negligence against the appellant for selling an impure product, and the court, at their instance, instructed the jury that proof of this was not required by direct evidence, but might be proved by circumstances, and if, from the circumstances adduced in evidence, a fair and reasonable inference might be drawn that defendant (appellant) sold as kerosene a different fluid which was dangerous and explosive in its nature, and this was the proximate cause of the injury, liability would attach to the defendant (appellant).

It is the contention of the appellant that the circumstances proved were not sufficient to meet the test laid down by the court, and that the verdict of the jury was without substantial evidence to support it. It is well settled that this court must view the evidence, with all the inferences reasonably deducible therefrom, in the light most favorable to the appellee, but, applying this rule, we are unable to discover any substantial testimony or proof of any circumstance to support the finding of the jury that the appellant sold to the retailer, Middlebrook, who in turn sold to the appellee, Bell, a fluid as kerosene which was not such, but a mixture dangerous in its character, from the use of which the injuries to appellees resulted.

Prior to this suit, a suit on the same cause of action had been instituted in the Federal District Court of the Western District of Arkansas, and evidence was fully developed on that trial. That case, however, was nonsuited, and on the trial of the instant case it was agreed that the evidence taken might be used for the purpose of showing the testimony of any witness in said trial for the purpose of contradiction, or in regard to any

statement of testimony of any witnesses who testified in said trial. The testimony of the witnesses in this case and the admissions made as to their testimony in the former trial established the circumstances upon which the appellees rely which are as follows: The appellees lived in the village of Hartman, a short distance from the place of business of Middlebrook, who, among other things, sold gasoline and kerosene, and that it had been their custom to purchase kerosene from him to use in starting fires in their kitchen stove and under their wash pots; that on or about the 9th day of July, 1929, the appellee, O. E. Bell, applied to Middlebrook for the purchase of a gallon of kerosene. The alleged kerosene was put into a gallon can which appellee kept for that purpose, and he returned with it to his premises. A quantity of this fluid was poured upon some fuel under a wash pot and was ignited by the application of a lighted match. Mr. and Mrs. Bell noticed that it appeared to flame up more quickly than the usual kerosene, which alarmed them and made them think it was dangerous and "looked like it might burn you up." Bell went back to see Middlebrook who told him it was all right, and they continued to use the fluid some three or four times for the purpose of starting fires before the occurrence on the 13th day of July. The can of kerosene was kept in the garage near the dwelling house and before the date of the explosion Bell had drawn out a small quantity in a bottle which he carried to the woods for the purpose of putting it on a saw, and after the explosion he went to the woods and found this bottle with some fluid still in it and took it to a chemist for analysis about September 10th. The fluid was found to be a mixture of equal parts of kerosene and gasoline. The chemist who made the analysis stated that the fluid would be highly dangerous for use in lamps and to use to build fires, and if used generally throughout a community would cause a great many casualties.

On July 13th Mrs. Bell cleaned out her kitchen stove, removing the ashes with her hands. She then placed some wood and kindling in the stove and got the

can of kerosene and poured some of the fluid on the fuel in the stove, and upon touching it with a lighted match the explosion followed. Immediately after the explosion the kerosene can was found on the floor near the stove. Appellee testified that on the day his house was burned he saw Mr. Spanke, the agent of appellant, and his driver came to Middlebrook's place of business and moved the tank in which the kerosene was kept out of his building and took another one off of the truck and put it on the inside, and that Middlebrook was there at the time. A witness by the name of Tinner stated that he was at Middlebrook's filling station and saw some person, or persons, whom he did not know, change the kerosene in the tank that the oil was carried out of the tank in a five-gallon can and other oil substituted for it. All of this was disputed by Middlebrook and Spanke who testified that no agent of the appellant came to Middlebrook's place of business on that day and neither the tank nor its contents were changed. There were three witnesses who gave some testimony regarding trouble they had experienced with kerosene bought from Middlebrook, which will be commented upon later in this opinion.

The facts about which there is no dispute are to the effect that the kerosene handled by Middlebrook was all purchased by him from the appellant company through its agent Spanke at Clarksville; that the kerosene in the tank at his filling station out of which he sold a gallon to the appellee, Bell, was purchased about the first to the 10th of July and was drawn into the appellant's tank truck from a large supply tank. This kerosene had been inspected at the point of shipment and again after it had been put into the tank of the local agent, Spanke, and the test showed it to be kerosene of good quality which came within the test required by law. Middlebrook was a retail dealer in gasoline and kerosene. The tanks in which his gasoline was stored were sunk in the ground outside his building and a small tank was located inside of his building in which he kept kerosene. Appellant's tank truck was divided into separate compart-

ments, in one of which was kerosene and in the others gasoline, with outlets from each compartment. The kerosene delivered to Middlebrook from the first to the 10th of July was delivered in the ordinary way without admixture with any other fluid or substance. From the storage tank of Spanke the local agent of appellant, kerosene was sold to a number of retailers about this time in that territory, who in turn retailed the same to their customers, and no complaint was made by any person who used it. Middlebrook had a number of customers in the village of Hartman, and out of the particular quantity of oil from which the sale was made to appellee, Bell, Middlebrook sold to various other customers the balance of the oil. They used it in their lamps and for the purpose of making fires. This amount, from July 1st to 13th, the date of the explosion in question, was about thirty gallons and was sold in small quantities to the householders in the village who used it in the customary way to light fires and burn lamps and they had no trouble in its use.

The trouble Tinner experienced was that when he started to blow out his lamp the oil ignited down in the lamp and exploded when it was thrown into the yard, but the condition of the lamp was not stated, and it is therefore uncertain whether or not that caused the flame to descend into the lamp or whether it was caused from the character of the oil. Brazier testified that he kindled a fire with the kerosene in his stove about the first of July, and the caps or lids were blown off the stove, but the manner in which the fire was kindled is not disclosed by the testimony—whether the oil was poured on a smoldering fire or whether the stove was hot or cold—so that that explosion may have been caused by the character of the oil used or from some other cause. It is in the undisputed evidence that kerosene, when poured upon a smoldering fire or under certain other conditions, quickly forms a gas which, upon application of a flame will explode. The witness, Smith, testified that he was not pleased with some kerosene purchased and returned

it—but he was unable to say with any degree of certainty when the purchase was made. It would, therefore, be but speculation to say that it was from the same quantity of kerosene out of which the sale to Middlebrook was made in July, 1929. It seems reasonably certain, from the definite and undisputed evidence relating to the character of the kerosene purchased by Middlebrook from appellant in July, 1929, that it was unadulterated and fit for use. Such being the state of the evidence, if it may be said to be established that the kerosene in the gallon can was mixed with gasoline when Mrs. Bell used it for starting the fire in the cook stove, how it became adulterated is a matter of conjecture. There was some testimony that a small quantity of gasoline was kept on the premises in a glass jar, and it appears equally as reasonable that it was inadvertently mixed with the kerosene as it is to say, in view of all the attendant circumstances, that it was mixed in Middlebrook's tank before the sale was made to Bell, or, as Bell himself furnished the container, that some gasoline might have been in it when the kerosene was purchased by him. It is certain that on the 10th day of September, 1929, the fluid in the bottle given by Bell to the chemist for analysis was found to be half gasoline and half kerosene, but it must be remembered that the time the fluid in the bottle was alleged to have been taken from the gallon can of kerosene is nowhere shown, nor where it was or in whose possession from that time until a date long after the accident resulting in the damages to Mrs. Bell and the destruction of the premises.

We have not overlooked the testimony of Bell and Tinner relative to the agents of appellant making some change of the tank of kerosene in Middlebrook's filling station on the day of the accident, but no particular significance can be attached to this because the testimony of Bell and his witness, Tinner, are contradictory to each other and there was nothing out of the ordinary in the action of the agents of the appellant, as it was a part of the business to visit the retail dealers from time to time

and deliver gasoline and kerosene to them, and, especially in view of the other circumstances in the case, it is insufficient to show any essential fact.

The essential fact in this case which must be established to fix liability on the appellant is that it delivered to Middlebrook kerosene mixed with gasoline and that it was a part of this mixture that was sold by Middlebrook to the appellee, Bell. While we may have inadvertently omitted mention of some circumstance in evidence, we have carefully reviewed it and believe that we have stated the circumstances in as favorable a light for the appellee as is warranted. We conclude that there is no substantial testimony which would justify a reasonable inference of the existence of the essential fact upon which a verdict might have been based. It is well settled that the verdict of the jury based on mere conjecture or speculation, as we find this verdict to be, will not be permitted to stand. *St. L., S. F. R. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102, and cases therein cited.

Appellees rely on the case of *Pierce Oil Corp.* v. *Taylor,* 147 Ark. 100, 227 S. W. 420, to support their contention that the evidence in the instant case is sufficient to support the verdict. In that case, however, the evidence clearly established the fact that the retail dealers sold kerosene only and not gasoline, and that on the truck of the oil corporation at the time of the delivery to the retail dealer were four barrels of kerosene and four of gasoline. Two of these barrels were delivered to the retail dealer and two days later a can of coal oil, supposedly, was purchased which was drawn from one of these barrels. In starting a fire with this fluid there was a violent explosion of sufficient force to burst the can nearby, and immediately after the explosion some of the oil was taken from the barrel from which the oil had been purchased, and the sample, after being securely sealed, was sent to a chemist in Fort Smith for analysis, who found that it flashed at a temperature of 80 degrees and contained ingredients found in gasoline and not properly present in kerosene. From this evidence the

reasonable inference could be drawn that at least one of the barrels delivered from the corporation's truck to the retail dealer contained gasoline and not kerosene. The mere statement of the facts in that case distinguish it from the facts of the case at bar and make it inapplicable thereto.

We deem it unnecessary to discuss the alleged negligence of Mr. and Mrs. Bell or the contention that they used the fluid with full knowledge of its dangerous character. We have examined the instructions and find that some of them erroneously declare the law, but, in view of our conclusion as to the sufficiency of the evidence, it is unnecessary to discuss those instructions. It follows from what we have said that the judgment of the trial court must be reversed, and the cause dismissed. It is so ordered.

VANCE *v.* HARKEY.

4-2793

Opinion delivered December 19, 1932.

Ward & Caudle, for appellant.

Robert Bailey, for appellee.

BUTLER, J. J. M. Jones died testate in the year 1921, devising his real property to his wife Dora Jones, for

life and the remainder in fee to four children, J. W., Luke, Bessie and Dolly Jones, being children born to him and his wife, Dora. Children by a former marriage were mentioned in the will, and Will D. Vance was named as executor. The executor took charge of the property under the will and proceeded to its administration as therein provided.

Seven acres of the real estate are located in the city of Russellville, and, this land not producing enough revenue to pay the general and local taxes, Mrs. Jones and the executor concluded that it would be best to sell the same. In 1926 the appellee, Ed Harkey, agreed to purchase this property for $4,250, provided the necessary orders were made by the court to authorize the sale as all of the children were minors. The appellee entered into a written contract with the widow and executor to that effect, and pursuant to that agreement Will D. Vance, as executor, and Mrs. Jones, for herself and as the natural guardian and next friend of the minor children, filed a petition in the chancery court for partition, if practical, and, if not, that the land be sold. It was alleged in the petition that the appellee had offered to purchase the property for the sum aforesaid.

It subsequently developed that the child, Luke Jones, had died while an infant and before the death of his father, and that after the execution of the will another child had been born who was named Catherine. The attorney who prepared and filed the petition for partition was not advised of the death of Luke Jones or the birth of Catherine Jones, but assumed that all the beneficiaries and children of J. M. and Dora Jones were those named in the will, naming them in the petition. On hearing of the petition the court granted same, and directed that the land be sold at private sale to the appellee by a commissioner who was appointed for that purpose. The sale was duly made and report thereof with the commissioner's deed duly acknowledged to the court, which sale and deed were by the court approved and confirmed, by which the interest of the four children

named in the will was conveyed to the appellee, Harkey. Mrs. Jones also conveyed to the appellee by proper deed her interest in the land in question.

The present litigation arose in the following manner: Early in the year 1927, Harkey entered into an agreement with the board of directors of School District No. 14 in Russellville for the sale by him, and the purchase by the said board, of the tract of land for the sum of $6,500. Before this sale was consummated, John W. White and a number of others, presumably citizens and taxpayers of said district, brought suit in the chancery court to enjoin the school board from purchasing the land, and prayed that the minor children named in the partition suit aforesaid be made parties, and that the sale of the land made under the partition decree aforesaid be set aside.

On October 22, 1927, the appellee filed his separate general and special demurrer and answer to this complaint, in which answer the allegations of the complaint were specifically denied. After the filing of this answer, on motion of Harkey, the child, Catherine Jones, was made a party defendant, and a special guardian was appointed to represent her interests. Thereupon Harkey filed an amendment to his answer and cross-complaint wherein he alleged that the child, Catherine Jones, had been inadvertently omitted from the proceedings up to that time, and that she should receive her distributive share of the amount paid by him for the land, and that his title should be quieted and confirmed against all persons including the said Catherine Jones.

An answer was filed for Catherine Jones by her special guardian, and on the 27th day of February, 1928, Mrs. Dora Jones and her children aforesaid filed their interventions, wherein they sought to have the sale made under the partition decree set aside for the reason that the sum contracted to be paid by Harkey was $5,200 instead of $4,250. To this intervention answer was made by Harkey. That case was heard and determined and final decree rendered June 12, 1929, a day of the regular February term. No appeal was taken from that decree,

but on December 28, 1929, Harkey filed an action in the probate court against the estate of J. M. Jones for $984 which he had paid into the registry of the chancery court pursuant to said decree. On motion of Will D. Vance, the executor, this claim was dismissed by the probate court on October 27, 1930. From this judgment Harkey appealed to the circuit court, but the record does not disclose what further action, if any, was taken by him in that regard.

Subsequent to all of these proceedings, Harkey filed this action, naming as defendants, Vance as administrator (executor) Dora Jones, the widow of J. M. Jones, J. W. Jones, Bessie Jones and Dolly Jones and Catherine Jones, minors, these being the four living children of J. M. Jones, deceased, and the owners under his will and by inheritance of the parcel of land sold to Harkey. In his complaint Harkey alleged the facts recited above, and that the $984 paid by him into the registry of the court was then in the hands of the clerk, Ed C. Bradley. The complaint concluded with the prayer that the original contract entered into by Dora Jones, for herself and minor children, and Will D. Vance, executor, be reformed so as to omit the name of Luke Jones, deceased, and insert the name of Catherine Jones, and that the original decree in the partition suit be reformed so as to insert the name of Catherine Jones where the name of Luke Jones appeared; that the deed from the commissioner made pursuant to the decree of partition be reformed in the same particular as the decree, and that he have judgment against the defendants in the sum of $984, and that the clerk of the court be ordered to pay said money over to him.

To this complaint the defendants interposed a special and general demurrer and answer admitting the allegations of the complaint and setting up as an affirmative defense that all the matters and things pleaded had been set up and determined in the suit instituted by citizens to enjoin the sale of the land in question by Harkey to the school board, in which suit all the parties had inter-

vened and all matters had been adjudicated by a final decree, and the defense of *res judicata* was specially interposed.

On the trial of the case the court rendered a decree against Vance, as executor, in the sum of $984 with interest from January 26, 1929, and, further, that the title of the defendants to the land be divested, and title be confirmed and quieted in the plaintiff (appellee) from which is this appeal.

It is insisted by the appellee that the trial court was familiar with the matters in controversy and, under all the facts in the case, rendered a decree in consonance with good conscience, which decree was right. It is not difficult to perceive that the chancellor was endeavoring to render such a decree, and it is one which we would feel constrained to affirm, were it not against well-settled principles of law.

In the decree of June 12, 1929, after reciting the filing of the several interventions and the answers of Harkey thereto, the court found as a matter of fact that, subsequent to the execution of the will under which Mrs. Dora Jones and her children held title, Catherine Jones was born, and as to her J. M. Jones died intestate. The court found that the decree for partition and sale thereunder had been duly made and entered and the land sold to Harkey for the sum of $4,250; that the sale was duly reported and in all things confirmed and approved, and "the court, being otherwise well and sufficiently advised, doth find that the purchase price paid for said land at said sale was the fair and reasonable value thereof, and the court now finds after hearing this cause, and upon proof, that the said amount of $4,250 paid for said land is the fair value thereof, and that, as against the said Dora Jones, J. W. Jones, Bessie Jones and Dolly Jones, and to the extent of their interest, the said Ed Harkey is entitled to have his title in said above-described property forever quieted and confirmed."

"The court further finds from the evidence in this cause that the minor defendant, Catherine Jones, was

not made a party to said proceedings, and that she has her title and interest in said lands, the same being an undivided one-fourth interest subject to the life estate in her said mother, Dora Jones, and that after investigation and hearing proof that it would be to the best interest of the said minor, Catherine Jones, to divest the title to her interest in said lands out of her and vest the same in the said defendant, Ed Harkey, upon the payment into the registry of this court by the said defendant, Ed Harkey, of her proportionate part and share of the value of the said land in the sum of $984, and that the said Ed Harkey, having paid the said sum of $984 in the registry of this court, which is the amount due said child for its interest in said land after deducting its part of the taxes paid by Ed Harkey, for the use and benefit of the said minor child, Catherine Jones, which amount is hereby ordered delivered to the statutory guardian of Catherine Jones after payment of attorney *ad litem,* M. H. Dean, and his attorney.

"It is therefore by the court considered, ordered, adjudged and decreed that all the right, title, interest and equity of the said Catherine Jones in and to the said above-described lands situated in Pope County, Arkansas, * * * be, and the same is, hereby divested out of her and vested in the said defendant to the intervention, Ed Harkey, and that the intervention and cross-complaint of the said Dora Jones, J. W. Jones, Bessie Jones and Dolly Jones, seeking to set aside the decree of the chancery court and ordering a sale of the lands hereinabove referred to, and to revest title in them, be and the same is hereby dismissed for want of equity, and the title of the said Ed Harkey in and to the above-described lands against the said Dora Jones, J. W. Jones, Bessie Jones, Dolly Jones and Catherine Jones be, and the same is, hereby forever vested, quieted and confirmed."

We take judicial knowledge of the fact that the term of the court at which the decree of July 12, 1929, was made and entered has lapsed, and the decree become final. The complaint in the present case shows that all

the issues involved were, or could have been, determined in the former suit, and all the parties that were necessary to that determination were then before the court. In that suit, Catherine Jones was made a party, and she and her brother and two sisters were the owners of the parcel of land which had been sold to Harkey and the decree quieted and confirmed title in Harkey, he having paid into the registry of the court the amount adjudged to be due the said Catherine Jones. It is argued that, since Vance, the executor, was made a party defendant in the instant case and was not a party to the proceeding which terminated in the decree of June 12, 1929, therefore that decree is not a bar to the instant suit. It is not shown, however, that the estate of J. M. Jones had any interest in the subject-matter of the litigation, and the sole duty of the executor (the specific bequest being only nominal) was to make a partition and division of the estate among the devisees and to pay the funeral expenses and debts of the deceased. There was no showing that any of these duties remained unperformed or that any part of the money arising out of the sale of the parcel of land involved was needed for the discharge of the obligations of the testator. Therefore, all of the persons necessary for the adjudication of the questions before the court were parties to the proceeding and all the matters in issue in the instant case were either directly adjudicated or necessarily involved in the determination of the action ending in the decree of July 12, 1929. That decree, under familiar principles, operated as a bar to any subsequent suit involving issues which were then, or might have been, determined. *Vittitow* v. *Bennett,* 112 Ark. 277, 165 S. W. 625; *Black* v. *Lenderman,* 156 Ark. 476, 246 S. W. 876; *Shaw* v. *Polk,* 152 Ark. 18, 237 S. W. 703; *Toll* v. *Toll,* 156 Ark. 139, 245 S. W. 299; *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. (2d) 610.

The appellee earnestly argues that, since he was not a party to the *ex parte* petition for partition in which a decree was rendered and by which he became the purchaser of the land, and that in that petition it was er-

roneously alleged that Luke Jones was one of the minor owners of the land, when in fact he was dead, the court had no jurisdiction of Luke Jones, and that, as his administrator was not a party to any subsequent proceeding, the principles announced would not apply. The answer to this is that it is apparent that the child, Luke Jones, died in infancy and therefore, had no estate or interest in the estate of his father, and further that the decree of partition is not the one sought to be modified in the instant case.

Appellee also insists that the proceedings and decree rendered in the court below were correct under the rule that a judgment rendered at a former term of court may be corrected so as to make it speak the truth, and cites a number of cases to support that contention. This, however, is not a case coming within that rule, for here there was no judgment of the court which was omitted by misprision of the clerk or one entered which in fact was not the decision of the court; it is an independent action to recover a sum of money which was ordered paid by the court and accordingly paid under that order, from which order, as we have seen, no appeal was taken.

We can see how it may be that the appellee has been required to pay more for the tract of land than he originally bargained, which was all the land was worth, but no authority has been cited, nor have we been able to discover any, that would warrant the affirmance of this case.

The judgment in the instant case therefore must be reversed, and the cause remanded with directions to dismiss the appellee's complaint for want of equity and to pay the sum in the registry of the court to the legal representative of the minor child, Catherine Jones. It is so ordered.

WILLIAMS *v.* STATE.

Crim. 3827

Opinion delivered January 9, 1933.

[redacted]

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

McHANEY, J. Appellant was convicted of murder in the first degree for the killing of C. H. Atwood, an employee of the Black & White Store at 12th and Welch streets, Little Rock, Arkansas, while engaged in robbing the store, and was sentenced to die in the electric chair. The robbery and killing occurred April 15, 1932.

In his motion for a new trial, appellant assigns two errors of the trial court for reversal, to-wit: (1) "because the court erred in allowing the prosecuting attorney to ask the jurors as to their conscientious opinions in the manner in which the questions were framed"; and, (2) because the verdict is contrary to the law and to the evidence.

1. We understand this assignment refers to the questions asked prospective jurors on their *voir dire* concerning any conscientious scruples they might have in returning a verdict of guilty where the punishment is fixed by law at death if the facts justified such a verdict. We understand further that the objections made go to the form of the questions only. The form of the questions objected to varied somewhat in wording, but substantially they were all the same. For instance, one juror

was asked this question: "Have you any conscientious scruples against returning a verdict of guilty where the punishment is fixed at death if the facts justify returning a verdict of that sort?" Another was asked: "Have you any conscientious scruples against voting for a verdict of guilty where the law fixes the punishment at death?" Substantially all the questions were the same. It is well settled in this State that there is no error in permitting the prosecuting attorney to ask prospective jurors such questions. In *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, the State was permitted, over appellant's objections, to ask prospective jurors similar questions which was assigned as error. Overruling this contention, the court said: "Under the law, as we construe it, capital punishment has not been abolished, and it still being within the province of trial juries to return a verdict that would result in capital punishment, the State, in the trial of cases where the death penalty may be imposed, is entitled to a jury that has no conscientious scruples as to such penalty." And in *Jones* v. *State,* 58 Ark. 390, 24 S. W. 1073, this court held that: "It was altogether proper for the prosecuting attorney to ask the jurymen on their *voir dire* if they had any conscientious scruples that would preclude them from returning a verdict of guilty when the law and evidence would justify same; and, on their answering the question in the affirmative, it was not error in the court to excuse them." The court did not therefore err in overruling the objections to the questions asked the jurors.

2. As to the assignment of error, that the evidence was insufficient to support the verdict, but little need be said. Counsel for appellant, in open court, admitted that he was the man that robbed the store and shot Mr. Atwood, and that it occurred in Pulaski County. The undisputed evidence further shows that appellant deliberately killed Mr. Atwood in cold blood while engaged in robbing said store; that he came into the store with a gun in each hand, forced two of the employees into the ice box, held up a customer, and, while robbing the

cash drawer, when Mr. Atwood rose up from behind the counter to see what was taking place, appellant shot him. He was a short time thereafter captured by the officers, still having the two guns in his possession and confessed his guilt. No evidence was offered in appellant's behalf. Under this state of the case, the jury could not well or reasonably have returned any other verdict than guilty, as charged in the indictment, carrying with it the death penalty.

Affirmed.

BOWLIN *v.* VINSANT.

4-2803

Opinion delivered January 9, 1933.

Phillip A. Yoes and *Evans & Evans,* for appellant.

Rains & Rains, for appellee.

McHANEY, J. This is a suit to quiet title to certain real property in the city of Van Buren, Arkansas. It involves the construction of paragraph 6 of the last will and testament of William Bowlin, deceased, admitted to probate in Crawford County, Arkansas, January 3, 1916. We think it unnecessary to set out the whole will, as it is lengthy and as only paragraph 6 is involved in this lawsuit. It reads as follows: "I give, devise and bequeath unto my beloved wife, Julia Bowlin, all of my household furniture and effects of every character and kind in and about the dwelling house occupied by me in Van Buren, Arkansas, including all silver plate, pictures and other personal property and effects of every character in and about the said dwelling house and premises. I also fur-

ther give and devise unto my said wife, Julia, for and during her natural life, the use, occupancy of my dwelling and home in Van Buren, Arkansas, with the lots and land inclosed and adjoining thereto, and at her death, or should my wife not survive me, I give and bequeath the said personal property herein set forth, or so much as may be undisposed of by my said wife, not in any manner intending to limit my wife in the disposition of said personal property, unto my daughter, Gertrude Vinsant, and I give and devise the said dwelling house and premises devised unto my wife during her life, at her death, or should my said wife not survive me, unto my daughter, Gertrude Vinsant, and unto the heirs of her body."

Julia Bowlin survived her husband, the testator, and held the real estate mentioned above during her lifetime. She died in the year 1916, at which time the appellee entered into possession and has had continuous possession thereof since said time. The question to be determined is, what title the appellee took on the death of her mother, whether a life estate or a fee simple title? The trial court held that she took the fee and entered a decree quieting the title in her.

We think the case is ruled by the recent case of *Pletner* v. *Southern Lumber Co.*, 173 Ark. 277, 292 S. W. 370, and cases there cited, and that the trial court correctly held that appellee acquired the fee to the real property devised in paragraph 6 of the will. In the Pletner case we said: "This court has often ruled that where land is conveyed, or devised, to a person and the heirs of the body, children, or issue of such person, such conveyance or devise creates an estate tail in the grantee or devisee, which, under our statute (§ 1499, Crawford & Moses' Digest) becomes an estate for life only in the grantee or devisee, and a fee simple absolute in the person to whom the estate tail would first pass, according to the course of the common law, by virtue of such devise, grant or conveyance." A number of our cases are there collected, so holding. Continuing the court said: "But this familiar doctrine cannot have applica-

tion here, for the reason that the estate is not devised to Mrs. Mary Elmira Godfrey and her bodily heirs, creating a life estate in her and a fee simple estate in her bodily heirs under the statute *supra*. The life estate as we have seen was previously devised to Mrs. Artemus F. Gillis, and the remainder of the estate, after such life estate, was devised to Mary Elmira Godfrey and her bodily heirs." The court then held that Mary Elmira Godfrey took the fee, and not a life estate.

In the instant case the testator devised the real property mentioned in paragraph 6 to his wife during her life, with the remainder to his daughter, the appellee, and the heirs of her body. While the testator did not use the word "remainder" in this connection as was the case of *Pletner* v. *Southern Lumber Co., supra,* it was in fact the remainder conveyed. If it had been the intention of the testator to devise only a life estate to Gertrude Vinsant, to take effect immediately upon the death of Mrs. Bowlin, he doubtless would have used similar language as he did concerning his wife, "during her life," or some similar expression showing a clear intention to convey a life estate. The testator was providing for two contingencies, first, if his wife survived him, and, second, if she did not survive him. In either event it was to go to the appellee and unto the heirs of her body. It is not necessary to determine what estate the appellee would have taken had Mrs. Bowlin not survived her husband. The fact is she did survive him and took a life estate in the real property devised. We think the real intention of the testator was that, if appellee were living at the time of his wife's death, she should take the fee, but, if she were not living then, the heirs of her body would take the fee. In other words, it was his intention that this particular piece of property should descend through the Gertrude Vinsant line of heirs to her first, if she were living at the death of the life tenant, but, if not, then unto her bodily heirs. Other cases holding to the same effect as the Pletner case are: *Gregory* v. *Welch,* 90 Ark. 152, 118 S. W. 404; *Harrington* v. *Coop-*

er, 126 Ark. 53, 189 S. W. 667; *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194.

It necessarily follows from what we have said that the decree of the chancery court is correct, and must be affirmed. It is so ordered.

MERIWETHER *v.* DUBOSE.

4-2794

Opinion delivered January 9, 1933.

Cook & Cook and *Ned Stewart,* for appellant.

E. A. Upton and *Searcy & Searcy,* for appellee.

BUTLER, J. J. W. DuBose brought this suit in the chancery court of Lafayette County, contending that

under a contract entered into with James S. Meriwether the latter and the Meriwether Sand & Gravel Company were due him as an overriding royalty two cents per cubic yard upon all the sand and gravel which Meriwether and the Sand & Gravel Company had mined and actually shipped from sand and gravel leases in and around Lewisville, Arkansas. His claim was based on the following contract:

"State of Louisiana,

"Parish of Caddo.

"This memorandum of agreement, made and entered into by and between James S. Meriwether, a resident of Caddo Parish, Louisiana, hereinafter known as party of the first part, and J. W. DuBose, a resident of Lafayette County, Arkansas, hereinafter known as party of the second part, witnesseth:

"That, whereas, the party of the second part has given his time and attention to the securing of gravel leases in and around Lewisville, Arkansas, for the benefit of the party of the first part, in contemplation of the party of the first part operating the said leases by mining sand and gravel therefrom, and

"Whereas, a consideration to the said party of the second part for such services is recognized to be due, therefore,

"It is agreed between the parties hereto that upon all sand and gravel actually shipped by the party of the first part from sand and gravel leases in and around Lewisville, Arkansas, the party of the first part will pay to the said party of the second part an overriding royalty of two cents per cubic yard, the said royalty to be based upon the royalties paid to the landowners under the original leases granted by them to the party of the first part, and shall be paid in the same manner and at the same time and place as specified in said original leases.

"Thus done and signed in duplicate at Shreveport, Caddo Parish, Louisiana, on this the 2d day of February nineteen hundred and twenty-five.

(Signed) "James S. Meriwether,

"Attests: "J. W. DuBose.

"Frank M. Cook,

"Nell Illien."

In DuBose's complaint the allegation regarding the liability of the Sand & Gravel Company was that the company, a corporation, knew of the existence of the contract and, with such knowledge, accepted the benefits and profits airsing from the mining and shipping of sand and gravel, and, by its dealings with DuBose, recognized said contract and acted thereunder. It is the contention of Meriwether that the contract, properly interpreted, rendered him liable only for an overriding royalty for gravel mined and shipped from certain leases which had been procured for him by DuBose, and that this royalty had been paid, but that large quantities of gravel had been shipped from other leases, and that as to this DuBose was not entitled to a royalty under his contract.

The Sand & Gravel Company filed a separate answer denying any knowledge of the contract entered into between DuBose and Meriwether, or that it had paid any royalty to DuBose, or that it was obligated in any way under the aforesaid contract.

Prior to the filing of the answers, the defendants filed a motion to transfer the case to the Lafayette Circuit Court. This motion was denied, and on the same day, a motion was filed by the defendants to make the complaint more definite and certain in certain particulars. This motion being overruled, the defendants answered.

At the conclusion of the testimony the court found that it was the intention of the parties to the contract that a royalty was due and payable to the plaintiff on all the sand and gravel mined and shipped from leases in and around Lewisville; that as a matter of fact DuBose procured certain leases for J. S. Meriwether, who then directed him to take all future leases in the name of the

Meriwether Sand & Gravel Company, a corporation, of which J. S. Meriwether was president, and the then owner of one-half of its capital stock; that at the time Meriwether entered into the contract with DuBose he had in contemplation the organization of the said corporation for the purpose of mining and shipping sand and gravel from all leases taken in and around Lewisville, and that said company was organized for that definite purpose; that a short time after the organization of the company J. S. Meriwether became the owner of practically all of the capital stock of the corporation. The court further found that the corporation, with full knowledge of the contract, accepted an assignment of all the leases taken by DuBose in the name of J. S. Meriwether, and a large number of leases taken by said DuBose in the name of the company at the direction of J. S. Meriwether, after the incorporation of the said company; that the corporation made payments to DuBose for royalties on gravel taken from leases taken in the name of J. S. Meriwether, and those taken direct to the Meriwether Sand & Gravel Company; that the company received and accepted the benefits of the contract with full knowledge thereof; that the total yardage shipped from the time operations began until December 16, 1930, was 549,941.69 cubic yards, and that the defendants were jointly liable to the plaintiff for two cents on each cubic yard of which amount the sum of $1,246.10 had been paid.

The court thereupon rendered a decree against both the defendants for the remainder due the plaintiff, from which judgment is this appeal.

It is first contended that the chancery court was without jurisdiction to try the issues involved, and that it should have transferred the case to the law court upon the motion of the appellant. Without setting out the complaint in detail, it suffices to say there were allegations to justify the prayer for an accounting. That this was obviated by stipulation of counsel during the trial of the case would not defeat the jurisdiction of the court. There was also the allegation that the company was in-

corporated for the purpose of carrying out the contract and to mine the leases procured by the plaintiff, and that, with full knowledge of the contract, the company received the benefits thereunder. This allegation stated an equitable cause of action, and the court did not err in overruling the motion to transfer. *Charlesworth* v. *Whitlow*, 74 Ark. 277, 85 S. W. 423; *McClintock* v. *Thweatt*, 71 Ark. 323, 73 S. W. 323; *L. R. & Ft. Smith Ry. Co.* v. *Perry*, 37 Ark. 164, at page 187.

The next assignment of error is the action of the court in denying the motion to make the complaint more definite and certain. The court did not err in its ruling, for it was apparent that the information sought to be elicited was not available to the plaintiff, but was in the possession of the defendants. Neither did the court err in overruling the renewed motion for transfer to the law court at the conclusion of the evidence, for the evidence accepted by the chancellor tended to establish the facts as alleged.

The fourth and fifth grounds for reversal are (a) that the court erred in its construction of the contract, and (b) in holding the corporation liable thereunder. It was fully established by the testimony that DuBose resided in Lewisville and was well acquainted with the landowners in that vicinity. He had discovered that there was a quantity of sand and gravel in that locality, and had conducted frequent exploratory operations to determine its quality and quantity. Believing that his find was valuable and learning that Meriwether was familiar with the value of deposits of sand and gravel and engaged in the business of mining such, he conveyed to the said Meriwether the information he had gained and of his acquaintance with those who owned the lands upon which sand and gravel had been discovered. Meriwether sent an agent with DuBose to go over the prospects, and, being convinced of the value of the find, entered into the contract with DuBose, which was prepared in Shreveport, Louisiana, by the attorney of J. S. Meriwether. At the time of the execution of the contract no leases had

been actually procured, but, after it was signed by the parties, DuBose began to secure leases which were taken in the name of J. S. Meriwether, and provided for the payment to the landowner of eight cents per cubic yard for sand and gravel. Within a short time after the contract was executed, Meriwether formed the Meriwether Sand & Gravel Company for the purpose of mining the sand and gravel around Lewisville, and assigned to it said leases. He was president of the company, and, at the time of the incorporation, the owner of fifty per cent. of the capital stock, and a short time thereafter purchased practically all of it. He was the owner of the company during the time it was engaged in developing the leases and shipping the product.

Without setting out the testimony at length, we deem it sufficient to say that there was testimony tending to sustain the finding of the court that Meriwether directed DuBose to take leases direct to the Meriwether Sand & Gravel Company, and that a number of such leases were procured either entirely by DuBose's efforts or with his aid, and that the company was called into being for the definite purpose of conducting the mining operations and made payments of the overriding royalties on leases taken in the name of J. S. Meriwether originally and assigned to the Sand & Gravel Company, and also on leases taken directly in the first instance to the company.

In view of the plain language of the operative part of the contract, the dealings between the parties with reference thereto, and the fact that the contract was written by Meriwether's attorney, we think the construction placed on it by the chancellor is justified.

On the question of liability of the Meriwether Sand & Gravel Company, the evidence supports the finding that the corporation was in contemplation at the time the contract was entered into, and that it was organized to provide in advance the means necessary for the successful operation of the leases; that the contract was for the benefit of the contemplated corporation, and that the corporation received the benefits thereunder with full knowledge of its existence. Therefore, the corporation may

be said to have adopted such contract as its own, and is liable to the same extent as J. S. Meriwether himself. The authorities cited by appellee support this view. *L. R. & Ft. Smith Ry. Co.* v. *Perry, supra;* 7 R. C. L. 61.

There is no question raised to the finding of the court as to yardage moved, and, since we think its construction of the contract and its finding of liability correct, the judgment must be affirmed. It is so ordered.

YATES *v.* STATE USE MILLER COUNTY.

4-2781

Opinion delivered December 12, 1932.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Shaver, Shaver and *Williams,* for appellant.

Millard Alford, Will Steel and *James D. Head,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the chancery court was without jurisdiction to surcharge and falsify the reports and accounts of the collector already approved by the judge of the Miller Circuit Court, which action, it is insisted, was conclusive and *res judicata.* The chancery court was not reviewing the decision of the circuit court in determining the matter submitted by the pleadings herein, but only exercising its ancient inherent jurisdiction to set aside and falsify accounts for fraud or mistake. The chancery court has not been deprived of such jurisdiction, if it could be done, and the court had jurisdiction of the action as established by our decisions:

"Original jurisdiction of equity to correct mistakes was not divested by the statute granting to the county court the power to readjust the settlements of the collector at any time within two years." *Big Gum Drainage District* v. *Crews,* 158 Ark. 566, 250 S. W. 865. See also *Gladys* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579. Chancery has jurisdiction, as is apparent from these and other Arkansas cases, not only to correct mistakes, but also to correct fraud in settlements of county officers. In *Sims* v. *Craig,* 171 Ark. 492, 286 S. W. 867, chancery was held to be the proper forum for the surcharging of set-

tlements, the court holding that unintentional error and mistakes as well as fraud might be corrected within two years (under the statute) by the county court, and thereafter (but not exceeding 5 years) by the chancery court. See also *Marable* v. *State,* 175 Ark. 589, 2 S. W. (2d) 690; *Marshall* v. *Holland,* 168 Ark. 449, 270 S. W. 609. In *Johnson County* v. *Bost,* 139 Ark. 35, 213 S. W. 388, in a case where the county court had allowed as credits certain items which were claimed to have been fraudulent and illegal, it was insisted that the chancery court was without jurisdiction and its judgment was sought to be avoided because no sufficient showing of fraud had been made, but this court said: "There is however a modification of that rule with respect to the judgments of county courts in the allowance of claims against the county, and in the recent case of *Monroe County* v. *Brown,* 118 Ark. 524, 177 S. W. 40, we stated the law concerning the force and effect of judgments of county courts and the power to set them aside as follows: 'The statute is not construed to mean that the county court is authorized to review former judgments of the court for mere errors in the allowance of claims, but they are authorized to reject claims [warrants] which have been illegally or fraudulently issued. In other words, where the claim against the county was one which, under any evidence which might have been adduced, could not have been a valid claim against the county, or where the judgment of allowance was obtained by fraud, it may be set aside and warrants issued pursuant thereto canceled." There is nothing in the statute (§§ 4637-4642 of the Digest) giving final and conclusive effect to the action of the circuit judge in approving such statements of expenses by the officials nor depriving the chancery court of jurisdiction to surcharge and falsify same. Applying the analogous rule of decisions to the action of the circuit judge herein which prevails relative to the judgments of county courts on settlements by county officers, it is apparent that there is no rule of decisions or statute concluding either the county or the State, by the mere approval of the circuit

judge, from proceeding in chancery to surcharge and falsify the accounts and settlements of such officers for fraud, mistake, etc. *Sims* v. *Craig, supra.*

The approval of the account or report by such circuit judge is rather a ministerial than a judicial act, and his determination of such matters is not *res judicata,* nor is this proceeding an attempt to review the decision of a court of equal and coordinate jurisdiction.

The chancellor held that a fraud had been perpetrated upon the circuit judge in obtaining his approval of two items of the accounts or reports, one for $1,000 in 1929 report and one for $300 in the 1930 report, claimed to be paid by the appellant to his wife for services in the collector's office. It is not claimed that Mrs. Yates had acted as a deputy, and there is no substantial proof tending to show she ever performed any work or service in the office of value to the county. The testimony is to the contrary. It appears that her work consisted in adding up the amounts shown on the tax receipts issued by the collector day by day in their home in the evening and taking the bank book and carrying the funds collected by him during the day to the bank. The testimony indicated that she did not work in the office and visited it rarely, and never for the transaction of any business. The charging of the amount paid to her in the report and asking approval thereof was a representation by the officer, of course, that his wife had done work for the county during the two years and earned the money which was a proper charge against the county. The Constitution provides (article 19, § 23): "No officer of this State, nor of any county, city or town, shall receive, directly or indirectly, for salary, fees and perquisites more than five thousand dollars net profits per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation."

In *Nixon* v. *Allen*, 150 Ark. 244, 7 S. W. 35, it was held that a statute creating a board to fix salaries of

county officials and the number of their clerks and employees was invalid, this court saying:

"The power to fix the salaries and fees of all officers in the State, and the number of their clerks and employees and their salaries, is a function which, within the limits of the Constitution, is lodged in the supreme law-making power of the State—the Legislature. *Cain* v. *Woodruff County,* 89 Ark. 456, [117 S. W. 768]; *Humphry* v. *Sadler,* 40 Ark. 100; Throop on Public Officers, § 500. The General Assembly cannot delegate this legislative power to any individual, officer or board."

It is not contended that the wife of the collector, to whom the money was paid, was the deputy or authorized employee of the collector, and there was no such showing made that the work performed by her could not have been as well done by the collector whose duty it was to do it, or his deputies, as would render the expense lawful which the collector represented it to be in making the claim for the credit for expenses of the administration of the office.

On the cross-appeal, the court erred in refusing to surcharge the 1929 settlement with the following items:

1929, Report, to David Elkins	$250
1929 Report, to J. W. Stuckey	250
1929 Report, to traveling expenses in making the rounds of the county with tax-books	500

and in the 1930 report with:

1930 Report, to David Elkins	$300

The law requires the collector to make the tour of the county with the tax books for the purpose of collecting the taxes in the different precincts, and nowhere indicates the payment of his necessary traveling expenses. No place visited by him for the collection of taxes was more than 40 miles distant from his office in the city, and only one that far, and could have been reached under modern methods of travel and the business of collection of taxes transacted with the return of the officers

to the office in the same day. The expenses would necessarily not have been great, and it was the intention to permit or require the officials to pay some of their own personal expenses necessarily incurred in the performance of the duties, for which a salary of the net amount of $5,000 is provided by the Constitution. If an official desired to conserve time, he might make such tour in an airplane either purchased or hired for the purpose, but it could hardly be expected that he should charge the expense thereof as a necessary one of administration for which the county could be required to pay in addition to the $5,000 allowed as a salary for such collector. In other words, the Constitution permits only an allowance of $5,000 net salary to him per annum for the discharge of all his duties of the office, and expenditures for extra, unusal or emergency services to be paid out of the excess of fees over the $5,000 must be shown to be lawful before any such allowance can be made; otherwise it must be done at his own expense. *Crittenden County* v. *Crump,* 25 Ark. 235; *Cain* v. *Woodruff County,* 89 Ark. 456, 117 S. W. 768. And the necessary deputies and employees for assisting him in the discharge of the duties of the office must be authorized to be employees by law before they can be paid out of the excess fees collected over the amount of salary he is entitled to retain under the Constitution, $5,000, which otherwise must be paid into the county treasury in accordance with the law.

It follows from what has been said that the decree will be affirmed on the appeal, and reversed on the cross-appeal, and remanded with directions to enter a decree in accordance with this opinion.

BUTLER, J., dissents.

HELTON *v.* SOVEREIGN CAMP OF WOODMEN OF THE WORLD.

4-2773

Opinion delivered December 19, 1932.

[redacted]

C. E. Smuggs, for appellant.

H. M. Jacoway, Cooper Jacoway and *Lee Miles,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that insured had complied with all the conditions of the contract, had reached the age of 70 years and was entitled to a paid-up certificate for the amount of the contract of insurance, had a vested interest therein which could not be changed by any new bylaws or assessments; and that any agreement for the paid-up certificate for a less amount was without consideration and void, and that the court erred in its finding and judgment that the benefit certificate issued to Helton, No. 1740, Ark., upon which this suit was instituted, had been surrendered by the insured during his lifetime, and that there was no liability thereunder.

Said benefit certificate No. 1740, Ark., contains these provisions: "Payments to cease after 20 years," and "His agreement to pay all assessments and dues that may be levied during the time he shall remain a member of the Woodmen of the World." The first clause "Pay-

ments to cease after 20 years'' is a marginal notation placed on the policy before its execution and delivery, while the latter is a general provision appearing in the body of the certificate by reference and doubtless appearing in every type of certificate issued to members. Provision is made for the issuance of a paid-up certificate also, and the testimony shows and the court found that a paid-up certificate was issued to the insured upon his request, and, although it was for a smaller amount than the original certificate and for a less amount than appellant now insists was due thereunder, such certificate was issued and delivered to the insured during his lifetime and accepted by him, and there was no fraud shown or alleged in its procurement. The member was doubtless liable under the provisions of the policy above set out to pay all assessments and dues during the time he remained a member of the Woodmen of the World, and his acceptance of the paid-up certificate in settlement of his rights under the original certificate cannot be said to have been made without consideration, since he could have been required to pay assessments or dues duly levied so long as he remained a member of the order under the provision of the policy, regardless of the notation ''payments to cease after 20 years,'' which doubtless was limited to the regular annual or monthly payments required for keeping the insurance in force. The regular assessments and dues had no relation to any others that might be properly levied under the constitution and bylaws during the time he remained a member.

Appellant did not recover or show any greater amount to be due him than the amount for which in its answer the appellee offered to confess judgment, and the court did not err, having found only that amount to be due, in rendering judgment therefor and for the costs as the law provides.

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

ARRINGTON *v.* LADD.

4-2921

Opinion delivered December 19, 1932.

W. J. Morrow, J. J. Montgomery and *Williams & Williams,* for appellant.

Paul McKennon, Reynolds & Maze and *Hays & Smallwood,* for appellee.

McHANEY, J. Appellant, appellee, and D. B. Bartlett were rival candidates for sheriff of Johnson County, Arkansas, in the Democratic primary election held August 9, 1932. According to the official returns made by the judges and clerks to the county central com-

mittee, appellee received 1,247 votes, appellant 1,000 votes and Bartlett 387 votes, which gave appellee 247 votes plurality, and a certificate of nomination was thereafter issued to him as to the Democratic nominee for sheriff.

Within the time prescribed by law appellant instituted this action to contest the nomination of appellee, alleging that more than 900 illegal votes were cast for appellee and against appellant, that such votes were illegal because not on the printed list of electors, were not legally and properly assessed, and sundry other grounds of illegality. Appellee and Bartlett in due time answered, and the issues were joined. Thereafter on September 22, 1932, the parties to this appeal agreed and stipulated there were 513 votes cast in the election, naming the voters, that were illegal because their names did not appear on the certified printed list of electors of the county. From that date to September 30, the court heard testimony as to other illegal votes cast, at which time court was adjourned to October 13, to hold an intervening regular term of court in Conway County. On October 13, the court found from the testimony that there were 239 other illegal votes cast in said election, which made a total of 752 illegal votes cast. It was then agreed that each side should select a judge or referee and a clerk, and that the court appoint the third judge or referee, and that this committee should examine the ballots so held and agreed to be illegal, ascertain for whom they had voted for sheriff, and report their findings to the court. The court would then deduct the number of illegal votes each had received from the total of each as shown by the election officials, and declare the result accordingly. Objection was made by appellant to the judge or referee appointed by the court, so the court sat in with the committee as the third man. Thereupon this committee, including the trial judge, began to make an examination and tabulation of the ballots agreed and adjudged to be illegal, and shortly thereafter it was discovered by the judge that said ballots, or a large number

of them, showed that they had been changed from a vote for appellant to a vote for appellee. As soon as appellee learned of this discovery, he filed a motion attacking the integrity of the ballots and seeking to stop the count. Proof was then taken on this motion by both sides, referred to hereinafter, and later all the ballots were counted, both legal and illegal, with the result that many changes were found to have been made in the ballots. In sustaining this motion the court found: "That the ballots have lost their integrity, and, there could be no counting or recounting of the ballots because of the destruction of their integrity, that the election returns are not impeached by the testimony, and that all votes stand as cast and counted by the election officials, and the contest should be dismissed." Judgment was accordingly entered, from which is this appeal.

Appellant argues eight propositions for a reversal of the case. We find it necessary to discuss only the sixth, as the principal one, and the fourth, seventh and eighth as incidental thereto. The others pass out because of the disposition we make of the case.

The principal question is, did the court err in sustaining the appellee's motion attacking the integrity of the ballots and in dismissing the contest? In answering this question in the negative, we are not unmindful of the unpleasant taste left in the mouth, so to speak, and of the unsatisfactory result, with 752 illegal votes out of a total of 2,634 votes cast for sheriff. Had the ballots remained inviolate, as the law and common honesty and decency require, then the result might have been changed by casting out the illegal ballots. But if, as the court has found, the ballots or a goodly number of them have been altered, changed, erased, and remarked so as to show they were cast for a candidate other than the one for whom the voter cast it, and this is pursued to such an extent that the court is unable to recount them as originally cast, then of necessity their integrity has been destroyed. This is exactly what the trial court has found.

In determining this question we are bound by the settled rule of this court that the findings of fact by a

circuit court sitting as a jury are as conclusive on this court as the verdict of a jury, and the rule is no different in election contest cases. *Williams* v. *Buchanan*, 86 Ark. 259, 110 S. W. 1024. The decisions are too numerous to mention that the verdict of a jury will not be disturbed unless there is no substantial evidence to support it, when viewed in the light most favorable to the verdict.

Is the court's finding supported by substantial evidence? When the committee, including the judge, discovered that the illegal ballots had been changed, the motion to dismiss the contest was filed and contestee brought in 28 witnesses, from several of the townships, who had voted illegal ballots, and shown to have been changed from a ballot for appellant to one for appellee. These witnesses testified that they had voted for appellant. Also 8 other witnesses refused to testify for whom they voted, but their ballots showed a change from appellant to appellee. There was other evidence of a similar nature. The court, not being satisfied, directed the count by the committee to proceed, a third judge being agreed to and all the votes in the county were examined, both legal and illegal. It was found that 111 legal votes had been changed from a vote for appellee to one for appellant, and approximately 70 illegal votes, originally for appellant, now show to be for appellee. In one township the first 40 votes cast were not numbered by the judges of election, but when examined by the committee all were found to be numbered, and other irregularities were found in this same box, as disclosed by the testimony of the judges of election, which occurred after they had delivered it to the central committee. We think this was sufficient to support the court's finding that the integrity of the ballots had been destroyed, and that they no longer furnished satisfactory evidence of the result. Without knowing exactly how the votes were cast, the court could not accurately determine the result. That a large number of the ballots have been changed, there can be no doubt as the erasures are plainly visible without the aid of a magnifying glass.

But appellant says the testimony of the voters that they had voted differently from that shown by their ballots was inadmissible and incompetent, because (1) parol evidence cannot be introduced to contradict the ballot where the ballot has not been lost or destroyed, and (2) that the ballot, being in evidence, is the best evidence as to how the elector voted. *Condren* v. *Gibbs,* 94 Ark. 478, 127 S. W. 731, is cited to support the contention. In that case the court said: "A voter cannot be allowed to testify that he voted for one person when he admits he cast his ballot, which has not since been changed, showing that he voted for another person. This rule is founded upon the principle that the ballot is a writing, and so cannot be contradicted by parol evidence. But, like other writings, it may be shown that the ballot has been changed since it was cast or that another or different ballot has been put in its place."

But here the ballots of the witnesses had already been examined, and showed they had been changed, and the court did not err in permitting the witnesses to testify that they had voted for appellant whereas the ballots as changed showed they voted for appellee. It is true that the ballots were not shown to the witnesses, nor were they asked to identify them. It would be difficult if not impossible for a witness to identify a ballot not signed by him. The subject of the inquiry was the integrity of the ballot, and since the ballots themselves showed on their face that they had been changed, it was quite proper to admit testimony as to how they had actually voted. Nor does the holding in the case of *Cain* v. *Carl Lee,* 169 Ark. 887, 277 S. W. 551, militate against this holding.

Again it is urged that the integrity of the ballots in eight townships was not destroyed because no changes were shown to have been made of the ballots in said townships, and in them appellant received 131 votes, appellee 94 votes and Bartlett 29 votes, giving appellant a plurality of 37, and that he should be declared the nominee on this account. We cannot agree, and in this

respect the principle announced in *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. (2d) 631, governs here. There were 24 voting precincts in 22 townships, and to so do would disfranchise the voters in the other townships without fault on their part or of the election officials.

Nor do we think the court erred in refusing to call in all the voters in the county to testify as to how they had voted. The law does not require the court to hold an election, but a contest, and if it develops that there is no legal basis on which the court may determine the contest, it must fail. Compare *Brown* v. *Nisler,* 179 Ark. 178, 15 S. W. (2d) 314.

The court found that, because of the many changes, there was no safe or certain way he could determine the result. In this we think the court was correct. Even though the voters whose ballots had been changed had been called to testify as to how they voted, still the result would be in doubt, as the evidence shows 95 ballots voting against all candidates. It would have been a simple matter for the thief who had unlawful access to the ballots to have marked out the name of the candidate for whom the voter had cast his ballot so as to show a vote against all three. Or again if the voter had failed to mark out any name but left them all on, it would be easy to mark or scratch off two and show a vote for the third, and in either case no one could detect a change. No erasure would appear. We agree that the result could not be determined. This finding is supported by very substantial evidence, and the judgment must be affirmed.

SMITH, J., (dissenting). The practical effect of the majority opinion is that an election may not be contested where the ballots and the returns thereof have been mutilated to an extent sufficient to destroy the presumption of verity which would otherwise be indulged. The cases cited do not sustain that conclusion, and I think no such case can be found.

On the contrary, as we said in the case of *Taaffe* v. *Sanderson,* 173 Ark. 970, 294 S. W. 74: "The real object of the courts in all election contest cases is to determine

whether the contestant or the respondent has received the highest number of legal votes. This should be the guiding star, like the star of Bethlehem to the wise men of old." Yet the majority opinion makes it not only possible to defeat this real object, but makes its defeat certain where some election thief destroys or mutilates the ballots by alterations, erasures, etc., so that the court is unable to recount them as originally cast. The majority appear to decide that if this has happened there can be no contest.

This rule might have some justification if it were applied to a contestant who himself, or whose adherents, had mutilated the ballots; but the rule is not thus limited. There was no finding, in fact, no showing, as to who had mutilated the ballots. We do not know whether this was the work of adherents of the contestant or of those of the contestee. The majority treat this as immaterial.

It ought not to be the law that fraudulent elections may not be contested provided the integrity of the ballots has been destroyed by mutilation or alteration. If this be the law, then one who was not the actual nominee may defeat a contest of his nomination by the added wrong of mutilating the ballots or having that additional wrong perpetrated. No previous holding of this court leads to a decision so unfair or so unfortunate.

The majority say the court did not err in refusing to call in all the voters in the county to testify how they had voted for the reason that the law does not require the court to hold an election; and it is also said that if it develops that there is no legal basis on which the court may determine a contest it must fail.

The court cannot be required to hold another election; but the court may, and should, determine who received a majority of the legal votes in the election which had been held and was being contested, and the right of a contestant to have this fact judicially determined ought not to be defeated by an act of desperation.

It appears that the integrity of the ballots in eight townships had not been destroyed; but, if we had the extreme case of an election in which all the ballots had been stolen or their integrity destroyed, yet the right to contest the election would remain. There would, even in this extreme case, be a basis for a contest; that basis being for the court to hear the electors, and all of them, if necessary, or such of them as either party wish to have heard, testify, not how they would now vote, but how they had then voted.

I am authorized to say that Mr. Justice KIRBY concurs in the views here expressed.

HOME LIFE INSURANCE COMPANY *v.* TAYLOR.

4-2797

Opinion delivered January 9, 1933.

Buzbee, Pugh & Harrison, for appellant.

Robinson, House & Moses and *Bridges, McGaughy & Bridges,* for appellee.

KIRBY, J., (after stating the facts). It is undisputed that this writing specifying the purpose for which the notes were delivered to and received by the bank was duly executed, but appellees insist that other terms were agreed upon at the time of such delivery, not shown in the receipt, authorizing the bank to substitute other paper or notes for the ones specified therein at its own option.

Parol testimony was admitted, over the objection of appellant, to show such fact, and it is insisted that the court erred in allowing parol testimony adduced to contradict, vary or add to the terms of the contract or writing. This contention must be sustained.

Although the writing is a receipt for the notes specified therein, the purpose for which the notes were received

and held by the bank is also set out therein as for collection, and there is nothing ambiguous about the instrument. It is a contract for the service to be performed as fully and completely as though it had been written out, and it is no less subject, so far as the purpose therein specified for collecting the notes is concerned, to the parol evidence rule than if the word "receipt" had not appeared therein, so far as it operates as a contract; there being no allegations of fraud or mistake in its procurement. When the bank acknowledged it received the notes for collection, such acknowledgment constituted a contract assuming all the obligations of a collecting agent as fully as if such obligations had been set out in detail, and the rule is that, where an instrument is both a receipt and a contract, as in this case, its terms cannot be varied by parol testimony. *Second National Bank of Baltimore* v. *Bank of Alma,* 99 Ark. 386, 138 S. W. 472; *Cleveland-McLeod Lbr. Co.* v. *McLeod,* 96 Ark. 405, 131 S. W. 878; *Darragh Company* v. *Goodman,* 124 Ark. 532, 187 S. W. 673; *Huckins Hotel Co.* v. *Smith,* 151 Ark. 167, 235 S. W. 787; *Lister* v. *First National Bank,* 181 Ark. 140, 25 S. W. (2d) 26, 10 R. C. L. 1926.

The execution of the receipt of the notes for collection by the bank through one of its vice presidents, not the official who testified about the agreement to change it, was not denied, and, although this official did testify that such an agreement was made, his statement being denied by the agent of the insurance company, this could not prove any such agreement as against the written terms of the contract contrary thereto. This official testified that he made the substitution of these notes with the knowledge and consent of the agent of the insurance company, and put the substituted notes in a separate envelope to be held by him for delivery to the company, depositing the notes for collection. This statement was contradicted by both the agent, whom he indicated had knowledge of the fact, and he, himself, in his own testimony admitted that he had never talked to the agent, Gulley, of the insurance company about the matter. In explaining his state-

ment to strengthen it concerning the agreement for the substitution of the notes, he said that Gulley, the insurance company's representative, agreed to it because he thought the list showed too much of the paper of Banks, the president, held by the insurance company, and that it did not look well, but he further stated that the paper that he selected for the substitution was the very kind of paper the holding of which Gulley thought might be embarrassing to the company. He did not claim to have notified the owners of the notes deposited for collection that there was any agreement for substitution of other notes, or that any attempt had been made to substitute such other notes in accordance therewith, nor did he transfer or indorse any of the claimed substituted paper to the Home Life Insurance Company, owner of the paper deposited for collection. Under the circumstances, his testimony was not entitled to any great weight, being so contradictory, and his unwarranted action in attempting to make such substitution, if it had been successful, could only have resulted in benefiting the bank, whose agent he was.

The chancellor's finding that the agreement was made by Gulley for the insurance company for the substitution of other securities instead of the ones deposited for collection for the insurance company was contrary to the preponderance of the testimony; the parol evidence, as already said, was inadmissible to contradict the contract, and said testimony was not sufficient, if true, to have authorized the collecting agent, the bank, to take anything else in payment for the notes deposited for collection but money (*Darragh Co.* v. *Goodwin, supra*), and the burden devolved upon the bank to show that it had the right to make such substitution and the collection of the notes in other than money, and it has failed to discharge this burden, and the court erred in holding otherwise.

The court correctly held that the interveners should recover from appellees the sum of $7,326.74, an amount collected on some of the notes deposited for collection, and that same was a prior claim against the bank.

It should have held also that all the money collected and realized from the collection of the notes deposited for collection was held in trust and should be paid to intervener as a prior claim, and directed the Bank Commissioner to surrender to the appellant company the remainder of the notes still in his possession originally delivered to the bank for collection.

The decree is accordingly reversed, and the cause remanded with directions to enter judgment for the full amount of the collections made on said notes deposited for collection as a prior claim, and direct the return of any of such original list of notes yet in the Bank Commissioner's possession to the interveners. It is so ordered.

SOUTHERN COAL COMPANY *v.* MCWILLIAMS COMPANY, INC.

4-2799

Opinion delivered January 9, 1933.

Armstrong, McCadden & Allen and *Coleman & Riddick,* for appellant.

George E. Pike and *Wm. M. Hall,* for appellee.

MEHAFFY, J. In October, 1928, appellee, McWilliams Company, Inc., entered into a contract with the receivers of the Farrelly Lake Levee District of Arkansas and Jefferson counties, an improvement district organized under special act of the Legislature, by the terms of which contract the McWilliams Company, Inc., undertook and became obligated to construct certain parts of the improvement which the levee district was authorized by law

to construct, and to furnish all material and labor necessary therefor.

To secure the faithful performance of its contract, the McWilliams Company, Inc., as it was required by said contract to do, executed and delivered its construction bond, dated October 20, 1928, and executed by the appellee, United States Fidelity & Guaranty Company as surety.

The bond was in the sum of $50,000, and conditioned upon full performance by McWilliams Company, Inc., of the obligation contained in the construction contract.

The Southern Coal Company, the appellant, sold and delivered to McWilliams, at the place where said work was performed in Arkansas County, coal for the agreed price of $1,465.92. All of said coal was actually used by McWilliams Company, Inc., in the operation of steam shovels and dredges with which the McWilliams Company, Inc., performed the actual construction work on the improvement being done by the levee district.

The McWilliams Company, Inc., refused to pay, and the appellant brought suit in the Arkansas Circuit Court against the McWilliams Company, Inc., and the U. S. Fidelity & Guaranty Company.

The McWilliams Company, Inc., filed answer, admitting the truth of the allegations in the complaint. The surety company filed a demurrer, alleging that the appellant had no right to sue on the bond, and that the complaint on its face showed that the material furnished was coal, and that this was not material within the meaning of law and the bond required for the performance of public contracts for labor and material.

The appellee now concedes that the bond was given pursuant to and in compliance with §§ 6913 and 6914 of Crawford & Moses' Digest, and that appellant had a right to sue upon the bond. The only question therefore for our consideration and determination is, whether coal is material furnished within the meaning of statute and bond.

The authorities on this question are in conflict. The United States Supreme Court and the Supreme Courts of

a number of States have held that coal and fuel furnished as this was is within the law and the bond, and entitle the person furnishing coal to a lien and to an action on the bond of the contractor.

A majority of this court, with which the writer does not agree, is of the opinion that the case should be affirmed, and that it is controlled by the former decisions of this court.

In the case of *Pierce Oil Corporation* v. *Parker,* 168 Ark. 400, 271 S. W. 24, the court reviewed the authorities, calling attention to the conflict, and we do not think it necessary to again review the authorities, or discuss the reasons given therein.

In the case referred to, the court said: "Having regard then for the well-defined and established meaning of a similar statute, we think that the fair meaning of the language used in the statute under consideration is only to give persons a lien who supply material directly used in the prosecution of the work, or material substantially consumed in the prosecution of the work, and are practically useless after such use.

"Therefore, we do not think that oil or other fuels used in operating motor trucks engaged in hauling stone for the construction of an improved highway can fairly and justly be said to be used in the prosecution of the work. As above stated, oil so used is only incidental to the operation of the motor trucks, and can be no more considered materials used in prosecution of the work than the motor trucks themselves, or the repairs on them." *Heltzel Steel Form & Iron Co.* v. *Fidelity Deposit Co. of Md.,* 168 Ark. 728, 271 S. W. 325; *So. Surety Co.* v. *Simon,* 172 Ark. 924, 290 S. W. 960.

In the last case referred to, we said: "We think the declaration was one upon the bond, and that no liability existed against appellant thereon for two reasons: First, the claim for supplying coal was not within the protection of the bond; second, the suit was barred by failure to bring it within six months after the improvement was completed."

It was again held by this court that the surety on the contractor's bond was liable only for the value of such material as actually entered into the construction of the road, and that it is not liable for the value of feed furnished the stock which was used in the work on the road. . *Goode* v. *Ætna Casualty & Surety Co.,* 178 Ark. 451, 13 S. W. (2d) 6.

A majority of the court is of the opinion that the cases decided by this court and cited herein are decisive of this case, and it is unnecessary to discuss the cases decided by other courts and cited by learned counsel.

The judgment of the circuit court is affirmed.

RAGLAND *v.* SNOTZMEIER.

4-2802

Opinion delivered January 9, 1933.

[redacted]

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

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

MEHAFFY, J. The appellant, about three o'clock A. M. on the 26th of August, 1931, left Stuttgart, Arkansas, in an automobile for St. Louis, Missouri. The appellant was the driver of the car, and the appellees were his invited guests.

H. A. Hoover occupied the rear seat, and William Snotzmeier rode in front with the driver.

Between Brinkley and Wheatley, about 50 miles from Stuttgart, in attempting to pass a truck parked on the side of the highway, the car in which appellant and appellees were riding was turned over, injuring the parties in the car.

From a point about five miles west of Brinkley, to the place of the accident and beyond, is a concrete surfaced road, and from Brinkley to the place of the accident the road is straight. The accident occurred about four o'clock in the morning.

Each of the appellees filed separate suits against the appellant, seeking to recover damages for the injuries sustained. The cases were consolidated and tried as one case.

The appellees alleged that appellant was driving at a high rate of speed, and that this excessive rate of speed

continued for approximately four miles beyond Brinkley; that, while continuing this high rate of speed, appellant undertook to pass another vehicle on the road, but, on account of the rate of speed at which he was traveling, or on account of the careless and negligent manner in which he was driving, appellant's car struck against the car which appellant tried to pass. It was also alleged that all of the occupants of the car were made unconscious as a result of the accident, and that appellant's car was traveling at such an excessive speed, and turned over with such force, that it was practically destroyed. The injuries received by appellees were described in their complaints, and it was alleged that the appellees suffered great pain, and would continue to suffer. Hoover prayed judgment for $4,736 and Snotzmeier for $10,000.95.

There is very little conflict in the evidence. The appellant himself did not testify.

The trial resulted in a verdict of $2,500 for Hoover, and $5,000 for Snotzmeier, and judgment was entered accordingly. Appellant filed a motion for a new trial, which was overruled, exceptions saved, and the case is here on appeal.

The undisputed evidence shows that appellant was driving his car at a very rapid rate of speed at the time and some time prior to the time of the accident.

It is not seriously contended that appellant was not guilty of negligence, but the appellant earnestly insists that the appellees were guilty of contributory negligence, and therefore not entitled to recover. He calls attention first to the case of *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71. Appellant quotes from that case as follows: "It is the duty of the guest to exercise ordinary care for his or her safety; and a failure to exercise such care, which contributes to the injury or might have resulted in avoiding the danger and resultant injury, will constitute contributory negligence." The court, however, also said: "It was also an issue for the jury as to whether the appellant was guilty of contributory negligence. The court erred in not submitting these issues to the jury."

Negligence and contributory negligence are questions of fact to be submitted to and determined by the jury, where there is any evidence tending to show negligence or contributory negligence. The question of the contributory negligence of the appellees was submitted to the jury at the request of the appellant.

Negligence is the failure to exercise such care as a person of ordinary prudence would exercise under the circumstances, and whether one has exercised such care is a question for the jury.

Appellant calls attention to many authorities in support of his contention that it is the duty of an invited guest to exercise ordinary care to protect himself from injury, to caution the driver of the danger, protest against it, and to do what a reasonable, prudent person would do under the circumstances for his own safety. If he fails to exercise such care, and his failure contributes in any degree to produce the injury, he cannot recover. This court has many times announced this doctrine, and it is supported by the great weight of authority.

In determining the question of contributory negligence, it is proper to consider all the circumstances and evidence in the case, the condition of the road, appellees' knowledge of the ability and fitness of the driver, the speed of the car, the character and cause of the accident, and all the circumstances in the case.

Mr. Conrey testified that the car had turned over two or three times, and, after it turned over the last time, had skidded for some distance. The car was almost demolished. The wrecked car had apparently "sideswiped" the truck; had run up on the pavement and turned over about 120 feet beyond the truck. The car was badly wrecked, and witness testified that he had to practically rebuild it.

Wm. Snotzmeier testified that he told the driver he was going too fast, and the driver told him not to worry, that he would watch out. Snotzmeier then testified that he dozed off to sleep, and the next thing he knew he was

in the hospital. Snotzmeier was riding in the front seat with the driver.

Hoover testified that the car was being driven at a high rate of speed, about 60 miles an hour. He heard Snotzmeier tell Ragland not to be in such a hurry, or something of the sort, and Ragland said that he would watch out and be careful.

Statements made by both Snotzmeier and Hoover were introduced in evidence. It will be seen from the evidence that the road was a concrete surface, straight, and the accident occurred about four o'clock in the morning, when there was very little travel. Snotzmeier testified that he cautioned the driver, and the driver said that he would be careful, and watch out. The question therefore of contributory negligence of appellees was for the jury.

"Unless the facts are manifest, and the inference to be drawn therefrom clear beyond peradventure, the question whether the guest of an automobile driver, having no control over him, was negligent in failing to appreciate the danger in crossing railroad tracks, or to act in relation thereto, must be submitted to the jury." 2 Blashfield on Automobiles, 1133.

So here the question of whether the guests were negligent was a question for the jury. Negligence is never presumed, but must be proved, and when Snotzmeier cautioned the driver, and when the driver said he would watch out and be careful, the guests had a right to assume that he would do this. They had a right to take into consideration the character of the road, the time of the morning, their knowledge of the driver's ability; and, considering all these facts and circumstances, it was a question of fact whether the appellees acted at the time as men of ordinary prudence would have acted under the circumstances, and, if they did, they were not guilty of negligence.

There would have been no reason at all for Hoover to speak to the driver, when he heard Snotzmeier speak to him, and heard his reply. If several guests are riding in a car, it would be unnecessary for all of them to

caution the driver, if any one of them cautioned him, and the others heard it. In other words, guests in an automobile are required to exercise just such care as a person of ordinary prudence would exercise under the circumstances.

"The question whether a guest or passenger in a motor vehicle exercised due care for his own safety is usually a question for the jury under all the evidence, as whether an automobile driver and his guests were negligent in attempting to cross before defendant's approaching motor truck, 75 or 100 feet away, or where plaintiff failed to act as a person of ordinary prudence would have acted under the circumstances, or, as the rule is sometimes expressed, he is bound to look out for his own safety as far as practical." 2 Blashfield on Automobiles, 109.

"The fact that a passenger in an automobile was sleeping before and at the time of being injured in an accident caused by the negligence of the driver does not necessarily show negligence on his part." 2 Blashfield on Automobiles, 1089.

The Connecticut court said: "The trial court submitted to the jury the question whether, in view of the circumstances preceding and surrounding the accident, the fact that the defendant momentarily fell asleep constituted negligence on his part. There is surprisingly little authoritative discussion in decisions or text books as to the relation of sleep to the doctrines of negligence, although in a number of cases it seems to have been assumed that it constitutes contributory negligence for one in a position of peril to become incapacitated by sleep from protecting himself from harm. * * * In any ordinary case one cannot go to sleep while driving an automobile without having relaxed the vigilance which the law requires without having been negligent. It lies within his own control to keep awake or cease from driving, and so the mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a *prima facie* case, and sufficient for a recovery,

if no circumstances tending to excuse or justify his conduct are proved. If such circumstances are claimed to have been proved, it then becomes a question of fact whether or not the driver was negligent; and in determining that issue all the relevant circumstances are to be considered, including the fact that ordinarily sleep does not come upon one without warning of its approach. The trial court was right in leaving the issue to the jury as one of fact." *Bushnell* v. *Bushnell,* 103 Conn. 583, 131 Atl. 432. 44 A. L. R. 785.

Appellant cites the case of *Sheehan* v. *Coffey,* 205 App. Div. 388, 200 N. Y. S. 55. The court in that case, however, set aside the verdict because it was against the weight of the evidence. This court does not pass on the weight of evidence, but, if there is any substantial evidence to sustain the verdict, it cannot be disturbed by this court, although we might believe that it was against the weight of the evidence

It is next contended by the appellant that the verdict of the jury is contrary to the law and the evidence. It is contended that the verdict is contrary to instruction No. 5, which tells the jury in substance that, if Hoover was riding in the automobile which was traveling at a high rate of speed for a sufficient distance for him to become aware of it, and he made no protest, he was guilty of contributory negligence, and could not recover.

We have already said that the request of Snotzmeier made in Hoover's presence made it unnecessary for him to caution the driver. Besides that, under instruction No. 5, the jury could have found that Hoover was not aware of the fact that the automobile was being driven at a dangerous rate of speed.

This instruction was immediately followed by instruction No. 6 with reference to Snotzmeier's right to recover, and both these instructions were given at the request of the appellant.

The appellant cites the case of *Oppenheim* v. *Barkin;* 262 Mass. 281, 159 N. E. 628, 61 A. L. R. 1228. In that case the evidence showed that the driver had gone to

sleep, and the court said: "If the plaintiff saw that the defendant was asleep, or if he were awake and the plaintiff saw him turning away from the line of travel across the highway to the left, it could have been found to be the plaintiff's duty to arouse the defendant or warn him of the approaching danger, or for the plaintiff to take some precaution for his own safety." The above case is annotated on page 1252, where a great many cases are collected, among others some Arkansas cases.

It is next contended that the instructions given on the measure of damages were erroneous. Special objection was made to that part of the instruction which submitted to the jury, as an element of damages, the alleged pecuniary loss on account of diminished earning capacity. Appellant contends there was no evidence upon which to base this instruction.

Snotzmeier was a farmer, and Hoover an expert machinist. There is ample evidence on which to base the instruction, both as to Hoover and Snotzmeier. The evidence shows that Snotzmeier was very severely injured, and that his earning capacity decreased. Both the appellees were severely injured, and there is evidenec to show that the earning capacity of each was decreased. The evidence showed the injury, the character of work that each performed, and from that the jury could estimate as well as any one else whether or not there was a decrease in the earning capacity, and, if so, how much.

It is next contended that the verdicts are excessive. The evidence shows that each appellee was severely injured, and also that the injuries are permanent, and are such injuries as will not only decrease their earning power, but cause them pain and suffering.

Appellant also contends that some of the instructions are erroneous, but he asked, and the court gave, practically the same instructions that he now objects to. We think the instructions, when considered together as a whole, correctly state the law to the jury.

We find no error, and the judgments are affirmed.

PARRISH *v.* NELSON.

4-2957

Opinion delivered January 9, 1933.

I. M. Greer, A. B. Caplinger and *June P. Wooten,* for appellant.

Roy Nelson, J. J. Mardis and *W. Leon Smith,* for appellee.

PER CURIAM. This is a proceeding contesting the nomination of appellant for the office of State Senator. The case was tried in the circuit court, judgment rendered, and an appeal prosecuted to this court.

The appellant seeks to supersede the judgment of the circuit court until the case can be heard here on its merits.

This is not a contest for the office of State Senator, and is not a proceeding to contest the election of a State Senator, but it is a proceeding to contest the nomination in the Democratic primary.

This court would have no jurisdiction to try a contest for the office of State Senator, nor to determine who is elected to the Senate.

Section 11 of article 5 of the Constitution provides: "Each House shall appoint its own officers, and shall be the sole judge of the qualifications, returns, and elections of its own members."

It will therefore be seen that under the Constitution the Senate is the sole judge of the election of its members. What we are to determine, and what we have a right to determine, is whether the appellant or appellee was entitled to the nomination.

If we determine that the appellee was entitled to the nomination, under the law the judgment operates as an ouster from office. This does not mean however that we decide who was elected, but it means only that we hold that the election is void.

The statute provides that when the judgment operates as an ouster, there will be a vacancy which must be filled according to law.

The Senate alone can determine who has been elected, and who may sit as a member of the Senate.

A supersedeas could therefore serve no purpose because we do not and cannot decide who is entitled to the office of State Senator. We simply decide the contest for the nomination, and, under the law, if a person is given a certificate of nomination, his name placed on the ticket, and he is elected, we have the jurisdiction to decide whether he was or was not entitled to the nomination, and if the court decides that he was not, and there has already been an election, the judgment of the court operates as an ouster. That is, it decides that his election was void because of a violation of the Primary Election Law.

Whether we issue a supersedeas or deny it, we cannot say who shall serve in the Senate, but the Senate itself is the sole judge of the election and qualification of its members.

The Senate may seat either the contestant or the contestee, or it may decline to seat either until the case is tried, but in no event could the court's order determine who is entitled to the office of State Senator.

A supersedeas would be useless, and it is therefore denied.

ENDICOTT-JOHNSON CORPORATION *v.* DAVIS.

4-2795

Opinion delivered January 16, 1933.

[redacted]

Clinton R. Barry, for appellant.

J. D. Benson, J. P. Clayton and *Evans & Evans,* for appellee.

SMITH, J. Appellant recovered a judgment in the Franklin Circuit Court, Ozark District, against A. H. Metcalf in the sum of $549.46, upon which an execution was issued in due form on October 10, 1925. The execution was delivered by the clerk to the attorney for the judgment creditor, who, on the same day, sent it by registered mail to S. J. Davis, then the sheriff of the county, accompanied by a letter directing him to serve and return the execution according to law. A postal money order for $1.60 was inclosed in this letter to cover the sheriff's fees.

The sheriff returned the execution to the attorney who sent it to him in a letter dated October 17, 1925, reading as follows:

"Replying to your letter of October 10th, covering execution against A. H. Metcalf, you failed to send indemnifying bond which we require on all executions. If you will send bond with a list of the property that is not

mortgaged, we will be glad to serve the execution for you; otherwise we cannot.

"Very truly yours,

"Sebern J. Davis, Sheriff,

"By J. C. Mainard, D. S."

In a letter dated October 31, 1925, the attorney replied to the sheriff's letter as follows:

"In re Endicott-Johnson Corp. vs. A. H. Metcalf.

"I am in receipt of your letter dated October 17, 1925, returning to me execution which I sent to you for service in the above case, with the postoffice money order for $1.60 sent you to cover your fees. I am holding the execution and money order subject to your order, and you will please bear in mind that the Endicott-Johnson Corporation, judgment plaintiff in this execution, does not acquiesce in your refusal to perform your duties in connection therewith, in accordance with the law."

No further correspondence passed between the parties, and this suit was brought against the sheriff and the sureties on his official bond under the provisions of § 4360, Crawford & Moses' Digest, to recover the amount of the judgment for the alleged failure and refusal to levy and make return of the execution.

The cause was submitted to the jury, under instructions, of which no complaint is made, except that it is insisted that the jury should have been directed to return a verdict in favor of the plaintiff, the judgment creditor. The verdict of the jury, however, was in favor of the defendants, and from the judgment pronounced thereon is this appeal.

The letter from the sheriff, signed by his chief deputy, assigns, as a reason for not levying the execution, the failure of the plaintiff "to send indemnifying bond which we require on all executions," which was not a sufficient excuse. It was definitely decided, in the case of *Mayfield Woolen Mills* v. *Lewis,* 89 Ark. 488, 117 S. W. 558, that a sheriff may not demand an indemnifying bond in all cases before levying an execution, but that, on the contrary, he may make this demand only when, acting in

good faith, he doubts that property is subject to execution which appears to be so. In the case of *Mayfield Woolen Mills* v. *Lewis, supra,* it was said: "We are therefore of the opinion that, under the provisions of the above sections (4287 and 4288, Crawford & Moses' Digest), the doubt as to whether the property is subject to execution arises when the officer acts in good faith and a claim is actually made relative to the property or such circumstances exist as might well justify a prudent person in apprehending litigation relative thereto; and in such cases the officer has the right to demand an indemnifying bond. And the officer in whose hands an execution has been placed cannot arbitrarily demand an indemnifying bond."

Testimony was offered to the effect that Metcalf, the judgment debtor, was in the actual and open possession of a stock of goods, located in a building fronting the courthouse square, of which fact the sheriff was advised, yet the sheriff made no attempt to levy upon this stock of goods, although same was unincumbered.

It appears from the testimony that Metcalf was in failing circumstances, and was operating on capital largely borrowed from a local bank, but had given the bank no mortgage. He first bought a half interest in the stock of goods, and later bought the other half, for which he paid $2,000. In this connection he borrowed $3,500 from a local bank, and owed about $6,000 when he went into bankruptcy in February or March, 1926. Numerous suits were brought against Metcalf in 1925, and a number of judgments were recovered against him, but these were for small amounts in a court of a justice of the peace. The testimony of the deputy sheriff indicates that these judgments were collected by the sheriff from the cashier of the bank.

The sheriff was dead at the time of the trial from which this appeal comes, but his chief deputy testified that he and the sheriff—his principal—made inquiry about the judgment defendant, and that the result of their investigation was that the financial condition of Metcalf

was such that they were afraid to levy the execution without an indemnifying bond. The sheriff discussed this execution with the cashier of the bank, and reported the result of his investigation to his deputy who had the execution in hand, but, upon objection of plaintiff's counsel, the court refused to permit the deputy sheriff to state what this report was as to Metcalf's financial condition. Metcalf owned an automobile which was mortgaged; and so were the store fixtures, and so also was Metcalf's home, and the deputy sheriff, who wrote the letter, set out above, returning the execution, testified that it was his impression at the time the letter was written that Metcalf had no property subject to execution. The money order was never returned to the sheriff's office, nor was any property pointed out to the sheriff, or his deputy, which was subject to execution. The deputy admitted that he knew of the stock of goods, but he was not permitted to testify as to his conversation with his principal about it. On the cross-examination of the deputy sheriff, he was asked: "Q. You say you found no property to levy the execution on?" and he answered: "A. No, sir; what stock he did have, the shelves were filled with empty boxes, and that stock was about all the property he had."

It is true, as has been said, that there was no mortgage on the stock of goods; and it is true also, as was said in the case of *Coffman* v. *Citizens' Loan & Inv. Co.*, 172 Ark. 889, 290 S. W. 961, that goods and chattels exposed daily for indiscriminate sale to the general public, at the place of business of the owner, and over which the dealer or merchant is permitted to exercise dominion, cannot be made the subject of a valid chattel mortgage. But the testimony, in its entirety, presents the issue of fact whether the sheriff acted in good faith in demanding an indemnifying bond. No specific request was made that the execution be levied upon the stock of goods, nor was the sheriff advised that it was subject to execution and was unincumbered, and the testimony supports the finding by the jury that there had been no palpable dereliction of duty on the part of the sheriff.

Upon the second appeal in the case of *Mayfield Woolen Mills* v. *Lewis,* 97 Ark. 149, 133 S. W. 590, it was said: " 'The statute in question is highly penal, and the party invoking it must bring himself within both the letter and spirit of it.' *Craig* v. *Smith,* 74 Ark. 364, 85 S. W. 1124. It 'was not enacted as a substitute for an ordinary action to recover the amount due, but was to reach palpable derelictions on the part of the officer.' *Williams* v. *State,* 65 Ark. 159, 46 S. W. 186. 'Its terms should not be extended to cases not within its plain meaning.' *Mayfield Woolen Mills* v. *Lewis,* 89 Ark. 488, 117 S. W. 558, citing *Hawkins* v. *Taylor,* 56 Ark. 45, 19 S. W. 105; *Moore* v. *Rooks,* 71 Ark. 562, 76 S. W. 548."

The verdict of the jury is not without testimony to support it, and it is therefore affirmed.

HUFFMAN *v.* HENDERSON COMPANY.

4-2775

Opinion delivered January 16, 1933.

Coulter & Coulter, for appellant.

J. K. Mahony, H. S. Yocum, W. T. Saye and *J. N. Saye,* for appellee.

SMITH, J. The north half of the northwest quarter of the northeast quarter of section 8, township 18 south, range 15 west, in Union County, Arkansas, was sold in June, 1925, for the nonpayment of the taxes assessed against it for the year 1924. Prior to the assessment of the land for the 1924 taxes, there had been a severance

of both the timber and the mineral rights, which latter had not been separately assessed, and the validity of the tax sale for any purpose was attacked on that account.

The owners of the separate interests in the land joined in a suit to cancel the tax sale and deed thereunder, and, from a decree awarding that relief, an appeal was prosecuted to this court. Upon the submission of the case in this court, it was held that, where there had been a severance of the timber or the mineral rights by duly recorded deed, it was necessary for the timber or mineral rights to be assessed separately and apart from the surface of the land, and that where this was not done the assessment applied only to the surface, and a sale for the taxes so assessed did not operate to convey the timber or the minerals. *Huffman* v. *Henderson Co.*, 184 Ark. 278, 42 S. W. (2d) 221.

After the rendition of this opinion, a petition was filed in the court from which the appeal had come for a writ of possession to place the present owners of the tax title in possession, and from a decree refusing to award that relief is the present appeal.

The testimony heard at the trial from which this appeal comes developed the following facts, as we find them to be: The Henderson Company, hereinafter referred to as the company, an Oklahoma corporation authorized to do business in this State, has extensive interests, in the State in the operation of which the twenty-acre tract of land above-described plays an important part. Oil has been produced from this land since 1921, and in 1922 appellee constructed an extensive casing-head gas plant thereon, which has been, and is now used in the manufacture of gasoline from the production from said land and other lands in Union County. The company also built upon the land an office and a residence for the use of its managing officer in this State.

In 1923 J. O. Huffman, who was then employed by the company in another State, was transferred to this State, and occupied, with his family, the residence above referred to as the general superintendent and the highest representative in authority of the company in the State.

It was a part of Huffman's duties as general agent to assess the company's holdings in this State, and to pay the taxes thereon by drawing drafts upon the company at its home office. It was Huffman's duty to have assessed and paid the taxes for the year 1924, and for which the land sold in 1925.

Huffman did not discover that this very valuable twenty-acre tract of land had been sold for taxes until July or August, 1930, and he then notified the home office of the company of that fact. He was advised by the company to take the matter up with the company's local attorneys in this State, and to take such action as was necessary to clear the company's title. He consulted the attorneys, who asked that an abstract of the title be brought down to date, and this was done. Several conferences were held between the attorneys and Huffman with a view of obtaining a deed to the company from the tax purchaser, and Huffman was entrusted with these negotiations. The original tax purchaser had died, but Huffman interviewed one of the heirs of the purchaser, who represented himself and the other heirs, and they offered to accept $2,500, and Huffman submitted a counter-proposition of $500. Huffman was advised by the company's attorneys that it was not necessary to bring suit, as the company was in possession and would acquire the tax purchaser's title by possession if no action was taken by the heirs of the tax purchaser before the statute of limitations had run.

While these negotiations were pending the company decided to dispense with Huffman's services, and on September 30th wrote him to that effect. This letter advised Huffman, however, that his resignation would not be effective until November 30th, and that his salary of $450 per month would be continued until that time. He was asked to turn over all records and company property to his successor, and this he did on October 1, 1930. On October 2, Huffman employed an attorney to buy the land. On the following day a deed was made to this attorney for a consideration of $1,000 cash in hand paid.

Huffman's wife furnished the thousand dollars, and the attorney later deeded to her an undivided half interest, retaining title to the other half interest for his services.

The court below decreed that the attorney and Mrs. Huffman had acquired title to the land in trust for the company, and directed that a conveyance of the land be made to the company upon payment of the purchase price, and this appeal is from that decree.

The instructions given Huffman by the company to recover the property for it were never withdrawn, yet he never advised the company that a quitclaim deed could be obtained for only $500 more than the company had offered. To the contrary, on the day after he was discharged, and while still in the pay of the company, he arranged to buy this land for $1,500 less than the sum for which he had reported to the company that it could be purchased.

Opposing counsel have cited many cases declaring the duty of an agent to his principal, a number of these being decisions of this court. We do not review these cases, as the law of the subject is well settled. The third headnote to the case of *Kelly* v. *Keith,* 77 Ark. 31, 90 S. W. 150, declares the law applicable to this case, and reads as follows: "Where an agent undertook to purchase land for her principal for $300, and found that it could not be purchased for less than $350, which she paid without notifying her principal or giving him an opportunity either to accept or to reject the land at that price, she will be held, at his election, to have purchased for him in performance of her agreement."

Section 206 of Perry on Trusts and Trustees, vol. 1 (7th ed.), appearing in the chapter on constructive trusts, deals with the conditions under which an agent, attempting to act for himself, is yet held to be a trustee for his principal, and this statement of law there appearing is peculiarly applicable to the facts of this case: "An agent cannot take advantage of his own negligence; as where one allowed his principal's property to be sold for taxes

and bought it himself, he was held as a trustee, although the relation of principal and agent had ceased."

The decree of the court below appears to be correct, and it is therefore affirmed.

RHODE ISLAND INSURANCE COMPANY *v.* BOATRIGHT.

4-2806

Opinion delivered January 16, 1933.

Cravens & Cravens, for appellant.

Duty & Duty and *Bernal Seamster,* for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Benton County to recover damages for an alleged libel contained in an answer of appellant herein filed by him in a suit brought in the chancery court of said county by Rogers Sewer District No. 8 to collect assessments from M. D. Boatright upon his lands embraced within the district, in which suit appellant herein was made a party as an equitable garnishee, alleging it owed M. D. Boatright a certain amount under a fire insurance policy issued by it to him. In that suit appellant herein filed an answer in which it denied liability under the policy on the ground that M. D. Boatright had destroyed the

house protected by the policy by setting fire thereto. This charge of arson was made the basis of the instant suit.

A demurrer was filed to the complaint on the ground that the charge of arson in appellant's answer in the Rogers Sewer District No. 8 case was a judicial pleading and privileged.

The demurrer was overruled, over the objection and exception of appellant.

Appellant elected to stand upon its demurrer; whereupon the court rendered a judgment for $1,000 in favor of appellee in response to the verdict of the jury impaneled to assess the damages, from which is this appeal.

Appellant contends for a reversal of the judgment under the rule announced and the application thereof in the case of *Mauney* v. *Miller,* 142 Ark. 500, 219 S. W. 1032. The rule is as follows:

"There are two classes of privileged communications recognized in the law governing the publication of alleged libelous matter: One of these classes constitutes an absolute privilege, and the other a qualified privilege, and, according to the great weight of authority, pertinent and relevant statements in pleadings in judicial proceedings are held to be within the first class mentioned and are absolutely privileged. * * * The test as to absolute privilege is relevancy and pertinency to the issue involved, regardless of the truth of the statements or the existence of actual malice."

The application of the rule to the facts in that case is as follows:

"The complaint in the present case discloses the relevancy and pertinency of the alleged libelous statements. The purpose of the original action was to cancel a lease on account of a breach or breaches of the contract alleged to have been committed by appellee. In the answer appellee, as the defendant in that action, denied the breach of the contract on his part and alleged that the delay in the performance of the contract had been caused by acts of appellant, among other things, the burning of the plant erected for the purpose of washing of diamond-bearing

dirt. The allegations of the answer, including allegations now under consideration, presented issues in defense to that action, and were pertinent and relevant to the issues involved. The alleged statement was therefore absolutely privileged, and the court was correct in sustaining the demurrer to the complaint."

Appellee admits the correctness of the rule, but denies its applicability herein, for the alleged reason that the libel set out in the answer of appellant to the suit brought by Rogers Sewer District No. 8 was not pertinent to the issues therein. The argument is made that under §§ 5674 and 5678 of Crawford & Moses' Digest, the proceeding to enforce the collection of assessments in improvement districts such as Rogers Sewer District No. 8 is by condemnation and sale of the delinquent property and not by personal judgment against the property owner, and that, since M. D. Boatright was not liable personally to the sewer district, there could be no liability against appellant as garnishee of the amount it owed Boatright under the fire insurance policy. It may be true that appellant could have made such defense in that action for Boatright as well as itself, but it was not compulsory for it to do so when M. D. Boatright, appellee herein, was made a defendant and properly served in that action. It was Boatright's duty to make such defense for himself, and, having failed to do so, he cannot have damages against appellant because it interposed other defenses it had against the attempted collection of the fire insurance policy, in order that the proceeds thereof might be subjected to the payment of the assessments.

Relative to the duties of a garnishee in situations like this, the rules announced in 28 C. J., p. 277, are as follows:

"Where defendant is personally in court, the garnishee is not required to question the jurisdictional legality of the proceedings or their regularity as to defendant, but where defendant is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action and to interpose in behalf of the defendant de-

fenses of which he is cognizant, and which he is able to make."

"But while the garnishee may plead all defenses which may be necessary for the protection of his own interest, he is not ordinarily permitted to set up matters which concern defendant only, with regard to the validity of the proceedings, or the claim asserted by plaintiff." (P. 274.)

The liability and extent thereof by appellant herein on the policy of fire insurance issued by it to M. D. Boatright, appellee herein, was drawn in question in the suit of *Rogers Sewer District No. 8* v. *M. D. Boatright,* as defendant, and appellant herein as garnishee, and on that account, appellant was privileged to plead as pertinent to the issue in that case its defense of arson against the payment of the policy.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to the trial court to sustain the demurrer to the complaint.

INTERNATIONAL SHOE COMPANY *v.* KING.

4-2811

Opinion delivered January 16, 1933.

Silas W. Rogers, for appellant.
Streett & Streett, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in the second division of the circuit court of Ouachita County to recover $1,784.99 for Red Goose shoes sold and shipped to appellee by appellant.

The defense interposed to the action was that appellant breached its contract with appellee by allowing the business firm of West Brothers in Camden, Arkansas, to advertise the same line of shoes in violation of an agreement that appellant should sell no one else, nor permit any one else to advertise the line of shoes known as the Red Goose shoe in Camden except appellee, and that when appellant thus breached the exclusive contract, appellee repacked and shipped back to appellant all the shoes not disposed of, in the total invoice sum of $1,517.19, for which amount he was and is entitled to credit, leaving a balance due on account of $267.80, which was tendered to appellant in full settlement. The cause was submitted upon the pleadings, testimony adduced by the respective parties, and instructions of the court, resulting in a judgment against appellee for $267.80 and interest, from which is this appeal.

There is no dispute in the testimony about the value of the goods shipped or returned, or that appellant's agent made the exclusive contract and that same was breached. The only issue in the case was whether appellant's agent had the authority to enter into the exclusive contract with appellee before the goods were sold and shipped. This issue was submitted to the jury by the court, over the objection of appellant, and a reversal of the judgment is sought upon the alleged ground that no substantial evidence was introduced in the case tending to show that appellant's agent had such authority. After the exclusive contract was breached by appellant, a correspondence ensued between appellant and appellee, in which the authority of appellant's agent to make exclusive contracts was admitted by appellant, but in which it took the position that its agent did not inform it that such a contract had been made by him with appellee, and that he made the contract in ignorance of the existence of

the contract between it and West Brothers in Camden for the purchase and advertisement of the same line of shoes. It also contended in the correspondence that the contract was not made by its agent with appellee until the 21st day of August, 1930, and that it was not bound under the contract to take the shoes back that were sold and purchased before that date. Three witnesses, on behalf of appellee, testified that the exclusive contract was made before any goods were purchased from appellant by appellee. On account of this dispute in the evidence, it was proper to submit the issue of whether the agent had authority to make the exclusive contract before the goods in question were sold and shipped by appellant to appellee.

Appellant also contends for a reversal of the judgment because the court refused to give its requested instructions Nos. 2 and 4, relative to the authority of an agent. The court gave an instruction fully covering the issue of authority of the agent to make the contract, so did not err in refusing appellant's requested instructions Nos. 2 and 4.

Appellant also contends for a reversal of the judgment because, even though the contract was made with authority, it was not mutual, and therefore not binding on appellant. The argument is made that the contract did not attempt to bind appellee to buy shoes in any definite quantities for any definite length of time, and to buy them exclusively from appellant. Appellant requested two instructions, Nos. 5 and 6, on mutuality of contracts, which the court refused to give. The doctrine of mutuality of contracts is not applicable, in so far as same have been executed or operated under. *El Dorado Ice & Planing Mill Co.* v. *Kinard,* 96 Ark. 184, 131 S. W. 460; *Weil* v. *Chicago Pneumatic Tool Company,* 138 Ark. 534, 212 S. W. 313. It was not error to refuse instructions touching the question of the necessity of mutuality of contracts, same not being applicable to executed contracts.

Appellant also contends that the trial court erred in rendering a judgment against it for all costs. We are

unable to find in the record where the costs were adjudged against appellant, and appellee concedes that he is liable for the costs in the case under the judgment rendered.

No error appearing, the judgment is affirmed.

STIPSKY *v.* DROTAR.

4-2814

Opinion delivered January 16, 1933.

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

J. F. Holtzendorf, for appellee.

MEHAFFY, J. The appellee, Mike Drotar, brought suit in the Prairie Circuit Court against Metho Tucek, Jan Kajs and Joseph Stipsky. He alleged that he leased and rented to the defendants, for the year 1929, certain lands, which he described, for the sum of $300; that the appellants agreed to pay the sum of $300 on January 1, 1930. He alleged that $45 had been paid on the contract, and that there was a balance due of $255 and interest. The following is the contract sued on:

"Be it remembered that on this date, February 19, 1929, it is agreed between Mike Drotar and Metho Tucek, the first party agrees to rent all the land he owns in section 6 and section 1 in township one (1) south, range 6 west, for the sum of $300 for the year 1929.

"The second party agrees to pay the first party the sum of $300 on January 1, 1930.

"(Signed) Mike Drotar.
"(Signed) Metho Tucek.

"Jan Kajs
"Joseph Stipsky."

A demurrer was filed to the complaint, which stated that the complaint did not state facts sufficient to constitute a cause of action.

The court overruled the demurrer, and appellants, Jan Kajs and Joseph Stipsky, filed their separate answer, in which they denied that they entered into any agreement with Drotar, and denied that any contract was executed under which they obligated themselves to pay $300 or any other sum. They also denied that they had paid anything on the account.

Metho Tucek did not make any defense.

There was a jury trial and a verdict and judgment for $255, with no interest to date of judgment. Motion for a new trial was filed, overruled, and exceptions saved, and the case is here on appeal.

The appellee testified that on February 19 he entered into a contract in writing with the defendants, Tucek, Stipsky and Kajs, agreeing to rent all of his land in sections 1 and 6 for the year 1929 for $300; that he entered into a written contract; that the signatures at the bottom of the contract were the signatures of defendants.

There were 238 acres in the tract of land leased; that Tucek came over to appellee's place with Kajs before the contract was made, and Tucek wanted to rent the land. He did not know Tucek before this visit, and Tucek was accompanied by Kajs; that he had received $45 of the rent, and the balance due was $255. Kajs and Stipsky have never paid anything. He received no note evidencing the rent. He received three notes for the sale of some farm machinery sold to Tucek, and these notes were signed as sureties or indorsers by Kajs and Stipsky.

He was not present when the contract was signed by Kajs and Stipsky. He would not have let Tucek have the farm unless they would stand for it. They knew they were to pay. The contract was written by Genlisky and his daughter at the request of witness. Witness told them what to put in the contract. He does not know what Tucek said to Kajs and Stipsky to get them to sign the contract. He told Kajs if he would sign the contract he would give Tucek the place. Kajs agreed to stand good for it, and Stipsky also agreed to this.

The contract was then introduced in evidence. Kajs and Stipsky gave witness the contract and signed their names to it, and he knew it was all right. Witness had the contract made up and Tucek took it, got it signed, and brought it back. He told Kajs that he would not let Tucek have the land unless he stood for it.

Jan Kajs testified that he signed three notes to help Tucek buy some machinery from Drotar, but these notes only covered the purchase price of the machinery; that he signed the contract only as a witness; did not sign it as security; he never promised Drotar that he would pay the rent.

Drotar asked him for the rent after the contract was signed. He told Drotar before the contract was signed that he would not stand good for the rent. He took Tucek over to see Drotar, and introduced them, but the land was not rented at that time. Drotar did not say anything to him about standing good for the rent. He said nothing about either Kajs or Stipsky signing the contract to secure the payment of the rent. He did not tell Drotar that he would guarantee the payment of the rent, and he only signed it as a witness.

Joseph Stipsky testified substantially the same as Kajs. Both of them testified that they did not sign the contract with the intention of being bound by it, but signed it as witnesses.

Appellant urges a reversal, first, on the ground that the verdict is contrary to the evidence. The contract itself is ambiguous. The parties to this suit are all Slo-

vaks. The appellee speaks English, and testified, but it is apparent from his testimony, and the language used by him, that he understands very little about the English language. The appellants do not speak English at all, and their testimony was given through an interpreter.

Tucek desired to rent the land from appellee. He was a stranger, and appellee testified very positively that he would not rent him the land without appellants signing the contract, and the proof is undisputed that Kajs went to see the appellee with Tucek.

The contract was signed by appellants on the left-hand side of the paper. There is nothing on it to show that they signed as witnesses, and it made no difference where appellants signed the contract if it was their intention to sign the contract, not as witnesses, but for the purpose of being bound by the contract.

"It is not necessary that the signature of a party to a contract should appear at the end thereof. If his name is written by him in any part of the contract, or at the top, or at the right or left hand, with the intention to sign, or for the purpose of authenticating the instrument it is sufficient to bind him, unless subscription is required by law." 13 C. J. 306; *Gray* v. *Brewer,* 177 Ark. 486, 9 S. W. (2d) 81.

The question here is whether they signed the instrument as witnesses, or signed it with the intention of being bound, and, the contract itself being ambiguous, this was a question of fact to be determined by the jury.

None of the parties, as we have said, knew enough English to know how to write a contract, or to understand it when it was written in English.

The court instructed the jury as follows: Instruction No. 1. "The plaintiff brings this suit against these defendants, Kajs and Stipsky, upon what he contends is a contract entered into between himself and one Metho Tucek. Tucek admits his liability upon the contract, but the plaintiff contends that these two other defendants signed this instrument of writing with the understanding that they were to guarantee the payment under the con-

tract, whatever that amount is. Kajs and Stipsky deny this fact, but admit that they signed it, but only signed it as witnesses, and that they did not intend by their acts to make themselves liable thereon, but merely signed it as a witness. That presents a question of fact for the jury to determine whether or not they obligated themselves upon the contract when they signed it, in order to get Tucek the place. If you believe they did that, then your verdict will be for the plaintiff, but, on the other hand, if you believe that they only signed the contract as a witness, then they would not be liable on the contract, and your verdict will be for the defendants, Kajs and Stipsky. If you find for the plaintiff, the form of your verdict should be, we, the jury, find for the plaintiff in the sum of $..... If you find for the defendants, Kajs and Stipsky, the form of your verdict should be, we, the jury, find for the defendants. If nine of you gentlemen agree upon a verdict, the nine agreeing will sign their names thereto, but if all agree, you will only sign it by one of your body as foreman. Whatever your verdict is, return same into open court."

Instruction No. 2. "The plaintiff must prove the material allegations set up in his complaint by a preponderance of the testimony. A preponderance of the testimony doesn't necessarily mean the greater number of witnesses who might testify in the case, but it does mean upon whom the burden rests is required to offer competent testimony which outweighs, overbalances or preponderates in his favor."

There is some conflict of authority as to the liability of one signing a contract in which he is not named, but, under the circumstances in this case, we think it was simply a question of the intention of the parties, and this was properly submitted to the jury, and its verdict will not be disturbed by this court.

It is next contended by the appellants that they were guarantors, and that it was void under the statute of frauds. We think the evidence is sufficient to justify the jury in finding that this was a contract signed by the ap-

pellants, and was binding on them. The jury might have found that they signed it as witnesses, and that finding would have been sustained by substantial evidence. The question was purely one of fact, and the verdict of the jury is supported by substantial evidence.

Finding no error, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* LANE.

4-2791

Opinion delivered January 16, 1933.

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

Tom J. Terral and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

McHANEY, J. Appellee sued appellant for personal injuries sustained by him while in its employ, under the Federal Employers' Liability Act, and recovered judgment against it in the sum of $5,000.

At the conclusion of the testimony appellant requested the court to direct a verdict in its favor, which was refused, and this assignment of error is now urged for a reversal of the case on two grounds; first, that the undisputed evidence shows that appellee assumed the risk; and, second, that it also shows appellee was not engaged in interstate commerce at the time of the injury, and that therefore the Federal law has no application in this suit.

We assume, for the purpose of this opinion, that appellee was engaged in interstate commerce, and it becomes unnecessary to decide whether he was or not, because of the disposition we make of the other assignment.

The facts, briefly stated, are as follows: Appellee was in the employ of appellant as a stationary engineer at McGehee, Arkansas. He operated a stationary engine used to pump water into water tanks and crude oil into oil tanks, to be used in the operation of locomotive engines in both State and interstate commerce. It was a part of his duty to unload crude oil which was shipped into McGehee in tank cars. When a shipment of oil was received for unloading, the switching crew would spot the car so it could be unloaded into the underground tank by gravity. When the car was spotted over this underground tank, it was appellee's duty to go on top of the tank car, unscrew the cap in the top of the dome, open the valves, and the oil would then run out by gravity into the underground tank, from which it would be pumped out by him into the storage tank. As above stated, such oil was used to operate locomotives on the road, as well as the stationary engines and the power plant in the shops. Appellee had been engaged in the same work for appellant for about four years. About 2:30 in the afternoon of February 1, 1931, while engaged in unloading a tank car of crude oil which had been shipped from El Dorado, Arkansas, through Louisiana, to McGehee, and which had been spotted over the underground tank, he was injured in the right knee by slipping in a small quantity of crude oil on top of the tank car, striking his knee against one of the pointed rivets in the tank car. The tank car was constructed with a ladder at each end, on both sides, with a walkway on both sides of the car at or near the bottom of the tank. At the middle of the tank another ladder goes up to the top of the car on either side with a platform constructed at or near the bottom of the dome which extends up about three feet from the top of the car. Appellee climbed up to the platform for the purpose of unscrewing the cap to the dome and opening the valve in the bottom of the car. He says that the cap had been put in crooked, or that the threads had become crossed, and did not readily come loose; that he then stepped out on top of the tank from the platform on

which he had been standing, and that he stepped into a small amount of oil on top of the car, which caused his foot to slip and him to fall, receiving a severe and painful injury to his right knee. He says he did not notice the oil until he slipped, and that he supposed that if he had looked down where he put his foot he might have seen it; that oil tank cars usually have oil spilled on top of them.

This is substantially the evidence in the case as given by appellee himself. There were no eyewitnesses other than himself. Under these facts, we are of the opinion that appellee assumed the risk as a matter of law, and that the court should have directed a verdict in appellant's favor at its request. Appellee had been engaged in this same character of work for about four years. He had unloaded many tank cars of oil. He knew that all or nearly all such cars have oil spilled on them. He knew that it was dangerous to step in oil on the rounded surface of a tank car, and that his foot might slip and cause him to fall. He was unloading this car in broad open daylight, and the only excuse he gives for not seeing the oil and thereby avoiding it is that he did not look. Had he looked, he would have seen the oil, as it was plainly visible on the top of the car. The law, under such circumstances, is well settled. In the recent case of *Mississippi Valley Power Co.* v. *Hubbard,* 181 Ark. 487, 26 S. W. (2d) 118, we said: "It is true employees do not ordinarily assume risks created by the negligent act of the master, and that he has a right to require of the master to provide suitable appliances and a safe place in which to do his work, and to do such is the clear duty of the master. *St. L., I. M. & S. R. Co.* v. *Touhey,* 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; *Pettus & Buford* v. *Kerr,* 87 Ark. 396, 112 S. W. 886; *St. L., I. M. & S. R. Co.* v. *Holmes,* 88 Ark. 181, 114 S. W. 221. But it is equally true that, where the danger arising from the negligent conduct of the master is so apparent and obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee, by voluntarily under-

taking to perform his work in such a situation, assumes the hazards which exempts the employer from liability on account of injury to the employee. *Wisconsin & Ark. Lbr. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197; *Ward Furniture Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002." Other recent cases on the subject are *Howell* v. *Harvill,* 185 Ark. 977, 50 S. W. (2d) 597, and *Koss Construction Co.* v. *Vanderberg,* 185 Ark. 316, 47 S. W. (2d) 41.

No one knew how the oil happened to be on the top of the tank, whether it had sloshed out of the tank car through the dome, or whether it had been spilt there by the oil company, from whom it was purchased, in loading it, but this can make no difference. The undisputed proof shows that it was quite the usual thing for oil to be on top of such cars, to the knowledge of appellee, and he could not blindly step therein under the circumstances of this case without assuming the risk of so doing.

The judgment will be reversed, and the cause dismissed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MEYER.

4-2818

Opinion delivered January 16, 1933.

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

Carneal Warfield, for appellee.

BUTLER, J. In an action for damages to an automobile at a crossing over the public highway, where a spur track of appellant's main line crosses to a gin nearby,

judgment was rendered against the appellant, from which is this appeal.

The appellant's claim of exemption from liability is predicated upon the contention that the switch or spur track was not its property, but was built by it for one T. E. Head, and at his expense, and, when the construction was completed, no duty thereafter rested upon the appellant to maintain the crossing. This contention is based upon the familiar principle that, "when the work is finished by the contractor and accepted by the employer, the liability of the former generally ceases and the employer becomes answerable for damages which may thereafter accrue from defective conditions in the work." The theory is that, in the absence of a special statute making a private siding a public track for the use of the public, no liability would attach for failure to properly maintain it, and, as we have no such statute, under the contract in the instant case, in pursuance of which the track was built, the property rights to the spur track were in Head, and he, or his successors in title, are liable, and not the appellee.

It is further argued that, although Head could not exercise the right of eminent domain and the railroad company could, the exercise of that right was not called for in the instant case as the highway was located on the land of Head, and he had the right to cross the same with the spur track, as the public owned only an easement, the fee remaining in Head, and his only duty was to so construct and maintain it as not to interfere with the public use; and, if he did not keep up the crossing, then he or his successors are alone liable for damages accruing because of its defective condition.

Referring to the last argument first, we note that it is assumed in the statement of the case made by the appellant that "the switch and place where it crosses over the public road was not on the right-of-way or any property belonging to the Missouri Pacific Railroad Company," and from the argument it is inferred that the public highway was across the lands of Head. We have care-

fully examined the plat filed as an exhibit in the case and the testimony of the witnesses, and are unable to determine where the public highway is located. It may be upon the land of Head, but there is no evidence which we have discovered to justify the statement. However, it is our opinion that this question of fact becomes immaterial because we think the defense in the case is based upon the erroneous view that the spur track was a private one. For the sake of brevity, the contract relied on is not written herein at length, but only the substance of its material parts stated.

The contract was called "An Industrial Track Agreement," and provided that, at the request of the shipper (Head), the appellant would construct a track 500 feet long, more or less, leading from carrier's (appellant's) existing sidetrack at Indian Station in Chicot County, Arkansas, to the ginnery and cotton seed house of the shipper. Section 1 of the contract provided that the connection with carrier's existing sidetrack should be at its cost, and that it should furnish all material and perform all labor required for the remainder of the switch at the shipper's cost. The shipper was to provide the roadbed, right-of-way, crossties and fastenings, and the use of so much of any highway as might be required. The estimated cost of the construction of the switch was $380, which the shipper was required to, and did, pay.

Section 2 of the contract provided that "the carrier may at any time, unless necessarily detrimental to shipper, lengthen, extend or connect with, and use any of switch." Provision was further made that the carrier should be indemnified for any expense or liability for any change or readjustment of the switch, and that the switch should be kept in good condition at shipper's cost, the carrier acting for the shipper to furnish or perform any work at shipper's cost in the event the shipper should neglect to furnish or do the work within ten days following the carrier's written request. For material furnished, or work done, the shipper was required to pay the cost to the carrier, plus ten per cent.

By section 3 the shipper was required to indemnify the carrier, regardless of its negligence, for damages arising from fire caused by the carrier's locomotives operating on the switch and for indemnification for any damages or injury from act or omission of the shipper, or his agents, to the person or property of the parties to the contract, and to the person or property of any other person or corporation while on or about the switch, and, if any claim or liability other than from fire shall arise from joint or concurring negligence of both parties, it should be borne by both parties equally.

Under the terms of section 4 of the contract, provision was made for its termination, and in that event the carrier was authorized to remove from its premises any metal track material, paying to the shipper from available funds its then present value as salvage. It was also stipulated that all of the switch at any time existing on the premises of the carrier, which should be deemed to include any portion of any intersecting public highway falling within the carrier's right-of-way, should belong to the carrier.

The contract was entered into and the switch constructed in 1924. It was moved and relocated some fifty to one hundred feet west of its first location, and, after its relocation and shortly before the happening of the injury complained of here, the track was again slightly moved and realigned for the purpose of straightening a curve. The appellant's employees did all this work, for which they were paid by the shipper, or his successors. The principal purpose for which the switch was built was for the movement of cotton and cotton seed from the shipper's gin to the main line of appellant for shipment thereon to the market. The evidence shows that it was also used by the appellant for other purposes than to serve the shipper and his successors, such as for the "spotting" of cars loaded with gravel, billets, bolts, etc.

It is apparent from the contract and the use to which the spur track was put that it was not constructed for the exclusive use of Head, but for the use of the appellant

also, and for their mutual benefit. While the contract provided that Head should pay for the cost of the original construction and for its maintenance, the work was actually done by the appellant, as well as the relocation and realignment of the switch; and appellant reserved the right, upon Head's failure to do maintenance work after notice, to do the work itself and charge the cost to Head, or his successors. The switch track emerged from the siding and was constructed in a slight curve down the right-of-way for approximately half of its distance from its emergence from the siding to the ginhouse, and the ownership of this portion of the switch was especially reserved in the appellant. It also reserved the right to lengthen the switch if it deemed it expedient, and to use it for purposes other than to serve Head, and it did, in fact, so use the spur track, and recognized its liability for damages by requiring indemnification in paragraph 3 of the contract. From this it will be seen that the appellant exercised practically the same control and dominion over the switch track that it did over any part of its system, and, to all intents and purposes, while constructed primarily to serve the ginnery of Head, it was a sidetrack of the appellant, although located on private property for a part of its length. The spur track is therefore included within the term "railroad" and comes within the duties imposed upon railroads by § 8483 of Crawford & Moses' Digest, which provides, among other things, that railroad companies which have constructed railroads across any public road shall construct and maintain suitable crossings. *Conway Oil & Ice Co.* v. *Gibson Oil Co.*, 175 Ark. 902, 1 S. W. (2d) 60, and cases therein cited; *Lane* v. *Interurban Ry. Co.*, 190 Ia. 738, 180 N. W. 895.

The undisputed evidence is to the effect that the crossing was in bad repair, and that the appellee, while traveling along the highway and while in the exercise of ordinary care, suffered an injury to his automobile because of the defective crossing. Since, as we have seen, it was the duty of the appellant to properly maintain the

crossing, the court properly found it liable for the injury, and its judgment is therefore affirmed.

[redacted]

BOYETT *v.* STATE.

Crim. 3825

Opinion delivered January 16, 1933.

[redacted]

R. H. Peace, J. S. McKnight and *C. L. Poole,* for appellant.

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

BUTLER, J. From a conviction of the crime of assault with intent to rape this appeal is prosecuted. The only question presented is that of the sufficiency of the evidence to warrant the conviction of the crime charged. The evidence adduced by the State, briefly stated, is as follows:

The prosecuting witness, a young girl about fifteen years of age, was walking alone on a road leading from a place where she had been attending a singing school to her home. She was met by the defendant, a man about twenty-eight years old, to whom she spoke. After he had passed her, he returned in a short time, overtaking her,

and, over her protests and despite her resistance, forced her to go with him some distance from the road into the forest. He placed his hand over her mouth to prevent any outcry, and, after he had reached a spot in the woods, and after some struggle, he threw her upon the ground and exposed her person by pulling down her underclothing. He got down on his knees over her, but for some reason proceeded no further in the attempt to ravish her. During the time that he was taking her from the road to the forest, and while she was on the ground, he indulged in conversation, which the prosecuting witness repeated on the witness stand, and which the appellant urges negatives the contention of the State that it was the defendant's intention to ravish the girl. We do not think that this interpretation can be placed on the language used, and do not deem it necessary to state it here.

It is well settled that an assault with intent to rape is an effort to obtain sexual intercourse by force and against the will of the person assaulted, and the intent is to be ascertained from the commission of some act or acts at the time or during the progress of the assault. The force actually used need be of no specific degree or character, but comes within the meaning of the law if it is reasonably calculated to subdue and overcome; nor need it be persisted in until the assailant's design is accomplished; if the assault is actually begun and the intent can be inferred from the acts committed, the offense is complete, notwithstanding the fact that the assailant may, for some reason, relent and forbear from the consummation of his purpose. *Anderson* v. *State,* 77 Ark. 37, 90 S. W. 846; *Tyra* v. *State,* 120 Ark. 179, 179 S. W. 167; *Lockett* v. *State,* 136 Ark. 473, 207 S. W. 55; *Snetzer* v. *State,* 170 Ark. 175, 279 S. W. 9; *Begley* v. *State,* 180 Ark. 267, 21 S. W. (2d) 172.

From the evidence we have related, it will be seen that it was of a substantive nature and brings the case within the rule announced, and warrants the jury in the verdict reached.

Judgment affirmed.

TAYLOR *v.* GREENE.

4-2808

Opinion delivered January 23, 1933.

M. A. Hathcoat, for appellant.

Woods and *Jones,* for appellee.

SMITH, J. Mrs. Jane Greene Wescher owned fifteen shares of the capital stock of the Citizens' Bank & Trust Company, of Harrison, Arkansas, which became insolvent and was taken over on September 1, 1931, by the State Bank Commissioner for liquidation. The Commissioner made and levied an assessment of the full amount of the capital stock of said bank against the shareholders thereof. Mrs. Wescher refused to pay the assessment against her stock, amounting to $375, and the Commissioner brought this suit to enforce its payment. As Mrs. Wescher is a nonresident, service was had by attaching her undivided interest in a certain tract of land.

An intervention was filed in this suit by Laura Glass Greene, who alleged the following facts: Frank R. Greene, the husband of the intervener and the father of the defendant, owned and occupied the attached land as his homestead at the time of his death. He was survived by his widow and three children, all of whom have now passed the age of twenty-one years. Intervener, the widow, occupies the property as her homestead, and does not own any other homestead.

No personal service was had on Mrs. Wescher, and she has not entered her appearance.

A demurrer was filed to the intervention by the plaintiff, which the court overruled, and, as no amend-

ment to the complaint was made, it was dismissed, and this appeal is from that judgment.

The question for decision is, whether the interest of the nonresident heir is subject to attachment during the continuance of the homestead right of her mother, there being no minor children to share the homestead right with the widow?

It is apparent, from the facts stated, that the defendant and the other heirs have a vested interest, the enjoyment of which is postponed during the homestead estate of their mother. *McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387. The homestead is not subject to partition during the continuance of the homestead estate. But it is not prayed that partition thereof be granted. It is prayed that an attachment be sustained against a nonresident heir more than twenty-one years of age; and we think this relief may be awarded. The Commissioner had the right, and was under the duty, to collect the stock assessment from the stockholder, and, upon his demand for payment being refused, he had the right to invoke the aid of the court, and, as an incident to this right, to attach the vested interest of the nonresident heir in the land which she had inherited from her father, even though this interest was subject to the homestead right of her mother.

The third headnote in the case of *Scoggin* v. *Hudgins,* 78 Ark. 531, 94 S. W. 684, 115 Am. St. Rep. 60, reads as follows: "Notwithstanding Constitution 1874, art. 9, § 3, provides that the 'homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon,' etc., a court of equity may declare that a claim of creditors is a lien on the homestead of a deceased debtor in the hands of his widow and heirs, but that it shall not be sold until the homestead expires."

In the case of *Winfrey* v. *People's Savings Bank,* 176 Ark. 941, 5 S. W. (2d) 360, the facts were as follows: Pottebaum sued Williams, a nonresident, upon a

note. Judgment was rendered for the amount of the note, and an attachment was sustained against a lot, upon which the mother of the defendant resided as the homestead of her deceased husband, who was the father of the defendant. The interest of the nonresident defendant was later sold under the judgment to Pottebaum. The homestead estate of the widow was later terminated by her death, and the widow of Pottebaum, who had acquired the interests of the heirs of her husband, brought suit to partition the lot which had constituted the homestead, and to have assigned to her the half interest which her husband had purchased at the execution sale under the judgment against Williams, one of the heirs. It was there said: "It was alleged that the judgment against Williams was void for the following reasons: The lot levied upon had been owned by Williams' father, who, upon his death, was survived by his widow and two children, and the lot was then occupied by Williams' mother as her homestead. It is therefore insisted that, as the lot was a homestead, it was not subject to sale. In reply to this contention, it suffices to say that the widow was not a party to the attachment suit, and her homestead right was not affected by it. The defendant had an interest in the lot, which was, of course, subject to his mother's right of homestead, and it was upon this interest that the attachment was levied. The homestead interest of the widow terminated by her death in 1925, before the institution of this suit." The decree from which the appeal had come directing the partition of the land was affirmed.

In the instant case the widow occupying the attached property is a party, but she became a party upon her own intervention. No relief was prayed against her, and her homestead right is not questioned, and no judgment rendered against her daughter will divest this right. See, *Brandon* v. *Moore,* 50 Ark. 247, 7 S. W. 36. There is therefore no reason why the court should not adjudicate the claim of the Bank Commissioner for a

judgment against the daughter, and the judgment of the court below overruling the demurrer to the intervention will be reversed, and the cause will be remanded with directions to sustain the demurrer.

TEMPLE *v.* GATES.

4-2800

Opinion delivered January 23, 1933.

Jones & Jones, for appellant.

Hal L. Norwood, Attorney General, *Walter L. Pope, David A. Gates* and *Chas. W. Mehaffy,* for appellee.

HUMPHREYS, J. Appellant brought suit in the circuit court of Miller County against appellee to recover $796.54 income tax which he paid appellee under protest, and which was assessed by appellee, in his official capacity, against the dividend received by appellant on three thousand shares of capital stock of the Southern Pine Lumber Company, a Texas corporation. The cause

was tried by the court, sitting as a jury, upon the pleadings and an agreed statement of facts, which resulted in a dismissal of appellant's complaint, from which is this appeal.

The agreed statement of facts is, in substance, as follows:

That at all times hereinafter mentioned plaintiff was and now is a resident of the State of Arkansas. That at all such times the Southern Pine Lumber Company, hereinafter called "Company," was and now is a corporation duly incorporated, organized, and existing under the laws of the State of Texas, and that at all such times, said Company owned and operated sawmills and planing mills, all located in the State of Texas, and sold and manufactured products of said mill in many States, including the State of Arkansas, and that said Company also purchased lumber in the State of Texas and sold the same in other States, including the State of Arkansas, and that the principal executive offices of said Company were and now are located in the Texarkana National Bank Building in the city of Texarkana, Texas.

That said Company sells the manufactured products and its lumber in the State of Arkansas by and through its duly appointed and acting agent, Southern Lumber & Supply Company, a corporation duly organized and existing under the laws of the State of Arkansas. That said Company furnishes to its said agent its stock sheets, price lists, and other selling information, and the officers and agents and employees of its said agent, Southern Lumber & Supply Company, acting for and on behalf of the Company, call upon the retail lumber dealers and other prospective purchasers of lumber in the State of Arkansas and personally solicit and obtain orders for lumber from them, and its said agent transmits the orders received by it to the Company at its principal office in the city of Texarkana, Texas, and the Company passes upon the credit of the purchaser of the lumber, and if the credit of the purchaser is approved by the Company, the lumber is shipped from the

State of Texas to the purchaser in the State of Arkansas on the order so placed; the said agent of the Company having full authority to bind the Company on all orders taken by the agent under the terms and according to the stock sheets, price lists, and other selling information furnished by the Company to its said agent, except the Company reserves the right to pass upon the credit and business methods of the purchaser of the lumber.

That 99 per cent. of the sales in Arkansas are handled by shipping the lumber on open bill of lading from the mill in Texas to the customer in Arkansas. That prices are quoted by the Southern Lumber & Supply Company to the purchaser, which includes the list price of the lumber plus the freight from mill to purchaser.

That payment is usually made by the buyer by sending its personal check to the Company at Texarkana, Texas, said check being deposited by the Company in a Texas bank for collection. That in some instances, when accounts become past due, the Arkansas agent corporation aids the company in pressing payment of the account.

That the Southern Lumber & Supply Company, in its advertising, holds itself out to be the agent of the Company.

That for several years it has been the custom of the Company to send one of its office staff to the retail lumber dealers' convention in Arkansas to meet the retail lumber dealers and work with the agent corporation for the furtherance of their joint interest.

That said Southern Lumber & Supply Company has been the agent for the Company in Arkansas for five years before the filing of this complaint.

That the Company has not filed its articles of incorporation with the Secretary of State of the State of Arkansas under § 1826 of Crawford & Moses' Digest, and that, other than hereinbefore stated, the Company has no place of business in the State of Arkansas, owns no property in the State, and that the business done

by the Company with Arkansas customers was and is interstate commerce.

That in 1928 the total gross sales of the company amounted to $4,954,166.10, and the gross sales of the company in Arkansas amounted to $23,577.36.

That on September 5, 1929, the Company, under advice of counsel and believing that same was required by law, filed its corporation tax return with the Commissioner of Revenues of the State of Arkansas, and paid said Commissioner the sum of $30.48, the same being tax due on net income of the company derived from sales in the State of Arkansas during the year 1928. Said Commissioner accepted such sum subject to any readjustment that might thereafter in due course be made.

That on December 31, 1928, the Company duly declared a cash dividend of 8 per cent. on its common stock, said dividend being held by the Company payable on demand to said stockholders.

That the dividend of $24,000 on the three thousand shares of common stock owned by plaintiff herein was not included in plaintiff's income tax return for the year 1928, but that later, plaintiff paid the Commissioner of Revenues of the State of Arkansas, under written protest, the sum of $796.54, the same being the income tax on the said $24.000 as computed by the Commissioner of Revenues of the State of Arkansas in his statement of differences mailed to plaintiff on January 17, 1930.

Appellant contends that the trial court erred in including, in his gross income, dividends received by him on his stock in the Southern Pine Lumber Company because said Company, itself, was properly assessable for income tax in Arkansas. He bases this contention on § 3, (b) of the Arkansas Income Tax Act, which provides that, in computing the gross income, from which deductions are to be made in arriving at the net income assessable under said act, there shall be exempted dividends payable to the taxpayer which have been received from stock in any corporation, the income of which was

assessable for the preceding year under the provisions of the act. In order to determine whether the court erred in so doing, it is necessary to ascertain whether the Southern Pine Lumber Company itself was subject to the assessment and payment of an income tax in this State. If it was, then the dividend derived from the stock owned by appellant was exempt from the imposition of an income tax under subdivision (b) of § 3 of the Income Tax Act. The agreed statement of facts reflects that the Southern Pine Lumber Company is a foreign corporation organized and doing business under the laws of the State of Texas. The Arkansas Income Tax Act imposes an income tax on the net income of foreign corporations doing business in Arkansas. Subdivision (c) of § 3 of the Income Tax Act is, in part, as follows:

"A like tax is hereby imposed * * * with respect to the entire net income as herein defined except as hereinafter provided * * * from every business, trade, or occupation carried on in this State by * * * corporations * * * not residents of the State of Arkanesas."

This statute means that if a foreign corporation conducts a business in this State, it must pay an income tax fixed upon its entire net income. The statute has no relation whatever to profits gained from interstate transactions by a corporation conducting a business in another State. In order to subject a foreign corporation to the payment of the income tax imposed by the statute in question, the business transacted by it in this State "must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction." *Gillen* v. *Hessig-Ellis Drug Company*, 181 Ark. 386, 26 S. W. (2d) 122. The substance of the agreed statement of facts warrants no such inference in the instant case. The agreed statement of facts shows that the Southern Pine Lumber Company was organized under the laws of, and has its business situs in Texas, where it conducts its business. It has never qualified to do business in this State in ac-

cordance with our statute. The transactions between it and the citizens of this State were interstate in nature and character.

The judgment is therefore affirmed.

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

4-2825

Opinion delivered January 23, 1933.

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

A. F. Barham and *Sam Rorex,* for appellee.

HUMPHREYS, J. Appellant filed an intervention in the case of Walter E. Taylor, State Bank Commissioner, v. Bank of Osceola, pending in the chancery court of Mississippi County, to have three cashier's checks and a time certificate of deposit, issued to it by the Bank of Osceola before it closed its doors, declared preferred claims. It was alleged in the intervention that appellant purchased the cashier's checks and certificate of deposit with currency, silver and checks its agent received in the course of its business, and, at the time, it was not a depositor in or indebted to said bank. It was also alleged in the intervention that the cashier's checks were presented in due course to the First National Bank of Memphis, Tennessee, but were not honored because during the interim the Bank of Osceola had gone into liquidation.

A demurrer was filed to the intervention on the ground that it did not state facts sufficient to show that the cashier's checks and time certificate of deposit were preferred.

The demurrer was sustained to the intervention, and same was dismissed in so far as it prayed for a preference, but the claims were allowed as general claims, from which is this appeal.

Appellant seeks a reversal of the decree denying its prayer for a priority or preference of its claims over those of general creditors on the ground that it was entitled to a preference under subdivision 7 of § 1 of act No. 107 of the Acts of the General Assembly of 1927. The subdivision referred to applies only to collections made by a bank in which the relationship of principal and agent exists. The purchase of cashier's checks and of time certificates of deposit creates a relationship of creditor and debtor. The instant case is governed by the interpretation placed upon said act in the cases of *Taylor* v. *Dermott Grocery & Commission Company,* 185 Ark. 7, 45 S. W. (2d) 23, and *Missouri Pacific Railway Company* v. *Taylor,* 185 Ark. 211, 46 S. W. (2d) 642.

No error appearing, the decree is affirmed.

SAFEWAY STORES, INC., *v.* ROGERS.

4-2720

Opinion delivered January 23, 1933.

[redacted]

G. R. Haynie, Robinson, House & Moses and *W. H. Holmes,* for appellant.

Gaughan, Sifford, Godwin & Gaughan and *Powell, Smead & Knox,* for appellee.

KIRBY, J., (after stating the facts). It is insisted for reversal that the verdict is not supported by the testimony, there being no proof of publication of the alleged slanderous statements, which it was claimed was semi-privileged, and that the court should have directed a verdict in its favor; that appellant company could not be held liable for the slanderous statements made by its employees without authority; and that the verdict is excessive.

Appellee testified that Mr. Green, who made the first statement, tapped her on the shoulder at the front door and told her to come back to the back thereof, that "she had stolen a can of pineapple," and that the others, who continued the conference or investigation and who were also clerks in the store and whose business it was to collect for goods sold, also accused her of stealing the can of pineapple.

It appears from the connection in which the charge was made, and, under the circumstances attending its utterance, that it was intended and understood to impute the crime of larceny—it so expressly stated it—and must be regarded as actionable *per se. Dean* v. *Black & White Stores, Inc., ante* p. 667; 36 C. J. 1208; § 2396, Crawford & Moses' Digest.

The jury found from substantial testimony that numerous persons were present when the slanderous

statement was made, in a position to hear it, and it will be assumed, unless the contrary is made to appear, that those present both heard and understood the words; and, although the burden is upon the plaintiff to prove the publication by a fair preponderance of the testimony, many persons were shown to have been present when the words were spoken, and it was a question for the jury to say whether such persons did or did not hear them. Only one of the persons present stated she did not hear the statement as first made at the door of the store when appellee was stopped by the manager and requested, "I want to see you in the back, lady you have stolen a can of pineapple." Townshend on Libel and Slander, page 555; Newell on Slander and Libel, page 725.

If the statements were made in the tone of voice as testified to, they could have been heard by a number of the many people in the store at the time, and certainly, when Mrs. Jennings returned to the store for appellee, who had not followed her out, the statement was made by Mrs. Rogers, it is true, explanatory of the delay that they had accused her of stealing a can of pineapple. This statement was made in the presence of the investigators, to whom she was turned over by the manager, and who were insisting that she did steal the can of pineapple and must pay $5 before she would be released from custody, otherwise she should be turned over to the sheriff. Under such circumstances, it cannot be said that the publication of the slander was invited or procured by appellee; and it was also shown that Worrell had charged her at that time with stealing the can of pineapple in the presence of Mrs. Jennings.

The court did not err in giving appellee's requested instruction No. 6, specially objected to as containing the clause, "that these statements were made in furtherance of the company's business." This language was approved as correct in *Waters-Pierce Oil Co.* v. *Bridwell*, 107 Ark. 310, 155 S. W. 126.

There was no testimony warranting the giving of appellant's requested instructions Nos. 10 and 11, and the court did not err in refusing them.

The majority of the court has concluded that the verdict is excessive. It is true that no great amount of actual damages suffered was proved, but appellee was greatly humiliated and embarrassed at the store and suffered from nervous excitement and did not sleep well on the night the incident occurred or for several nights thereafter. The words being actionable *per se* however, appellee was entitled as a matter of law to compensatory damages, and was not required to introduce evidence of actual damages, it being necessary in such cases to prove special damages, which under the circumstances of this case the court has concluded should not be more than $2,500. The damages were probably aggravated by proof of the fact that the employees required the payment by appellee of $5 for a 10-cent can of pineapple, although the jury was instructed to disregard this fact, which the jury evidently believed she had no intention of stealing, and their action in forcing her to make a written statement that she had stolen the can of pineapple during the investigation of the matter when the slanderous statement was made.

If appellee will enter a remittitur reducing the amount of the judgment to said amount of $2,500, it will be affirmed; otherwise it will be reversed and remanded for a new trial. It is so ordered.

HUMPHREYS, J., dissents from modification.

McMAHON *v.* McNABB.

4-2810

Opinion delivered January 23, 1933.

Hardin & Barton and *Reynolds & Maze,* for appellant.

Patterson & Patterson and *Starbird & Starbird,* for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in the giving of certain instructions requested for the plaintiff Nos. 1, 2, 3, 4 and 5, it being contended that said instructions were erroneous in directing the jury to find in appellee's favor, if they found the facts as stated therein, without consideration at all or mention of the appellant's alleged defense of contributory negligence.

In instruction No. 4 the jury were told that, if they found the defendant was negligent or that his negligence was the proximate cause of plaintiff's injuries, "then it is your duty to return a verdict for the plaintiff." Objection was made specially to this instruction for the reason that it directed a verdict for the plaintiff without taking into consideration any issue of defense. There was a plea of contributory negligence, and the testimony was in conflict thereon. The court should not therefore have instructed the jury that they might find for the

plaintiff, and that it was their duty to do so without consideration of such issue, and erred in so doing. *Herring* v. *Bolinger,* 181 Ark. 925, 29 S. W. (2d) 676; *Newell Cons. Co.* v. *Lindahl,* 181 Ark. 272, 25 S. W. (2d) 1052; *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676; *Garrison Co.* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396; *Wisconsin-Arkansas Lbr. Co.* v. *Hall,* 170 Ark. 576, 280 S. W. 363; *National Gas & Fuel Co.* v. *Lyle,* 174 Ark. 146, 294 S. W. 395. This instruction also uses the words "safe transportation," when under the law the driver of an automobile is only bound to the use of ordinary care in the transportation of the passengers in his car and is not bound as an insurer for the safety of persons riding therein whether by sufferance or invitation.

Instruction No. 9 is objected to as assuming that defendant was negligent and allows the jury to find against the defendant even if the taxicab driver was negligent, etc., omitting entirely the issue whether the plaintiff himself was guilty of contributory negligence.

It was insisted in the oral argument that the specific objections to the instructions had not been properly made and should not be allowed for the reason that they were permitted to be written out by the trial court after the instructions were read to the jury, thereby depriving plaintiff of any knowledge of such objections before the conclusion of the trial and preventing him from consenting to or meeting such objections if he cared to do so and thus avoiding the errors, if any. The objections were permitted to be made however by the court, doubtless because he thought the instructions were not subject to the objections and that they were entitled to be given without regard to said specific objections. It is not complained that the objections were not made general or specific, as shown in the bill of exceptions, but only of the practice in permitting them to be made after the case had gone to the jury, which the bill of exceptions does not show was done.

Because of the errors already pointed out, it is not necessary to pass upon the question of the excessiveness of the verdict for damages, nor upon the admissibility of the testimony of certain witnesses as experts about nervous disorders, who did not claim to be qualified as experts to give opinions thereon, as these things will not likely occur upon the new trial.

For the errors designated the judgment is reversed, and the cause remanded for a new trial.

QUIRLES *v.* SMITH.

4-2801

Opinion delivered January 23, 1933.

C. T. Carpenter, for appellant.

KIRBY, J. This appeal comes from a judgment of the circuit court refusing to vacate and set aside a default judgment rendered herein.

The case was begun in the justice court as a suit on a note with an attachment issued. An affidavit and bond for attachment were filed and a writ of replevin was issued, it seems. The case was transferred to the court of common pleas on motion of the defendant's attorney, who failed to appear for his clients, and the default judgment against them and their bondsmen was rendered but was not entered on the judgment record of that court. Their attorney, Kelley, filed a motion to vacate the judgment, but withdrew it and took an appeal to the circuit court.

There was no record of the proceeding and no judgment of the court of common pleas, no note or copy of it and no mortgage transmitted to the circuit court.

On December 21, 1931, the circuit court affirmed the judgment of the court of common pleas by default, it being alleged that no evidence was introduced there nor a copy of the note upon which suit was brought, no judgment or docket entries of the court of common pleas, and no evidence to support the attachment and fix the damages. The defendants and their bondsmen learned of the judgment and at the adjourned day of the court on February 19, 1932, presented their motion to vacate the default judgment, which the court overruled, and this appeal is prosecuted from that order.

The motion to vacate the judgment was filed on the 21st day of January, 1932, and heard by the court at an adjourned day of the regular term on February 19, 1932. It was alleged in the motion to vacate that the defendants had employed and paid an attorney to defend the suit, but that he failed to attend the trial or notify the defendants and judgment was taken against them by default. It was alleged that the judgment was void because rendered without evidence and was but an affirmance of the judgment of the common pleas court, where no judgment was in fact entered of record; and that the defendants and their bondsmen have a good defense for the following reasons:

"(a) That the property was never attached; (b) that the affidavit calls for attachment but no order of attachment was issued but an order of delivery in its stead; (c) that the property was never taken under the order of delivery; (d) that the property, if attached or taken, was not worth over $25."

The court was requested to make findings of law and fact, but refused to do so and overruled and denied the motion to vacate the judgment. Appellants gave notice to opposing counsel on March 15, 1932, that the motion for a new trial would be presented on the 16th day of March, the court having adjourned. The motion was overruled, and an appeal granted.

It is urged that the court erred in not setting aside the default judgment on the ground of unavoidable cas-

ualty because defendants' attorney, duly employed, failed to appear and represent them at the trial or notify them that he would not do so or had not done so. The motion to vacate or set aside the judgment, however, did not set up a meritorious defense so far as the original defendants were concerned, but only stated that they had such a defense and specified that the bondsmen were not liable because the property was never attached, but an order of delivery was issued therefor, and that if the property was attached or taken it was not of the value of more than $25.

One seeking relief from a default judgment on the ground of unavoidable casualty preventing defense to the action, as here, must allege and show that he has a meritorious defense, it being held in some cases that such defense must not only be alleged but a *prima facie* showing of merit made in order that the court may determine whether he was injured by not being permitted to have benefit of it. *Lambie* v. *Rawleigh and Co.*, 178 Ark. 1019, 14 S. W. (2d) 245; *Smith* v. *Globe-Rutgers Fire Ins. Co.*, 174 Ark. 346, 295 S. W. 388; *United Order of Good Samaritans* v. *Brooks,* 168 Ark. 570, 270 S. W. 955; *Minick* v. *Ramey,* 168 Ark. 180, 269 S. W. 565; *Supreme Lodge of Woodman of Union* v. *Johnson,* 179 Ark. 589, 17 S. W. (2d) 323.

A mere allegation of having a meritorious defense is not a sufficient showing of such defense as would warrant or require the granting of the relief sought.

There was no abuse of discretion in the court's holding, and the judgment will be affirmed. It is so ordered.

MID-CONTINENT PETROLEUM CORPORATION *v.* SMITH.

4-2815

Opinion delivered January 23, 1933.

[redacted]

J. C. Denton, I. L. Lockewitz and *Dwight L. Savage,* for appellant.

John Mayes, for appellee.

MEHAFFY, J. On May 28, 1931, the appellees were the owners of an automobile service station in Fayetteville, Arkansas, and executed in writing a lease called the "Private Service Station Lease," for the period of from June 1, 1931, to June 1, 1934, and, on the same day the appellant executed to appellees a license called "Private Service Station License Agreement," for the same period of time. It was provided in each of the instruments that the appellant might revoke the license upon giving 10 days' notice, and might terminate the lease by giving a like notice and paying $5.

Some time about January 22, 1932, the appellant served notice upon appellees of the cancellation of the license. It did not undertake to cancel the lease. At the same time that it served notice of the cancellation of the license, it offered another contract to appellees, which they declined to accept.

In June, 1932, appellees filed this suit in the Washington Chancery Court for the cancellation of both the lease and license. It alleged, among other things, that they were procured by fraud. Considerable evidence was taken on the question of whether the lease was procured by fraud.

The property on which the lease was given was the homestead of appellees, and consisted of a two-story building, a portion of the first floor being occupied by a grocery, which extended the entire length of the building. There is a garage, and in front of the office and store building is the filling station. Appellees live above, occupying the whole of the second floor, and their dwelling extended over the filling station and land described in the lease.

Appellees are husband and wife, and the lease was not acknowledged by either.

Section 5542 of Crawford & Moses' Digest is as follows: "No conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same."

The only question we find it necessary to determine is whether the lease was void because it was not acknowledged by the wife, and, that being true, it is unnecessary to set out the testimony with reference to fraud.

Our Constitution provides for homesteads, and the section we have above quoted provides that no instrument affecting the homestead shall be of any validity unless the wife acknowledges the instrument.

It is contended by appellant that it is unnecessary for the wife to sign and acknowledge a lease where it does not interfere with the comfortable use of the property as a homestead. It says that a leading case on the subject is *Millikin* v. *Carmichael,* 139 Ala. 226, 35 So. 706, 101 Am. St. Rep. 29.

The statute of Alabama, however, is somewhat different from ours. It provides that no mortgage, deed, or other conveyance of a homestead by a married man shall be valid without the voluntary signature and assent of the wife, etc. Our statute makes invalid any instrument affecting the homestead, but the court, in the case of *Millikin* v. *Carmichael, supra,* said: "The authorities are not

uniform as to the right of the husband alone to lease the homestead premises, for this right has been both affirmed and denied. The most satisfactory rule would seem to be that the husband alone may lease the homestead lands for purposes not interfering with the use of the property as a homestead, but cannot do so when the lease interferes with such possession and enjoyment of the premises by the wife."

In that case the lease was to box and take from pine trees standing on the homestead gum or resin, and the court said that it did not deteriorate the value of the trees, diminish the value of the land, or otherwise impair its value as a homestead, but rather that its value was enhanced, and its use and occupancy as a homestead rendered more valuable.

Under statutes like the Alabama statute, it has been held, not only by the Alabama court, but by some other courts, that a lease like the one in the Alabama case, that in no way interfered with the occupancy of the homestead, did not require the signature and acknowledgment of the wife; but those cases all hold that, if it does in any way interfere with the use, occupancy and enjoyment of the homestead, the lease is void unless the wife signs and acknowledges same.

Taking gum and resin from pine trees in the forest would probably in no way affect the use or enjoyment of the homestead, whereas a stranger conducting a filling station right under the living rooms of the parties would certainly interfere with the occupancy and enjoyment of the homestead.

The same rule is announced in 15 A. & E. Enc. of Law, 674, and it is said in a note in the case of *Mailhot* v. *Turner,* 133 Am. St. Rep. 333, that a lease of the homestead property amounts to such an alienation as to render it void when executed by one of the spouses only, when it interferes with the possession and enjoyment of the premises as a homestead. If he may do so for a period of five years, as attempted in that case, he may continue

to lease the premises for a longer period, and even for an indefinite period.

If the parties could execute the lease in this case, they could do it for an indefinite period. If appellants could occupy the space in front of and under the floor where the parties were living without the wife's consent and acknowledgment, then a valid lease could be given on any part of the building occupied as a homestead. We know of no court, however, that has ever held that this could be done.

In the case of *Bacon* v. *Mirau,* 148 Minn. 248, 180 N. W. 579, cited and relied on by appellant, the court said: "In this case the lease was of a business appendage, not a part of the residence, and the lease of it in no sense interfered with the family occupation, but added to the family income."

Not only is our statute different from the statutes construed in the cases relied on by appellant, but this court has said, with reference to an oil and gas lease affecting the homestead: "In this connection it may be stated that under our statute no conveyance or other instrument affecting the homestead shall be of any validity except in certain enumerated cases, unless the wife joins in the execution of the instrument, and acknowledges it." *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34.

Under our statute, no instrument affecting the homestead is valid unless the wife joins in the instrument and acknowledges the same, and this is true, although it might not interfere with the occupancy and enjoyment of the homestead.

In the last case referred to, the court was discussing a gas and oil lease, and held in that character of lease that the wife must join and acknowledge to make it valid.

Any instrument affecting the homestead must be acknowledged by the wife, and, if not, such instrument is void.

The decree of the chancery court is affirmed.

HAYNIE *v.* CAMDEN GAS CORPORATION.

4-2807

Opinion delivered January 23, 1933.

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

McHANEY, J. This appeal is prosecuted from an order of the circuit court denying the petition of appellants for an attorney's lien under § 628, Crawford & Moses' Digest. The petition was filed in a proceeding tried in the circuit court, wherein the Camden Gas Corporation was plaintiff and the city of Camden, the mayor, and members of the city council were defendants, in which plaintiff sought to enjoin the enforcement of a city ordinance lowering gas rates in said city to domestic consumers of gas. In that case the mayor, by authority of the council, employed appellants to represent the city and the domestic consumers of gas as attorneys in that litigation. The ordinance fixing the maximum rates to be charged domestic consumers was adopted April 1, 1929. The Camden Gas Corporation refused to accept the new rates fixed by said ordinance, and brought suit attacking its validity. An injunction was issued suspending the new rates, and a bond was given by the gas corporation guaranteeing a refund of the difference to domestic consumers between the old rates and the new, in the event it was finally determined the ordinance of April 1 was valid. The ordinance was sustained. See *Camden Gas Corporation* v.

Camden, 184 Ark. 34, 41 S. W. (2d) 979. The result was that during the pendency of that litigation there was a fund accumulated in the hands of the Camden Gas Corporation in the sum of $17,819.17, for which amount judgment was rendered. The judgment reads: "That the defendant, city of Camden, Arkansas, do have and recover of and from the plaintiff the sum of $17,819.17 for the use and benefit of the domestic consumers of gas within the city of Camden, Arkansas."

At a mass meeting of the domestic consumers of gas, an agreement in writing was reached between appellants, and nearly all the domestic consumers, whereby appellants were allowed a fee of 20 per cent. of the money due the consumers as a refund from the gas company. However, this petition for a lien was filed. The Camden Gas Corporation is ready, willing and able to pay, but one consumer, for himself and others, filed objection to the claim of lien on the ground that appellants had no contract with the consumers, either express or implied, but their contract was with the city, and not for or on behalf of the consumers; that, if the city employed them on behalf of the consumers, its act was *ultra vires,* null and void and not binding on the consumers. It was admitted by the intervener that appellants were employed by a large number of the domestic consumers, but says said employment was a voluntary arrangement between them, which did not affect the rights of those consumers who did not employ them. The court held appellants were not entitled to a lien on the fund due interveners, and dismissed its petition.

Every act of the mayor and members of the council in the defense of the action to nullify the ordinance, including the employment of attorneys, was on the behalf and for the benefit of the domestic consumers of gas in the city of Camden. Not a single cent of benefit did accrue or could have accrued to the city of Camden, as a corporation. If the new rates fixed in the ordinance of April 1, 1929, were sustained, all the benefit therefrom would accrue to the domestic consumers. The bond given was

for their benefit, and the final judgment rendered was one in favor of the city "for the use and benefit of the domestic consumers of gas." The city employed counsel to defend an action, not for its benefit, but for the benefit of these consumers, with their knowledge, and, if not with their actual consent, with their implied consent. In other words, the action of the city was as the representative or agent of the consumers who stood by and, without objection, accepted the service and its beneficial result. Under such circumstances the law implies an agreement, or that the agreement made by the city in employing counsel had been ratified. In either case the domestic consumers would be liable to pay counsel for their services a reasonable fee, and, if any should refuse to do so, the court should declare a lien on the fruits of the litigation. Compare *Board of Education of Lonoke County* v. *Lonoke County,* 181 Ark. 1046, 29 S. W. (2d) 268.

The judgment will be reversed, and the cause remanded with directions to declare a lien in appellant's favor to the extent of 20 per cent. on the fund in the hands of the Camden Gas Corporation.

MASSACHUSETTS PROTECTIVE ASSOCIATION *v.* ODEN.

4-2816

Opinion delivered January 23, 1933.

Frank L. Harrington and *Cravens & Cravens,* for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

McHaney, J. In June, 1922, appellant issued to appellee its policy of accident and health insurance, by which it agreed to pay him $50 per week for total disability caused by sickness for a total period of 60 weeks. The application for the policy was taken in Fort Smith and forwarded to appellant at its home office in Massachusetts, where the policy was promptly issued. The application provided for a quarterly premium of $43.25 until he was fifty years of age, and thereafter a quarterly premium of $45. This application was changed at the home office to show a quarterly premium up to fifty years of age of $46.25 and thereafter of $53.75, and the policy as issued contained or called for these amended amounts as quarterly premiums, and attached to the policy was a letter calling appellee's attention to such changes. The policy, with letter attached was forwarded by appellant to its agent in Fort Smith for delivery to appellee. It was accepted by him, and the premium was paid according to such changed amounts, and has been continuously paid since that time. Also attached to the policy is what is called a "continuous disability rider," which reads as follows: "If total disability resulting from disease and arising thereunder prior to the insured's sixtieth birthday continued beyond the sixty weeks described in clause 1 of the attached policy, the weekly indemnity provided for by clause A of said policy shall continue to be payable to the insured so long as he thereafter lives and is continuously totally disabled and necessarily confined within the house under the care of licensed physician. In all other respects the terms, provisions and conditions of said policy remain the same."

More than sixty weeks prior to August 1, 1931, appellee became totally disabled, being afflicted with heart trouble, known as myocarditis, for which appellant paid

to him $50 per week for sixty weeks, which expired August 1, 1931, and thereafter it refused to pay under said "continuous disability rider," although demanded so to do, because it claims appellee was not "necessarily confined within the house," as provided in or within the meaning of said rider. Suit was thereafter brought to collect the accumulated benefits which had accrued under said policy, which resulted in a verdict and judgment in appellee's favor with penalty and attorney's fees.

For a reversal, appellant first insists that the evidence is insufficient to entitle appellee to recover. It admits that he is totally disabled, was so during the sixty weeks for which it paid up to August 1, 1931, and still is. But it says, in order for him to be entitled to recover under said rider for continuous disability, he must not only be totally disabled, but must be confined within the house as a necessary result of his sickness. In other words, it is contended that he was not "necessarily confined within the house." This contention is based on the fact that appellee, under the advice of his physicians, took frequent short automobile rides, in favorable weather, for fresh air and sunshine; that he also, under the same advice, took a train trip to the seashore at Corpus Christi, Texas, for a change of climate and for the salt air; and that he made an automobile trip to Monticello, Arkansas, to spend Thanksgiving with relatives and friends. This evidence, of course, shows that he was not confined within the four walls of his house for every minute of the day. But does it show such a break in confinement as to preclude a recovery as a matter of law? We do not think so, and we think the case is ruled on this point by the previous decisions of this court in *Great Eastern Casualty Co.* v. *Robins,* 111 Ark. 607, 164 S. W. 750, and *Interstate Business Men's Accident Association* v. *Sanderson,* 144 Ark. 271, 222 S. W. 51. In the former case the clause under consideration was, "and shall necessarily and continuously confine him within the house"; while in the latter it was, "that the disease shall compel the insured to remain continuously and strictly within the

house," etc. In the former or Robins case the trial court instructed the jury that "a continuous confinement within the meaning of this instruction does not mean that the plaintiff, in order to be entitled to this benefit, must have actually been confined within the walls of a house every minute or hour," and that "the mere fact that he went out occasionally and at stated intervals for the purpose of taking exercise and fresh air, under the instructions of his physician, would not be sufficient to prevent plaintiff from recovering in this action." This instruction was approved by this court. A number of cases from other courts are cited to the same effect. In the course of its opinion, the court said: "The contract is couched in the language of the insurer, and it would be following too much the letter of it to say that temporary excursions from the house upon the advice of a physician for the purpose of treatment, take the case outside of the terms of the policy. That would be a very strained construction of the language of the policy, and would defeat its very purpose." In the Sanderson case, *supra,* the court held that it was ruled by the Robins case and followed it on the construction of the language quoted. The case now under consideration is not distinguishable from those. The facts are quite similar, and the law is the same. Of course, as said in the Sanderson case, and as the court instructed the jury in this case, if the disease is such as to require the insured to remain out of the house, he could not recover, as the insurer has the right to dictate the terms upon which its risk is assumed. "But," as said in the Sanderson case, "short trips away from the house for purposes necessary to bring beneficial results to the health of the insured does not take the case out of the operation of the language of the policy which requires confinement to the house."

It is next insisted that the policy and rider constitute a Massachusetts contract, and that the courts of said State have placed a different construction on the language used than the foregoing, and hold under such circumstances there is no liability. The case of *Rocci* v. *Mass.*

Acc. Co., 222 Mass. 336, 110 N. E. 972, is cited. We will not here determine what the Supreme Court of Massachusetts has decided in the premises, for we are convinced that, under the facts heretofore detailed, this is an Arkansas contract. The application was changed at the home office so as to increase the rates named therein; the policy was issued based upon the increased rates; it was sent to its local agent in Fort Smith for delivery to appellee; and it had to be accepted by him and at least the additional premium paid by him in Fort Smith before any binding contract was made. It became a completed contract upon delivery, acceptance of the policy, and payment of the premium, all of which occurred in Arkansas. Therefore it was an Arkansas contract and governed by its laws. *Scaife* v. *Bird,* 39 Ark. 568; *Cage* v. *Black,* 97 Ark. 613, 134 S. W. 942; *Garnet Carter Co.* v. *Carver,* 132 Ark. 305, 200 S. W. 984; *Connor* v. *Excess Ins. Co.,* 51 Fed. (2d) 626.

Complaint is also made of the action of the court in giving appellee's instruction No. 3 and in refusing to give appellant's requested instruction No. 4. What we have already said disposes of these assignments. No. 3 was similar to that given in the Robins case, which was there approved, and No. 4 was properly refused.

Other assignments are argued, which we have carefully considered, and find them without merit. We think it unnecessary to discuss them, and to do so would unduly extend this opinion.

We find no error. Affirmed.

WOLFF *v.* ALEXANDER FILM COMPANY.

4-2828

Opinion delivered January 23, 1933.

P. S. Seamans, for appellant.

A. R. Cooper, for appellee.

McHaney, J. Appellee contracted in writing with appellant for the rent of "a series of advertising films for a continuous period of twelve months from the date the first film is shipped," to be screened in the Siegel Theatre of McGehee at a cost to appellant for screening of $10 per month. He also agreed to pay appellee for rent of the advertising films in installments of $15 per month, the first to be and was paid at the date of the contract, March 7, 1930; the second to be due and payable 30 days after the first shipment of service, and the others every 30 days thereafter, covering twelve months. The first shipment of film service was April 5, 1930, and the service was thereafter continued as per contract until said theatre was closed, about May 20, 1930. Thereafter, on July 30, 1930, the theatre was reopened by Mr. Baradel under the name of the Ritz Theatre. Shipments of film service was then continued to the Ritz Theatre, which screened the films under agreement between appellee and Baradel that a monthly charge of only $7.50 should be made to appellant. This new arrangement with the Ritz was brought to the attention of appellant by appellee, and he made no objection thereto. These shipments continued to September 20, 1930, when they were suspended by appellee because appellant had breached the contract by refusing to pay it the rental price of $15 per month.

The contract provides that "the film company may, in case of delinquency in payments, suspend service until such payments are made." Upon appellant's refusal to proceed further under the contract, or to pay therefor, this suit was instituted for the recovery of $150, the balance due, appellant having paid the cash payment and one installment of $15. Trial before the court sitting as a jury resulted in a judgment for appellee for the amount sued for with interest.

For a reversal of the judgment, it is first urged that the closing of the Siegel Theatre terminated the contract, and that the evidence fails to show it was thereafter revived. We think appellant is wrong in both contentions, but, assuming without deciding that the closing of the Siegel Theatre did terminate the contract, we are of the opinion that the evidence is sufficient to support the judgment of the court on the finding that it was thereafter revived. The evidence shows that, after the opening of the Ritz Theatre, appellee arranged with Mr. Baradel to screen the same film service for $7.50 per month, a cost to appellant of $2.50 per month less than was to have been paid to the Siegel, and that appellant was immediately notified of such arrangement and made no objection thereto. The films were thereafter exhibited at the Ritz with his knowledge and without objection, and it is admitted that he made at least one payment to the Ritz. The proof further shows, viewed in the light most favorable to appellee, as we must do, that he promised appellee that he would pay, would mail his check in payment for the service under the contract. This conduct on appellant's part is strong evidence of a waiver of the right to insist on a breach, and this court has many times so held. In *Clear Creek Oil & Gas Co.* v. *Brunk,* 160 Ark. 574, 255 S. W. 7, we said: "The principle is elemental that one party to a contract who, with knowledge of a breach by the other party, continues to accept benefits under the contract and suffers the other party to continue in performance thereof, waives the right to insist on a breach"—citing cases. This principle applies here

in bar of the right of appellant to insist on a breach when sued for the price of the service agreed to be rendered.

It is next urged that the court erred in rendering judgment for the full amount of rentals less payments, as that is not the correct measure of damages. That was not an issue in the court below. Appellant defended on the sole ground of a breach of the contract. The question of the measure of damages was raised in the motion for a new trial for the first time. Since it was not an issue in the court below, it cannot be considered here on appeal.

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

TEMPLE *v.* TOBIAS.

4-2827

Opinion delivered January 23, 1933.

Bridges, McGaughy & Bridges, for appellant.

Isaac McClellan and *Wm. J. McClellan,* for appellee.

MEHAFFY, J. On March 4, 1932, John Temple filed suit in the Grant Circuit Court against T. C. Tobias and Eva Tobias, alleging that he was the owner in fee simple and entitled to the immediate possession of certain described lands; that the defendants wilfully and without right were holding over said lands after the termination of the time for which they were demised to them, and wilfully and unlawfully holding possession of said lands after written demand for delivery of possession; that the reasonable rental value of said lands is $100 per year; that the defendants have not paid any rental for the year 1931.

He prayed for a writ of unlawful detainer, for judgment for possession, for $100 rent, and costs.

Bond was filed on March 5, 1932, and on the same day the appellees entered into and filed a bond that they would perform the judgment of the court.

The appellees answered, denying each of the allegations of the plaintiff's complaint, and alleging that the lands belonged to T. C. Tobias, and have belonged to him for many years, where he has lived in the peaceable possession of same, and is still in possession, and no one has ever claimed title or possession until this suit.

On April 18, appellant, B. T. Burkett, filed suit in the same court, alleging that he was the owner of the lands described in plaintiff's complaint, and that the appellees had conveyed the land to John Temple on April 14, 1926, and on April 3, 1931, Temple and wife had conveyed the lands to Burkett. He also alleged that the defendants were in possession of the premises.

The appellees answered Burkett's complaint, denying the allegations, and denying that they had conveyed the land to Temple. They further stated in the answer to Burkett's complaint that he gave to John Temple a mortgage, or what he understood was a mortgage, for an account due Temple for merchandise; that he had traded with Temple for many years, and had given him mortgages from year to year before this, and that Temple represented to him that this was a mortgage; that, while he had traded with Temple for many years, he went to him in the spring of 1927, and Temple told him he would have to get furnished elsewhere; that he had kept the lands described and lived on them and cultivated them, and no one had ever claimed any rights or title to them until Temple's suit was brought, and then Temple informed him that, instead of making a mortgage in 1926, he had made a deed; that it was not his intention to make a deed, and Temple had told him it was a mortgage; that Temple had died since he brought his suit, and that Burkett's complaint alleged that he bought the lands from Temple a year before Temple's death, and that the claim

was fraudulent and void; that the deed mentioned was a mortgage, was intended to be a mortgage, and was so understood by him, and was so represented by Temple; that five years has run without any payments being made on said indebtedness, and that defendant pleads the statute of limitations of five years, and asks that said deed be held as a mortgage, and set aside and held for naught.

There was a prayer also that the case of Burkett be consolidated and tried with the case of Temple, and both complaints be dismissed.

The case brought by Temple was, after his death, revived in the name of Susie B. Temple. Appellants filed motion to transfer to equity, which was overruled, and the parties announced ready for trial.

There was a verdict and judgment for defendants, and the case is here on appeal.

It will be seen from the pleadings that Temple deeded the place to Burkett on April 3, 1931. Temple's suit was begun March 4, 1932, not quite a year after the deed.

The undisputed evidence shows that Burkett purchased the lands while the appellees were in possession, occupying the place as a homestead, as they had for many years.

S. M. Burkett, the father of appellant, testified that he bought the lands in the fall of 1930 for his son; that Mr. Temple furnished him an abstract; that Temple dealt with witness as agent for his son, and that, after he got the abstract, he paid $100, and that his son gave five notes for the rest of the purchase money. He introduced the deed from Temple, which was a warranty deed, retaining a vendor's lien for the payment of $430.16 unpaid purchase money; that the notes were afterward paid off. He testified that he knew nothing about Tobias claiming the lands; all he had was the abstract. He said Tobias told him that he signed a paper, but that he was signing for something to eat. This conversation was after the purchase by Burkett.

He further testified that both he and his son knew that Tobias was living on the land, but they went by the

abstract. Tobias was notified as soon as his son purchased the land. Tobias refused to give possession. He did not know that Temple owned the land until he saw the abstract. Tobias was in possession, but Temple told Burkett he had rented it to Tobias.

It was agreed that Temple was dead, and that Ezell, who acknowledged the deed, is also dead.

It will be seen from the above evidence that Burkett knew at the time he purchased the lands that the appellees were in actual possession, and he therefore purchased with notice of appellees' equities, and is bound thereby.

In a somewhat similar case, where there was a party in possession, a purchase was made, although the purchaser did not have actual notice of the occupancy of the place, and this court said:

"She purchased without any actual notice of appellee's occupancy, and appellee did not place a deed of record until after the sale to Mrs. Thalheimer. But she was informed by Smith that he had previously sold forty acres to appellee, and when she purchased appellee was in actual, open and visible possession of eight acres of the land which Smith conveyed to her. Such possession was equivalent to actual notice of the title, rights or equities of the occupant." *Thalheimer* v. *Lockert,* 76 Ark. 25, 88 S. W. 591.

Burkett, the purchaser, with appellees in possession of the lands purchased and holding adversely, acquired no greater title than Temple had. He was not an innocent purchaser. *Crawley* v. *Neal,* 152 Ark. 232, 238 S. W. 1054; *Naill* v. *Kirby,* 162 Ark. 140, 257 S. W. 735; *Reed* v. *Ziff Lodge No. 119, Order of Masons,* 175 Ark. 979, 1 S. W. (2d) 1000; *Midland Savings & Loan Company* v. *Brooks,* 177 Ark. 470, 6 S. W. (2d) 828.

Whatever rights Burkett acquired by his purchase depended upon the rights of Temple, and, if Temple did not have title to the property, Burkett did not have, because Tobias' occupancy of the premises was notice to Burkett of whatever rights and equities Tobias had.

Appellants contend that the court should have given the peremptory instruction for possession of the property, or should, under the undisputed testimony, have declared a lien upon the property, and cites and relies on the case of *Sturdivant* v. *McCorley,* 83 Ark. 278, 103 S. W. 732. It is insisted that that case is conclusive of all the questions involved here.

That case was in chancery court, and the undisputed evidence showed that the son borrowed money from his father and gave him an absolute deed to the land, under an oral promise from his father that he would reconvey so soon as the money was paid. The court held that, as no time was fixed for the payment of the money, it was due on demand, and the statute of limitations began to run immediately; but it also held that the title to the land was in the grantee, and that he had a right to bring an action at law to recover the possession, and, as the deed was absolute in form without written defeasance, the defendant could not show the parol agreement to reconvey; and, as the defendant had not held the land adversely for more than seven years, the grantee or his heirs could recover possession, unless the defendant set up an equitable defense that the deed was in equity a mortgage. The court also held that when he did this he would be met by the equitable principle that he who asked equity must do equity, and that the court would interfere only on condition that the debt be treated as a valid lien on the land; that the statute of limitations as to mortgages did not apply to equitable mortgages, evidenced by absolute deeds without any written defeasance.

This court has repeatedly held that, when a deed, absolute in form, was given as security for debts, the statute of limitations as to mortgages does not apply, and that, when suit is brought for the possession of the land by the grantee, the grantor cannot show that the deed was intended and was in fact a mortgage to secure debt, and defeat the grantee's action, by pleading the statute of limitations. In other words, he cannot defeat the action without paying the debt.

This doctrine seems to be supported by the weight of authority, but, so far as we have been able to discover, all the cases hold that this is because the grantee has title to the land.

In this case Temple brought suit claiming to be the owner of the land and entitled to possession and rent for the year 1931. He claimed that he was the owner and had title under the deed from Tobias and wife, dated April 14, 1926. He, however, deeded the land to Burkett on April 3, 1931, and the suit was not brought until March 4, 1932, nearly a year after he had conveyed the land to Burkett and been paid for it, and he had no title or interest in the land at all at the time he brought suit.

According to the undisputed testimony in this case, it was not the intention of the parties to take a deed absolute in form for the purpose of securing indebtedness, but that the deed was acquired by Temple fraudulently, and that he told Tobias at the time that it was a mortgage.

If there had been a deed for the purpose of securing a debt, and it had been the agreement and understanding that it was for this purpose, then the cases referred to by appellant would apply. But, if the evidence of appellees is true, this deed was procured by fraud, and was absolutely void. It is only where the parties agree to make a deed to secure a debt that it will constitute an equitable mortgage.

In the motion to transfer, made by the appellants, they did not claim that the instrument was a mortgage, but said that the answer in the consolidated cause stated grounds of defense cognizable only in equity, and that, in substance and effect the answer asked that the deed executed by defendants be reformed to read as a mortgage.

This was a suit in unlawful detainer for the possession of property and rent, and this court has many times held that a defendant may set up or plead all the defenses he may have, both legal and equitable. The defendant in this case alleged that he did not give a deed to Temple, that it was never intended that he give a deed, and that Temple himself said that it was a mortgage, and his

prayer was that both complaints be dismissed and the title vested in him. That is, his contention was that the deed relied on by Temple was void, and this was a legal defense to plaintiff's cause of action, a defense in a court of law, as well as in a court of equity.

If the evidence of appellee is true, Temple could not fraudulently procure a deed, and then, when the deed was held invalid, take advantage of his own wrong and have it declared a mortgage.

Appellant's contention all the way through the lawsuit was that it was not a mortgage, but a deed. Certainly there was no equitable mortgage as is discussed in the case of *Sturdivant* v. *McCorley, supra.*

Under the pleadings in the case, it was not contended by appellants that Tobias owed anything, but it was contended that the property did not belong to him because he had conveyed it.

If there had been a mortgage, the right to foreclose would have been barred when the debt was barred.

Appellant calls attention to some other cases which are, in effect, the same as *Sturdivant* v. *McCorley, supra,* but in all of them that we have examined, they were discussing deeds intended as mortgages.

Temple could not have had any intention that the deed should be a mortgage, but he intended it as an absolute deed, and actually conveyed the lands to Burkett, nearly a year before the beginning of the suit, and, so far as the evidence shows, never at any time said anything to Tobias about conveying it.

Therefore, under the evidence, there can be no conclusion other than that Temple did not take this deed to secure a debt, but to acquire title to the lands.

Appellant requested the court to instruct the jury in effect that, if Tobias signed the instrument believing it to be a mortgage, its verdict would be for the defendant for possession of the land, subject to a lien of $1,477, with interest, to be enforced by appropriate orders of the court.

The court modified this instruction by adding the following: "unless you further find that the statute of limitations has run against plaintiffs, Temple and Burkett, as defined in other instructions given in this case."

It is contended that this modification by the court was error because it has no application under this type of mortgage. As we have already said, appellants contended that this was a deed conveying the land to them, not intended as a mortgage, and, according to appellees' testimony and the finding of the jury, the deed was void, and was not an equitable mortgage.

Therefore the instruction requested by appellants was erroneous, and there was no error in the modification by the court.

The court, at the request of the defendants, gave the following instruction: "The jury is instructed that the plaintiff must recover upon the strength of his own title and not on the weakness of the title of the defendant, and if you believe from the evidence that the plaintiff has failed to establish a good title within himself, then he cannot recover in this action, and you should find for defendant."

Appellants' objection to this instruction was that the undisputed evidence established plaintiff's muniments of title, and that the burden was on the defendants. But the court gave instruction No. 3 at the request of appellants, which was as follows: "If you find from all the evidence that the deed made by the defendants to plaintiff in 1926 was intended as a mortgage and the defendants signed it under that belief and understanding, then you will find the title to the lands in controversy in Tom Tobias, regardless of any amount that may be shown he owes plaintiff."

There was no conflict between these instructions, and instruction No. 1, given at the request of appellees, is a correct statement of the law.

Appellants also objected to instruction No. 3, given at the request of the appellees, which told the jury that, if the deed was intended as a mortgage, and the defendants

signed it under that belief and understanding, they would then find the title to the lands in controversy in Tobias, regardless of any amount that he might owe. This instruction, we think, is a correct statement of the law. If appellee thought he was signing a mortgage, but, by reason of the false and fraudulent representations by Temple, he was induced to sign a deed instead of a mortgage, the deed would be void, and the appellants would not be entitled to recover.

Temple could not recover in this case in any event, because the undisputed evidence shows that, even if the deed to him had been valid, he had conveyed the land and had no interest whatever in it.

Appellants also object to instruction No. 4, given at the request of the appellees, because they say it tells the jury that defendants may recover if they held the lands adversely for more than five years after the deed. The instruction tells the jury, if it was executed as a mortgage, then the statute would begin to run from the date of the alleged deed. They object to the instruction also because they say it disregards their theory that the instrument was a mortgage given to secure a current account, and was not barred for that reason.

In the first place, that was not the theory of the appellants. Their theory was that it was not a mortgage; that it was a deed, and that it was intended to be and was executed as a deed.

As to whether the deed was procured by fraud, and as to whether the debt was barred by the limitations, were questions of fact submitted to the jury at the request of both parties, and the jury's verdict on these matters is conclusive.

We find no error, and the judgment is affirmed.

MUTUAL LIFE INSURANCE COMPANY *v.* MARSH.

4-2804

Opinion delivered January 23, 1933.

Frederick L. Allen, Rose, Hemingway, Cantrell & Loughborough, for appellant.

Martin & Martin, for appellee.

BUTLER, J. Action by appellee for total disability under the provisions of a policy issued by appellant. Judgment in the court below, from which is this appeal.

1. The appellant, Mutual Life Insurance Company, is a foreign corporation with its domicile in the State of New York, and the appellee is a citizen of this State. The amount sued for was $3,000 and attorney's fee. It is the contention of the appellant that the prayer for attorney's fee made the amount sued for more than $3,000, exclusive of interest and costs, within the meaning of the Federal statute, and on that theory, in apt time, filed its petition for removal of the cause to the United States District Court in the proper district. The court overruled that motion, and this action of the court is the first assignment of error urged upon our attention.

Counsel for appellant has cited a number of cases which support their view, but this court has recently had the identical question before it in the case of *Missouri State Life Ins. Co.* v. *Johnson, ante* p. 519, and ruled against the contention here made. On the authority of that case, we hold that the assignment urged is not well taken.

2. That portion of the policy involving the question of disability and the rights and duties of the parties in respect thereto is that, upon due proof to the company by insured "that he has become totally and permanently disabled by bodily injury or disease so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation," during the continuance of the disability, and, after proof made, the payment of premiums accruing thereafter will be waived by the insurer, and it will pay to the insured a monthly income of $10 for each $1,000 of the face value of the policy, the first premium being due on receipt of said proof, and subsequent payment on the first day of each calendar month thereafter; that, after proof had been made and accepted, the insured nevertheless was required, no oftener than once a year, on demand of the insurer, to furnish proof of the continuance of the disability, and the right was reserved, if it should appear to the insurer that the insured had become and was able

"to perform any work or follow any occupation whatever for gain or profit, no further premium shall be waived, and no further income shall be paid."

The policy was for $2,000, issued on January 18, 1922; the premiums were regularly paid on or before their due date, and it was in full force and effect on July 28, 1926, the date of appellee's injuries. Thereafter, appellee made claim and furnished due proof of total and permanent disability occasioned by his injuries; the claim was allowed, and the insurer made the disability benefit payments of $20 per month to the insured regularly until and for the month of December, 1930. Ascertaining that the insured had been elected to the office of circuit clerk of Nevada County and was inducted into office on January 1, 1931, the insurer declined to make any further payments, on the ground that the insured was no longer permanently disabled within the meaning of the policy, but was able to work and engage in a gainful occupation.

At the time of the injuries received by the appellee, he was a traveling salesman for a drug company. As a result of his injuries, his right arm is totally paralyzed, his right leg, because of fractures it sustained, has become shorter, and its function impaired so that he uses it with pain and difficulty, and it is not more than 25 per cent. efficient. At the time of the trial of this cause and before, at intervals of about sixty days, a sinus develops in the upper part of the leg, causing appellee to run a high temperature and requiring his confinement in bed for a period of about two weeks. It was necessary at these times that the sinus be opened to allow drainage. After the sinus was thoroughly drained, he begins to feel better, and can get around for a while until the sinus develops again. On the right heel there is a constant sinus which causes appellee discomfort. He is unable to walk without the use of a cane, and is obliged to wear a shoe specially constructed to fit the right foot because of the shrinkage of the bone from the fracture.

It is conceded that appellee's physical condition is permanent, and such as is calculated to lessen his power of resistance and to destroy his vitality. His mental powers have not been affected by his injury, and his mind is as it was before the date of the accident. In the summer preceding the election he was able to, and did, conduct an active compaign for office; he went around the country in a car, having some one to drive for him, making the rounds with the other candidates and making frequent speeches to the voters, and was not seriously ill during the campaign. The appellee is not able to do any physical work in connection with his office, which requires a considerable amount of physical labor. The office is conducted by means of deputies. It is on a fee basis, and from the fees received the appellee pays for the deputies needed. He is able to sign his name with his left hand, and spends the time sitting around the office, giving it his general supervision. It appears that, with the exception of signing his name, the appellee is unable to do anything of a substantial nature in his office; and, while he is able to go to the office daily and usually to remain during office hours, some two or three times a week he is obliged to leave and go home about two o'clock because his injured leg requires rest. Although he conducts the office by deputies, he has received, in addition to the salaries paid to them, a substantial sum from the time he went into office until the date of the last trial in the court below.

From these facts, which are undisputed, it is strongly insisted that a case arises where the injuries, though great, and the disabilities, though serious, do not bring them within the nature of such as were contemplated when the policy was issued, and counsel do not believe a single case can be found where a recovery under such conditions has been sanctioned. It must be conceded that this is a unique case, and it is to be doubted whether one similar in all its circumstances has been before the courts. We do not agree, however, with the theory held by the appellant, for, if we adopt it, no case of total disability can arise

except where not only the body is disabled, but the mind wrecked as well. No matter how seriously the body may be affected, there are those who, because of some peculiar ability or because of some happy chance, are still able, despite their handicap, to escape from beggary and to earn a living. Cases are not infrequent where men have been stricken totally blind and yet have earned substantial incomes; some, with their bodies totally disabled, have been able to conduct a successful business from the bed in which they are continuously confined; others, because of fortuitous circumstances, have been placed in a position where they were removed above want. These cases all arise, however, because of the possession of some extraordinary capacity or of some fortunate circumstance. Certainly, no cases of this character were in the minds of the insured or the insurer when the contract was entered into, but only the ordinary and usual events that would affect the ordinary person.

In construing contracts such as the one now before us, it has always been insisted by the insurer that a strict and literal interpretation is required, and a few courts have adopted this view. The great majority, however, decline to do so, on the theory that a fair intention of the parties is that the insured should receive indemnity when he is so injured as would prevent him from carrying on any business which, without the injury, he is able to do or capable of engaging in. In the case of *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, the following rule was announced: "In the construction of all contracts, the true object is to arrive at the intention of the parties; and, in order to do that, it is necessary to take into consideration the purpose of the parties in making the agreement. In construing such a provision as is involved in this policy, that meaning should be given to the language which will be consistent with the fair import of the words used, having reference to the object and purpose of the parties in making the contract. The contract sued on is like any other insurance policy, and its provisions should therefore be con-

strued most strongly against the insurer. As the language employed is that of the defendant, a construction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one."

In the instant case, it is undisputed that practically none of the essential duties of the office of circuit clerk is performed by the appellee. He merely sits around as long as his injuries will permit, signing his name and filing a few papers.

"This court has held that provisions in insurance policies for indemnity in case the insured is totally disabled from prosecuting his business do not require that he shall be absolutely helpless, but such a disability is meant which renders him unable to perform all the substantial and material acts of his business, or the execution of them in the usual and customary way. * * * The object to be accomplished was to indemnify the insured for loss of time for being wholly disabled from prosecuting his business. It has been well said that, if the language used was to be construed literally, the insurer would be liable in no case unless the insured should lose his life or his mind. Of course, as long as he is in possession of his mental faculties, he is capable of transacting some part of his business; but, as we have already seen, he was not able to prosecute his business within the meaning of the policy unless he was able to do all the substantial acts necessary to be done in its prosecution. The very purpose of obtaining the policy was to indemnify him in case he should become disabled, so that he could not carry on his business." *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310, (quoting from pages 500-1). In that case Spencer, the insured, was engaged in the truck and produce business, and prior thereto had taught school and farmed. For several years he had suffered with sacroiliac arthritis and sciatic neuritis, which had disabled him to some extent, but finally he became so disabled that he could do but little work. He could walk around, but was unable to do anything in his place of business except sit around a part of the day answering the telephone and

advising with his sons as to the conduct of the business. The contract of insurance in that case was practically the same as in the case at bar, and it was there held, under the rule stated, Spencer was entitled to recover. The rule announced was recognized in *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600, and in *Travelers' Protective Ass'n* v. *Stephens, Id.,* 660, 49 S. W. (2d) 364.

If the appellee had been circuit clerk at the time he was disabled, the fact that he could go to his office and sit around and sign his name would certainly not have precluded him from obtaining the benefits for which he had contracted and paid. We can see no difference in his having obtained this office after the disability than in the state of case supposed, and we do not think that an office such as that of circuit clerk was in the mind of the parties at the time of the contract, or, under the facts in this case, that it comes within the term, "gainful occupation." It has no degree of permanence, and in this particular case appears to be, so far as the appellee is concerned, a sinecure bestowed upon him perhaps because of his infirmities by an indulgent people. In any view of the case, since the appellee is not able to perform all of the substantial duties of the office in the usual and customary way, he is totally disabled within the rule announced in the case of *Ætna Life Ins. Co.* v. *Spencer, supra,* and, as the facts are not in dispute, the court properly directed a verdict for the plaintiff.

3. The court instructed the jury on the question of damages to the effect that, if they found that the appellee was totally and permanently disabled within the meaning of the policy, they might return a verdict for a sum equal to the present value of the monthly benefits payable monthly during the period of appellee's life expectancy. The appellant contends that this was error, and in this contention we agree. The general rule permitting recovery on the theory of anticipatory breach is stated in Richards on the Law of Insurance, 4th ed., p. 580, § 342, as follows: "By the weight of authority, if the insurer renounces the continuing contract of insurance, upon his

part, and unequivocally refuses in advance of its maturity to perform it, the insured may at his option take the insurer at his word. The insured is then relieved of the duty of further performance on his part, and may maintain an action at law for damages, before the specified date of expiration. * * *

"Especially is the rule clear where the insurer not only repudiates the contract by his declaration that he will not pay in future, but also violates a present obligation under the contract, by refusing to accept a premium when due. It would indeed be a harsh doctrine that compelled the insured to struggle on paying premiums all his life or tendering premiums to an unfriendly insurance company, in constant apprehension of a lawsuit in place of an immediate cash payment, as his family's inheritance upon his own decease. The insurer's refusal to perform his promise, however, must be distinct, unequivocal and absolute, and the reliance by the insured upon such renunciation must be equally clear to warrant his action for damages before maturity of the contract. And if, with knowledge of the facts, the insured elects to continue with the contract, he cannot subsequently exercise a second and inconsistent election to treat it as abrogated."

The case of *Roehm* v. *Horst,* 178 U. S. 1, 20 S. Ct. 780, cited in the text, is the leading case on that question, and supports the rule stated. There are many authorities holding in accordance with the rule announced in *Roehm* v. *Horst,* which we deem it unnecessary to cite, since that rule was approved by this court in the case of *Kirchman* v. *Tuffli Bros.,* 92 Ark. 111, 122 S. W. 239, in the following language: "In the case of *Roehm* v. *Horst,* 33 C. C. A. 550, it was ruled that a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to a breach of the contract, and that, after the renunciation of the agreement by the one party, the other party should be at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damage he has suffered from the breach of it. This case was affirmed by the Supreme Court of the

United States in the case of *Roehm* v. *Horst,* 178 U. S. 1, [20 S. Ct. 780] and, we think, correctly announces the rights of the parties under such circumstances."

In the instant case there was not a refusal to carry out the contract and a renunciation of the agreement, but, in the course of the correspondence between the parties, when default was first made in the payment, there was simply the contention that, under the existing facts, the insured for the time being was no longer entitled to the monthly benefits. Recognizing that there had been no repudiation of the contract, appellee paid the premium January 25, 1932, and testified that the policy was still in effect, and in his complaint alleged that the contract had been put in force in January, 1922, and had remained in full force and effect thereafter, and was in full force and effect at the time of the filing of the suit. The appellant, in its answer expressly disavowed any repudiation, but affirmed the contract, and merely contended that under its terms the appellee was not entitled to the monthly benefits. This makes this case unlike that of *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, relied upon by appellee. In that case the plaintiff was allowed to recover the present value of the future benefit installments because the court found that there had been a total repudiation of the contract in that the insured, by letter, had in express words denied liability on the claim that the policy had lapsed. The court said: "This letter evinced an intention on the part of the appellant not to be bound by the terms of the contract and was equivalent to a renunciation thereof." That case followed the rule in *Roehm* v. *Horst, supra.* Since then there have been a number of cases before the court where recovery was allowed for damages for anticipatory breach, the latest cases being *Liberty Life Ins. Co.* v. *Olive,* 180 Ark. 339, 21 S. W. (2d) 405; *Ætna Life Ins. Co.* v. *Spencer, supra; Travelers' Protective Ass'n* v. *Stephens, supra; National Life & Acc. Ins. Co.* v. *Whitfield, ante* p. 198; *Atlas Life Ins Co. of Tulsa* v. *Bolling, ante* p. 218. In all these cases it appears that damages for anticipatory

breach were allowed because of an unqualified renunciation of the contract.

In the Whitfield case, the case of *Ætna Life Ins. Co.* v. *Phifer, supra,* was referred to as authority for the holding there made, and in the Bolling case the contract was repudiated on the allegation that it had been obtained through fraud. We have made diligent search and have been unable to find any case holding contrary to the rule announced in Richards on the Law of Insurance, expressly approved by this court in *Kirchman* v. *Tuffli Bros., supra,* and followed in subsequent cases.

4. Since the judgment must be modified and limited to the amount of the matured monthly benefits at the time of the filing of the suit, it follows that the attorney's fee was improperly allowed by the court as the amount to be recovered will not equal the amount sued for. *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384. It is therefore unnecessary for us to determine here the contention that § 6155 of Crawford & Moses' Digest regarding attorney's fees to be taxed as costs in certain cases does not apply in suits for damages for anticipatory breach.

The judgment of the trial court will be modified so as to eliminate the attorney's fee, and all sums in excess of the benefits matured at the time of the filing of the suit, with six per cent. interest per annum thereon, and, as modified, will be affirmed without prejudice to the maintenance of further actions by the appellee upon the benefits now matured or such as shall hereafter fall due. It is so ordered.

WADDINGTON *v.* MARSHALL.

4-2829

Opinion delivered January 23, 1933.

[redacted]

S. Hubert Mayes, for appellant.

Brickhouse & Brickhouse, for appellee.

BUTLER, J. This is an appeal from judgments in favor of the appellees in suits for personal injuries and property damage alleged to have been sustained by them. The occurrence which gave rise to the litigation happened on December 12, 1931, when a truck owned by the appellant and driven by his son, J. B. Waddington, collided with an automobile belonging to the appellee, Dr. L. L. Marshall, in which the other appellees were riding.

It is admitted that the evidence is sufficient to sustain the finding that J. B. Waddington was negligent in the operation of the truck driven by him, and the only point urged here is that there was an absence of proof showing that J. B. Waddington was the servant, agent, or employee of the appellant at the time of the accident. Both the appellant and his son, J. B. Waddington, testified in round terms that there was no connection between them in a business way; that each was engaged in a business, which, though similar in nature, was wholly independent. They were engaged in selling and delivering oatmeal cookies manufactured by Mrs. Mamie Ashton. They testified that each had a separate territory; that the appellant used a Chevrolet sedan and J. B. Waddington used a truck in working their respective territories; that they were not partners or connected in any way in business, and, while the truck was the property of appellant, J. B. Waddington, his son, rented it from appellant and paid for its use at the rate of ten cents for each package of cookies he distributed amounting to about $3 per day.

Mrs. Ashton testified that she had a contract with the appellant and J. B. Waddington by which they worked on a commission basis independent of her; that they would take the goods out, sell them, pay the witness the wholesale price and retain the profit; that the Waddingtons divided the routes between themselves and she kept separate accounts with them; that when J. B. Wad-

dington bought cookies the charge was entered on his account and he settled with the witness. At one point in her testimony witness stated that J. B. Waddington always drove the truck and appellant drove the car.

It is insisted that this is all the testimony relative to the relationship between the appellant and J. B. Waddington, father and son, and that this fails to show any business connection between the two, either as partners or as employer and employee, and that the court should have directed a verdict for the appellant. We do not accept this contention. It is true that the Waddingtons testified emphatically that there was no business connection between them, but the jury was the sole judge of their credibility, and it did not believe what they said. Waddington, Jr., had also testified as emphatically regarding the collision as he did regarding the business relation with his father and his testimony was in direct conflict with that of disinterested bystanders who witnessed the accident. J. B. Waddington had no separate contract with Mrs. Ashton. The contract was between her as party of the first part and E. G. Waddington and J. B. Waddington as parties of the second part, and it, of itself, indicated that they were jointly engaged in the enterprise.

The undisputed facts are that the appellant had been in the business for four years before his son became interested; that this son was a high school boy in May, 1930, having graduated about that time. The record does not show whether he was a minor or not on the 12th day of December, 1931, or upon the date the contract was entered into, October 22, 1931. About the latter date however the appellant asked Mrs. Ashton if it would be all right for Jimmie (J. B. Waddington) to help him in the business and upon her agreeing to this a joint contract was entered into. The Waddingtons made their own arrangements for separate routes. The truck which J. B. Waddington drove belonged to the appellant, and he kept it in repair, and, while Mrs. Ashton at one time stated that J. B. Waddington always

drove the truck, in answer to a question by a juror she replied that both drove it from time to time. At the time of the accident the appellant was out of the State visiting in Illinois. Just how long he had been away and the date of his return was not shown, but during his absence J. B. Waddington was running the entire business. Mrs. Ashton testified that during the absence of the appellant, his son, J. B. Waddington, bought all the cookies which were handled under the contract in question.

J. B. Waddington, while testifying, was asked "When he (appellant) was out of the city, you had the whole territory?" He answered, "I had serviced his territory for him." He was further asked, "You didn't buy separately when he was out of town and you were running his route for him?" He answered, "I bought cookies for his territory under his account." We think this testimony of J. B. Waddington and the circumstances connected with the operation of the business was substantial evidence to warrant the jury in the conclusion it reached, and the judgment is affirmed.

TAYLOR *v.* HALE.

4-2758

Opinion delivered January 23, 1933.

M. A. Hathcoat, Robinson, House & Moses and *H. A. Meek,* for appellant.

J. Loyd Shouse and *Shinn & Henley,* for appellee.

KIRBY, J. On September 1, 1931, the State Bank Commissioner took over five banks in Boone County as

being insolvent. Taxes had been assessed against these banks, in the time and manner required by law, for the year 1930, which had not been paid before they became delinquent. When the time for payment had expired, and the taxes had not been paid, the collector of taxes for Boone County filed a motion, in the nature of an intervention, in the chancery court where the assets of the banks were being administered, praying that the Bank Commissioner be required to pay these taxes out of such assets as he had on hand belonging to the respective banks.

The cause was heard on an agreed statement of facts, in which it was stipulated that the Commissioner had, pursuant to law, levied a 100 per cent. assessment against the stockholders of all five banks, but that the proceeds of this assessment, together with the other assets of said banks, would not suffice in any instance to discharge the claims of the creditors and depositors in full.

The chancellor held that there was a paramount lien for the taxes, and ordered them paid, and this appeal is from that decree.

It was stipulated that the taxes had been properly assessed, and that the lien therefor had attached before the banks were taken over by the Bank Commissioner. Section 9949, Crawford & Moses' Digest, prescribes how these taxes shall be paid, and it reads as follows: "The taxes assessed upon the shares of stock thus listed shall be paid by the corporation or company, respectively, and they may recover from the owner or owners of such shares the amount of taxes to be paid by them, or deduct the same from the dividend accruing on such shares, and the amount paid shall be a lien on such shares, respectively, and shall be paid before a transfer of such stock or shares can be made."

It is argued, for the reversal of the decree of the court below, that the Bank Commissioner cannot pay the taxes pursuant to this section, for the reason that the shares of stock have no real value; indeed, their ownership has become a liability, instead of an asset, and

an assessment of the face value of these shares of stock has been made to discharge this liability, and that the Bank Commissioner has in his hands no funds with which to pay the taxes on the shares of stock due by the stockholders.

There is no controversy about the facts, and we are of opinion that the Bank Commissioner is correct in his contention.

It was said, in the case of *First National Bank of Batesville* v. *Board of Equalization of Independence County,* 92 Ark. 335, 122 S. W. 988, that the revenue statutes of this State contemplate that the shares of stock in banks shall be taxed, and not the capital stock of the bank itself, and that the tax is assessed *in solido* against the bank as trustee or agent for its stockholders, and is to be paid by the bank and collected by it from its stockholders.

Many States have similar legislation. In the case of *In re Feliciana Bank & Trust Co.,* 143 La. 46, 78 Sou. 169, it was said, by the Supreme Court of Louisiana, in construing a statute similar in essential respects to our own in regard to the taxation of banks, that State legislation upon the subject is responsive to the Federal legislation permitting the taxation, by the State, of shares in national banks, which would not otherwise be subject to taxation, and that the object and effect of the State legislation was to enable the State to reach, for taxing purposes, the capital stocks of banks as the property of its shareholders, thus placing the burden of State taxation equally upon National and State banks.

It was said in this Louisiana case that the tax is assessed on the shares of stock as the property of the shareholders, and that the liability for the tax is upon the shareholders, and not upon the bank, which, under the statute, was construed as being merely the agency or instrumentality through which the tax is collected, and that the duty or obligation of the bank was merely to pay the tax out of the means or property of the shareholders in its possession—a method of collection supplementary to,

and not exclusive of, the ordinary means available for the collection of taxes on personalty.

After thus declaring the law, it was held by the Supreme Court of Louisiana that a proceeding by the State against the liquidator of an insolvent bank for the collection of taxes assessed against its shareholders could not be maintained where it was neither alleged nor proved that the liquidator has, or that the bank had, on the date of insolvency any assets belonging or accruing to the shareholders.

In the instant case there is, not only no allegation or proof that the Bank Commissioner has assets in his hands belonging to the shareholders with which to pay taxes, but, on the contrary, it is stipulated that all of the assets, including the 100 per cent. assessment made against the stockholders, will not be sufficient to discharge the claims of the creditors and depositors in full.

Other cases having the view expressed by the Louisiana court as to the liability of an insolvent bank for the taxes due from its stockholders on their shares of stock are: *First Nat. Bank of Louisville* v. *Kentucky,* 9 Wall. 353, 19 U. S. (L. ed.) 171; *Primghar State Bank* v. *Rerick,* 95 Iowa 238, 64 N. W. 801; *Farmers' & Traders' Nat. Bank* v. *Hoffman,* 93 Iowa 119, 61 N. W. 418; *Court of Commissioners of Washington County* v. *State ex rel. Fairford Lumber Co.,* 172 Ala. 242, 55 Sou. 623; *State* v. *Barnesville Nat. Bank,* 134 Minn. 315, 159 N. W. 754; *Baker* v. *King County,* 17 Wash. 622, 50 Pac. 481; *City of Boston* v. *Beal,* 51 Fed. 306; *Rosenblatt* v. *Johnston,* 104 U. S. 462.

In 3 Cooley on Taxation (4th ed.) at § 1269, it is said: "Statutory liability is often imposed on corporations for taxes due from its stockholders or bondholders, in which case reimbursement is expressly provided for or is implied. The statutory liability of the corporation to pay the tax against stockholders carries with it an implied lien in favor of the corporation against the stock and the dividends for reimbursement. Generally, payment cannot be enforced against a corporation, where

the tax is one on the stockholders, where the corporation is insolvent and in the hands of receivers.''

We conclude therefore that the court was in error in directing the Bank Commissioner to pay the taxes of the stockholders on their stock when no funds were in his hands belonging to them.

The decree of the court below will therefore be reversed, and the cause remanded with directions to deny the prayer of the collector of Boone County that the Bank Commissioner be required to pay the delinquent taxes.

KEMPNER *v.* STEPHENS.

4-2836

Opinion delivered January 30, 1933.

Bevens & Mundt, for appellant.

Brewer & Cracraft, for appellee.

MEHAFFY, J. On September 17, 1928, J. A. Chambers, of Memphis, Tennessee, and associates, organized the Specification Motor Oil System, Incorporated. The capital stock was 25,000 shares of no par value. No money was paid in at the time of the incorporation, but Mr. Chambers testified that he was the owner of all the patents covering certain fixtures pertaining to the system,

and that he exchanged his patent rights and property rights, and became the sole owner of all the stock. He transferred 3,000 shares to Ike Kempner, and took Kempner's notes for $22,500. Chambers was president of the company, and Kempner was vice president and director.

The evidence showed that Kempner acquired 3,000 shares of stock in April, 1929. He did not pay any money, but executed his notes.

On December 13, 1929, H. C. Duke sold to the appellee, H. G. Stephens, stock in the corporation, and Stephens at the time gave him a check for $1,000 and a note for $1,000. This note was indorsed by Duke, and transferred to Chambers, and Chambers afterwards transferred the note to Kempner without indorsement. This note was given for stock sold in the corporation, and the Blue Sky Law was not complied with.

There was a jury trial, and a verdict and judgment in favor of the appellee. To reverse that judgment, this appeal is prosecuted.

The statute prohibits the sale of stock by any dealer or corporation unless the person selling said stock has complied with the provisions of the Blue Sky Law. The term "dealer," however, does not include the owner or issuer of such securities or stock who acquired the same for his own account in the usual and ordinary course of business, and not for the direct or indirect promotion of any speculative enterprise within the provisions of the act, provided such ownership is in good faith.

It is contended, however, by the appellant that the Blue Sky Laws of the State of Arkansas or the Arkansas Securities Act is not applicable to this case for the reason that H. C. Duke was not a dealer within the purview of the acts. If H. C. Duke owned the stock in good faith, and sold it in the usual course of business, this would not be a violation of the Blue Sky Law, and the note would be valid, or, if Kempner was an innocent purchaser, he would have a right to recover on the note. The question therefore is whether, under the evidence in this case, Duke was the owner in good faith, or whether this

was the promotion of a speculative enterprise within the meaning of the law.

T. W. Lewis, who assisted in the sale of the stock, testified that he knew Duke and Chambers, and he knew about H. G. Stephens purchasing 40 shares of the stock in the Specification Motor Oil System. He handled the transaction. Stephens bought the stock and paid $1,000 cash and gave a note for $1,000. The note was made to H. C. Duke. Duke at the same time sold part of his stock to Foster, Moore and Lewis. He asked Chambers over the 'phone if Duke was sent to Helena by Chambers to sell stock of the corporation, and that Chambers said he was; that Chambers stated that he handled the notes so that cash could be gotten. Lewis himself bought stock, gave a note, and afterwards paid it to Kempner, who held it at maturity. The stock had no value. Witness did not promote the sale of stock, but did talk to Stephens, and repeated the representations that Duke made to him. From general reports, the company has no financial standing. Witness had tried to sell his stock, but had been unable to do so.

R. M. Foster, who bought stock, testified about the purchase of the stock, and about the sale to others in Helena; that he made a note and paid it to Ike Kempner. The note was made payable to Duke. Kempner told him that he regarded the stock as valuable. Duke represented to others that he was selling his individual stock. Duke and Chambers were present when witness made the note. He was afterwards made a director.

Stephens testified about purchasing the stock and paying the $1,000 cash and giving his note. He testified that the stock that he bought was not worth anything.

The witnesses for appellant contradicted the statements made by appellee's witnesses, but the undisputed evidence shows that Kempner gave his note, or rather gave two notes, one for $17,500 and one for $5,000. After the suit was brought, Mr. Kempner died, and, of course, we do not have his testimony.

J. M. Kempner, son of Ike Kempner, and one of the executors of the estate, testified and introduced the orig-

inal note, signed by Stephens. Kempner also testified that, when his father received the note from Chambers, Chambers did not indorse it, and Mr. Kempner testified that it was not indorsed by Chambers because his father had every reason to believe that the maker of the note would pay. He testified that his father knew that the note was given for stock, and all circumstances in evidence tend to show that he knew this.

While it is said that Mr. Kempner bought stock, giving his note for $22,500, and bought the stock as an investment, yet, in his dealings with Mr. Chambers, all of the stock for which he had given his note was taken back by Chambers, except 700 shares of it, and in exchange therefore he was given the notes of Stephens and others.

As we have said, no money was paid into the concern; Mr. Kempner was vice president and director, and there is substantial evidence that Duke was selling stock for Chambers. It is true this evidence is denied, but, when the evidence is in conflict, it is a question for the jury, and the court, at the request of the appellees, instructed the jury that, if Duke was the owner of the stock which he sold to Stephens and sold it in the ordinary and usual course of business, and he was in no sense a promoter of the same, it would not be necessary for him, as such owner, to comply with the Blue Sky Law, and that the sale, under such circumstances, would be perfectly valid, and the note be valid and binding.

The court also, at the request of the appellant, instructed the jury in effect that the defense to the action was that the Blue Sky Laws had not been complied with; that this defense could not stand or prevail as to Kempner, who was suing on the note, unless the jury found that Kempner knew that the note was actually given for sale of stock, and unless they find also that the stock had been sold in violation of the Blue Sky Law; that, if they found that the Blue Sky Law had been violated, this would not defeat a recovery, but Kempner must have known at the time that he acquired the note, that it had been given

for stock, and must have also known that the Blue Sky Law had not been complied with.

The court also, at the request of the appellant, instructed the jury that the burden was on appellee to show that Kempner had knowledge of the fact that the note sued on was given in payment of stock, and that such stock was sold in violation of the Blue Sky Law.

The court also gave an instruction, at the request of the appellee, that no person or corporation could engage in the business of selling or the offering for sale of securities until permission was given by the Arkansas Railroad Commission. In the same instruction the court told them that this does not include the owner or issuer, who acquires stock for his own account in the usual and ordinary course of business, and not for the direct or indirect promotion of any speculative enterprise.

The court told the jury that it is undisputed that neither Duke nor Chambers had complied with the Blue Sky Law, and that, if it appeared from the preponderance of the evidence that Duke, either acting for himself or as agent for Chambers, was engaged in the sale of stock of the Specification Motor Oil System, Incorporated, in the promotion of a speculative enterprise, and not in the usual and ordinary course of business, and, while engaged in said promotion sold the stock to appellee, the note would be void and unenforcible, unless they further found that Kempner purchased it without knowledge that said stock was sold in violation of law.

The evidence being in conflict, it was a question for the jury, and the question was submitted to the jury under proper instructions. The jury could not have found for appellee under the instructions of the court without finding that the stock was sold in violation of the Blue Sky Law, and that Kempner knew that the note was given in payment of stock sold in violation of the law. There is a full discussion of the questions involved here in the case of *City Nat. Bank* v. *DeBaum,* 166 Ark. 18, 265 S. W. 648. The court there said: "The statute relating to the organization of corporations does not require that all the stock authorized shall be subscribed

before the Secretary of State shall issue the certificate of incorporation, but, after the corporation is organized and has become an entity, it comes within the operation of the Blue Sky Law, and cannot sell its unsubscribed stock, without first complying with the laws of the State governing such sales.

"As we have said, the notes sued on were executed for the stock of a corporation, and upon the authority of the Randle case, *supra,* the transaction was void unless the bank acquired them as an innocent purchaser."

In the instant case, the corporation was organized and all of its stock immediately transferred to Chambers. Thereafter this stock was sold to Stephens, and, if in violation of the Blue Sky Law, the note was void and unenforcible, unless Kempner acquired it as an innocent purchaser, and this question was submitted to the jury, which found against appellant.

In another recent case we said: "If the corporation had been solvent, and, no matter how prosperous it may have been, if it issued and sold the stock in violation of the Blue Sky Law, and took the note for said stock, the note was void, and, if the appellee knew these facts, it could not recover." *Fentress* v. *City Nat. Bank,* 172 Ark. 711, 290 S. W. 58.

It is next contended by the appellant that the court erred in permitting the defendant the opening and closing arguments. Section 4112 of Crawford & Moses' Digest reads as follows: "The party holding the affirmative of an issue must produce the evidence to prove it." Section 4113 reads: "The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." Section 1292 of Crawford & Moses' Digest provides: "In the argument, the party having the burden of proof shall have the opening and conclusion."

The burden of proof in the whole case was on the defendant. He admitted that he paid $1,000 cash and executed his note for $1,000, and the only defense that he interposed was that the stock was sold in violation of the Blue Sky Law. The burden was on him to prove this.

Appellant calls attention to the case of *Roberts* v. *Padgett,* 82 Ark. 331, 101 S. W. 753. In that case the court said: "The defendant did not deny that he executed it, or that it had been assigned to the plaintiff. He undertook to show that it was procured by fraud and misrepresentations, and also that there was a failure of consideration; and he denied that the note had been transferred to plaintiff before maturity, or that plaintiff was a *bona fide* purchaser for value. But, as there was no denial of the execution of the note or its assignment to plaintiff before the action was commenced, it is evident that, had the defendant introduced no evidence, judgment would have been rendered against him, whether plaintiff introduced any evidence or not."

The court also quoted with approval the following: "In all suits on promissory notes, bills of exchange, accounts, insurance policies, or any other form of money demands where the amount claimed is liquidated and can be ascertained without the necessity of proof, the defendant is entitled to open and close the evidence and argument if he relies for his defense solely on affirmative pleas, as payment, failure or want of consideration, or duress, set-off and counterclaim, usury, or other pleas in bar by way of confession and avoidance." 15 Enc. Plead. & Prac. 194.

The burden was upon the defendant in the only issues involved in this case, and this fact entitled him to open and conclude the argument. *Columbian Woodmen* v. *Howle,* 131 Ark. 299, 198 S. W. 286.

There was no error in permitting the defendant to open and conclude the argument. The jury was the judge of the credibility of the witnesses and the weight to be given to their testimony, and the finding on these questions is conclusive here.

We find no error, and the judgment is affirmed.

ROACH *v.* HENRY.

4-2939

Opinion delivered January 30, 1933.

[redacted]

John Baxter, for appellant.

W. W. Grubbs, for appellee.

MEHAFFY, J. The Northwest Engineering Company, a foreign corporation, brought suit in Chicot Circuit Court on September 6, 1932, against the petitioner, T. W. Roach, and on the same day a combined summons and attachment was issued against Roach, and at the same time a bond was filed and a writ of garnishment issued against Sternberg Company, Incorporated, a foreign corporation doing business in Arkansas. The writ of garnishment was served on the same day the complaint was filed.

The petitioner states that the only question to determine is one of jurisdiction. It is his contention that there

was no suit actually commenced at the time the garnishment was issued, and that the garnishment is therefore void.

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. This was done on September 6, 1932. Complaint was filed, and summons issued thereon.

The summons, however, was not served on Roach, but the respondent says that, under the allegations of the complaint and statements by counsel for plaintiff, which are not denied, at the time the complaint was filed and summons issued, Roach was engaged in levee work in Chicot County, and that before and since the filing of the suit Roach had been in the county from time to time. If Roach was in the county, as alleged by the respondent, where he could have been served, and the complaint was filed and summons issued thereon as alleged, action was begun on September 6, in accordance with § 1049 of Crawford & Moses' Digest. The mere fact that the defendant was not served would not render the garnishment void.

We have held repeatedly that there must be a strict compliance with the requirements imposed by statute in order that the garnishment proceedings may be sustained, but conversely such a compliance with the statute is sufficient. *Missouri Pacific Rd. Co.* v. *McLendon,* 185 Ark. 204, 46 S. W. (2d) 626.

We think the statute was complied with, if the statements of respondent are true, and they are not denied. Moreover, as to whether the court had jurisdiction of the person of the defendant under the circumstances and facts in this case would have to be tried and determined by the trial court.

"It is well settled that, if the existence or nonexistence of jurisdiction depends on contested facts, which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the opinion that the claims of fact had been wrongfully determined by the lower

court, and, if rightfully determined, would have ousted the jurisdiction." *Mechanics' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421.

On September 13 an affidavit was filed by the plaintiff for a warning order, and a warning order was issued on that day. This, however, was not necessarily an abandonment of the effort to get personal service. A man might be a resident of the county and still evade personal service.

When the plaintiff filed an affidavit and secured a warning order, he might still have intended to get personal service, but sought and obtained a warning order because he thought the defendant might evade service.

On December 3, 1932, the petitioner, Roach, filed a motion in the Chicot Circuit Court to quash the garnishment proceeding on the ground, first, as alleged by the petitioner, that plaintiff had filed its complaint in the circuit court on September 6, and that on said date a summons was issued, and also a garnishment was issued; second, that the sheriff failed to find Roach in Chicot County, and served the summons on a Mr. Grant, who was in charge of some equipment for Roach; third, that on September 13, 1932, plaintiff's attorney made and filed an affidavit for warning order for Roach; fourth, that Roach is a resident of the city of Memphis, and has never been a resident of Chicot County, and, fifth, that the garnishment proceeding was void because no suit was actually pending when the garnishment was issued.

As we have already said, under the facts stated by the respondent, which are not denied, the filing of the complaint and issuing of the summons on September 6 was the commencement of the suit.

Thereafter, on December 3, 1932, the petitioner filed a motion to quash the proceeding without limiting his appearance to that motion, and thereby entered his appearance generally.

The writ of prohibition is therefore denied.

MISSOURI PACIFIC RAILROAD COMPANY *v.* JOHNSON.

4-2812

Opinion delivered January 30, 1933.

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

Ward & Ward, for appellee.

MCHANEY, J. Appellee brought this action against appellant to recover damages for the killing of one horse and injury done to another, by the operation of a train, in the total sum of $120, being $100 for the horse killed and $20 for the horse injured. He prayed for double damages and attorney's fees under the statute. Appellant defended on the grounds that it was not guilty of any negligence in the killing and injury of said stock, and that the horses ran upon the track in such close proximity to the train that it was impossible for the operatives to stop the train in time to avoid injuring them. The case was submitted to a jury, and the following verdict was returned: "We, the jury, find for the plaintiff, E. C. Johnson, against the defendant, in the sum of $100." Appellee requested the court to render judgment on the verdict in the sum of $200 and a reasonable attorney's fee, which the court declined to do, but entered a judgment for $100, in accordance with the verdict. There is an appeal by the railroad company and a cross-appeal by appellee.

The first and principal assignment of error urged by appellant is that the court erred in refusing to direct a verdict in its favor at its request. We do not agree with appellant in this contention. The facts, briefly stated, are as follows: The train was running south through Piggott, Arkansas, at a slow rate of speed. The horses were on the track between a quarter and one-half mile north of the depot in the town of Piggott. The stock alarm was given by the operatives, when the horses began running down the tracks. They continued to run down the tracks, past the depot and onto a trestle some two or three hundred yards south of the depot where one of them was killed and the other slightly injured. The one killed failed to get across the trestle because his hind feet fell through the trestle and the train ran against it and killed it. The other got across but was injured by being struck by the train. The train came to a stop with the engine a short distance south of the trestle. Several eyewitnesses, other than the engineer and fireman, testified as to how the accident happened, but the substance of the testimony is that the horses ran down the tracks, then off to the side of the tracks, then back on the tracks, always ahead of the train, and would probably have escaped had they not tried to cross the trestle. For a distance of approximately a one-half mile therefore these animals were running along and by the side of the tracks, in a dangerous position, to the knowledge of the engineer and fireman, who were giving the stock signals all the time.

They therefore had plenty of time to stop the train. or to have had it under such control as to be able to stop it, without doing injury to the stock. They knew that the trestle was ahead, and that, if the horses attempted to cross same they would likely be injured. In *Paragould Southeastern Ry. Co.* v. *Crunk,* 81 Ark. 35, 98 S. W. 682, which was a case where a horse was injured in a trestle by being frightened by the approaching train and running into the trestle, a similar contention was made as in this case. There the court quoted from *Railroad Co.* v. *Ferguson,* 57 Ark. 18, 20 S. W. 545, 18 L. R. A. 110, 38

Am. St. Rep. 217, that "appellant did owe the appellee the duty, when it discovered its colt upon its track, to use ordinary or reasonable care to avoid injury to it by running its train against it, or by frightening and driving it by unnecessary alarms against the wire fence," and said: "Generally speaking, ordinary or reasonable care does not require a train to be stopped in order to avoid injury to stock on the track; but there may be facts which make the stoppage only ordinary care to avoid the injury which would otherwise occur, and there were sufficient facts in this case to send that question to the jury." So here these colts, according to one witness, never did get off the track, but, according to others, they were off and on several times before attempting to cross the trestle, and we are of the opinion that it was a question for the jury as to whether the operatives exercised ordinary care to prevent injurying them.

Complaint is also made by appellant of the refusal of the court to give two instructions requested by it, Nos. 2 and 3. We think these instructions were properly refused, and, in so far as they were correct, were fully covered by other instructions given by the court on its own motion.

On the cross-appeal of appellee, but little need be said, as the court correctly declined to enter judgment for double damages as provided under certain conditions defined in § 8563, Crawford & Moses' Digest. The proviso to that section relating to double damages reads as follows: "And provided further that, if the owner of such stock killed or wounded shall bring suit against such railroad after the thirty days have expired, and the jury trying such cause shall give such owner a less amount of damage than he sues for, then such owner shall recover only the amount given him by said jury and not be entitled to recover any attorney's fees."

Here appellant made demand for $120 for both animals and prayed double damages in the sum of $240 and attorney's fees. The jury returned a verdict for $100, without stating whether it was for the value of the horse

killed or the value of the horse killed plus damages for the horse injured. We are unable to say that the verdict related to the dead horse only, but, in any event, appellee failed to recover the amount sued for, so, under the plain provisions of the statute, he was not entitled to recover double damages or attorney's fees.

The judgment will be affirmed both on the appeal and cross-appeal.

CENTRAL STATES LIFE INSURANCE COMPANY *v.* HALE.

4-2830

Opinion delivered January 30, 1933.

Pratt P. Bacon and *Mann & Mann,* for appellant.

Shaver, Shaver & Williams, for appellee.

BUTLER, J. The appellant in this case admits liability for the face value of a certain policy of insurance, the obligations of which it assumed, but it denied liability under the double indemnity clause. From a judgment against this contention in the circuit court, the appellant has prosecuted this appeal.

The pertinent facts are undisputed and are these: The premiums were payable quarterly, and the last premium before the date of the injury was due on October 19, 1931, with thirty-one days of grace in which to pay the same. The insured was fatally injured in the afternoon of the 19th day of November, 1931, and died on the 21st day of that month. She was so badly injured that she was rendered unconscious and remained in that

state until her death. The premium falling due in October, 1931, was not paid, but the policy was still in force on the date of the accident by virtue of the thirty-one day grace period allowed for the payment of premiums, which period did not expire until the day following the accident, but did expire before the death of the insured.

That part of the policy which the appellant insists exempts it from liability on the double indemnity benefit provides, among other things, that, after the first year's premiums have been paid and while the policy is in full force and effect, if the insured, from any cause arising after the delivery of the policy, shall become permanently disabled so as not to be able to do any work of "compensable value," upon receipt of proof the insurer shall waive the payment of any premium or premiums that might become payable thereafter, "except premiums for double indemnity benefits"; and, continuing, the policy further provided (referring to the double indemnity clause): "This supplemental contract shall cease to be in force when the insured shall attain the age of 43 years, or when any premium provided for in the principal contract shall not be paid when due, or within the days of grace therein set forth, or when premiums on said principal contract shall cease to be payable, *or when a premium shall be paid by the company for insured under any permanent disability clause attached to this policy.*" The provisions in the foregoing clause of the policy which provide that the waiver of payment of any premium because of disability does not include premiums for double indemnity benefits, and the further provision that when a premium shall be paid by the company for the insured under any permanent disability clause, the contract shall cease to be in force, are the special provisions which it is claimed exempts the appellant from liability on the double indemnity feature of the policy in question. The supplemental contract, called "Double Indemnity and Beneficiary Insurance," begins with the following statement: "In the event of the death of the insured by bodily injury effected exclusively by external, violent

and accidental means and occurring within ninety days after such injury, the amount payable hereunder as above shall be double the face value of this policy."

In the eighth paragraph of disability clause No. 2 is the following provision: "This supplemental contract shall terminate and all benefits hereunder shall terminate upon the termination, forfeiture, cancellation, maturity or exchange of the policy first herein above described, and the company shall not be obliged to issue any similar contract in connection with any substituted policy which may thereafter be issued in exchange therefor."

The appellant insists that, under the agreed facts and the stipulations in the policy, if "it had not been for the fact that the insured was permanently injured and the injury resulted in death, this policy would have lapsed for the nonpayment of the premium, because the insured did not die until after the lapse of the thirty-one day grace period," and that, since this is bound to be true, no liability can attach for double indemnity benefits. We agree with the appellant in the statement above quoted, but are unable to assent to the conclusion that follows. The reason is that the insured was permanently injured while the policy was in full force and effect. By paragraph No. 8 of the disability clause No. 2 it was provided that the contract should terminate upon forfeiture of the policy. The policy had not forfeited when the accident occurred, and no premium was then in default, nor was it necessary that any be waived or paid before the day following the accident. It was the accident resulting in death that was the subject of the insurance, and the liability became fixed at the moment of the injury.

In *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, the appellant contended that, under a total disability clause, liability did not begin until six months after final proof of the injury and disability, but we there held that liability attached when disability occurred.

The facts in the case of *Burkheiser* v. *Mutual Accident Association, etc.,* 61 Fed. 816, 26 L. R. A. 112, were as follows: The insured, husband of plaintiff (appel-

lant), was insured under a certain policy dated October 4, 1890, against injury during the continuance of the policy through external, violent and accidental means, and, if death resulted from accident within ninety days, a certain amount would be payable to the beneficiary. It was provided that, if any member of the association should fail to remit to it the amount of any assessment made within thirty days from notice thereof, he should cease to be a member. It was further provided for reinstatement of a member in default, but that any member so reinstated should not be entitled to any indemnity for injury sustained during the period he was in default. On the 15th day of December, 1890, the company levied an assessment upon its members, payable on the 15th day of January, 1891, notice of which was given to Burkheiser on December 15, 1890. Under the terms of the policy, he had thirty days from the 15th day of December to pay the assessment upon failure to pay which he would be in default, and his membership would cease. On December 20th the insured met with an accident within the terms of the policy, from the sole effects of which he died on January 23, 1891, which was after the thirty-day grace period had lapsed, without having paid the assessment levied.

On that state of case the district court ruled that the company was not liable under the terms of the policy, and directed a verdict in its favor. On appeal, the Circuit Court of Appeals held that the trial court erred in its ruling, and in doing so said: "The correctness of the ruling is dependent upon the proper construction to be given to the contract of insurance in question. If liability for an accidental injury came to an end when Mr. Burkheiser, by reason of default in payment of the assessment, ceased to be a member of the association, the instruction was correct. If, however, liability for an accident occurring during the membership in the association continued, notwithstanding the cessation of membership after the accident, then the instruction was wrong, and the court should have directed a verdict for the plaintiff.

The policy insures against personal bodily injuries effected during the continuance of membership in this insurance through external, violent and accidental means. The language of the contract is plain and unambiguous. It was clearly designed to effect the object of the association, which was to indemnify for injury sustained during membership. The consideration paid by the assured is for such protection. The injury which resulted in the death of Mr. Burkheiser occurred during such membership. The accidental injury was the cause; the death, the consequence. The contract indemnified against injury produced by accident as the operating cause, and occurring during membership. The contract, with respect to liability of the company, had relation to the time of the happening of the accident, not to the time of the final outcome of the injury, or to the time when liability should be discharged by payment. The liability of the association became absolute upon the occurrence of the accident, the amount of indemnity and the person to whom it should be payable being contingent upon the character and result of the injury sustained; as to the plaintiff, contingent only upon the death of the assured within the stated time. It was not contingent upon continuation of membership, either within the letter or spirit of the contract. There was no obligation on the part of the assured to continue in membership after an injury, nor does his failure so to do result in forfeiture of indemnity for injuries theretofore received, or in discharge of liability theretofore incurred."

In *Railway Mail Association* v. *Dent,* (C. C. A.) 213 Fed. 981, where the association promised to pay the beneficiary a certain sum in case the insured "received injuries through external, violent and accidental means, resulting in his death from such injuries within 120 days," it was said: "The death was the result of the accident alone, and the accident happened before the amendment. The insurance was against accident, not death, as in an ordinary life policy. The subsequent death was relevant only as indicating the extent of the accidental injury. The

cause of action against the association arose when the accident occurred, and was not subject to impairment by subsequent default of the insured in the conditions of continued membership. The insurance being in force at the time of accident, the right of the beneficiary would not have been affected by its lapse before the death ensued."

As liability attached upon the happening of the accident, which was the contingency insured against, and at a time when the policy was in effect, it would be immaterial when death resulted if it occurred within the ninety-day period, for the death was relevant only as indicating the extent of the accidental injury. There were no premiums to be waived or paid by the company. Therefore the clauses in the policy relied on have no application, and the trial court was correct in holding that the appellant was liable on the double indemnity clause, and it was proper to include in the judgment a twelve per cent. penalty and reasonable attorney's fees. The judgment of the trial court will therefore be affirmed.

MILSAP *v.* HOLLAND.

4-2839

Opinion delivered January 20, 1933.

W. A. Dickson and *Price Dickson,* for appellant.

Earl Blansett and *John Mayes,* for appellee.

BUTLER, J. This case was before this court on appeal at its November term, 1931. The opinion on the judgment then rendered appears in 184 Ark., at page 996, 44 S. W. (2d) 662. The mandate reversing the judgment of the trial court with directions was filed in the lower court, but, not being entered of record, it was refiled with a motion requesting the court to enter of record the said mandate and to affirm the judgment of the county board of education consolidating the two districts in accordance with the judgment of this court. A reply to that motion was filed by W. N. Holland and others, and upon a hearing of the matter the circuit court ordered the mandate of this court stricken from the files, and that the cause be dismissed for want of jurisdiction of said Supreme Court, the circuit court and the county board of education. From that order and judgment this appeal is prosecuted.

It is the contention of the appellees, and the conclusions reached by the trial court, that the issue presented by the appellees in the instant case was not adjudicated before the circuit court or this court on appeal, and, as it now appears that the notice was not in fact legally given within the rule announced in *Texarkana Special School Dist.* v. *Consolidated School Dist. No. 2,* 185 Ark. 213, 46 S. W. (2d) 631; *Shook* v. *Morrison, Ib.* 522, 47 S. W. (2d) 1089, and *Ellis* v. *Gann, Ib.* 625, 48 S. W. (2d) 1103, the order of the county board of education was void, and neither the circuit court nor this court acquired any jurisdiction on appeal; that for that reason the judgment of this court reversing and remanding that of the circuit court was, and is, void, and that the circuit court therefore was justified in making

the order last appealed from and its action should here be sustained.

A number of cases from this court and other jurisdictions are cited by the appellees as tending to sustain their contention, but which we find it unnecessary to review, as we are of the opinion that the appellees are in error in their contention, *i.e.*, that the question of jurisdiction was not before the court on appeal to the circuit court from the order of the county board of education consolidating the districts or in this court on appeal from the judgment of the circuit court. The facts out of which this litigation arose are fully stated in *Milsap* v. *Holland*, 184 Ark. 996, 44 S. W. (2d) 662, and from the opinion it will be seen that on appeal to the circuit court that court found the facts and law in favor of the remonstrants and adjudged that the petition for consolidation be dismissed for want of jurisdiction. The opinion in *Milsap* v. *Holland, supra,* shows that the county board of education, among other things, found that due notice had been given as required by statute, and in the statement of the case it was said: "Notice of the proposed consolidation was duly given as required by statute and was introduced in evidence."

The judgment of the court appealed from and the opinion of this court on that appeal are sufficient to disclose that the issue as to the jurisdiction of the court was considered and the judgment of this court and its mandate based thereon are binding upon the trial court, and this court as well, even though our decision may have been based upon an erroneous view of the law. It is a rule of universal application early recognized by this court, that whatever is before the Supreme Court and disposed of in its appellate jurisdiction is to be considered as settled, and the lower court must carry its judgment into execution according to the mandate. This remains true even where an error is apparent and where a case has been remanded to the trial court and is again brought before the Supreme Court nothing is before the court for adjudication but the proceedings subsequent

to the mandate. It will be observed that the term of this court at which the case of *Milsap* v. *Holland, supra,* was decided has long since expired, and we have no power to review or reform the judgment and opinion which irrevocably concludes the rights of the parties thereby adjudicated.

In *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473, 275 S. W. 741, the case was here on second appeal, and, in referring to the decision on the first appeal, we said: "Whether this decision was right or wrong, it is a law of the case; it is *res judicata.* The rule has been long established in this State and uniformly adhered to that in the same cause this court will not reverse nor revise its former decisions." Numerous decisions of this court are cited to sustain the rule announced, and the reason is thus stated: "This general rule is grounded on public policy, experience, and reason. If all questions that have been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end of their litigation until the financial ability of the parties and ingenuity of their counsel had been exhausted. A rule that has been so long established and acted upon and that is so important to the practical administration of justice in the courts should be followed and not departed from."

In that case the issue was the constitutionality of the severence tax act. Referring to the first appeal in the case, the court said: "The act was held to be constitutional on the ground that it was an occupation tax, and no testimony or raising of additional issues as to the construction of the act or its applicability to appellants can prevent our former decision and judgment from being the law of the case."

On the hearing of the motion granted by the court below and from which comes the appeal we are now considering, no additional testimony was heard, but the motion was considered on the record made in the case decided in *Milsap* v. *Holland, supra.* Therefore all the questions expressly or necessarily involved in the former

appeal must be deemed to have been considered and must be regarded as the law of this case. It follows from what we have said that the action of the circuit court in refusing to obey the mandate of this court must be reversed and the cause remanded with directions to enter judgment in accordance with the said mandate.

TURNER *v.* WALNUT RIDGE.

Crim. 3829

Opinion delivered February 6, 1933.

Beloate & Beloate, for appellant.

W. P. Smith, for appellee.

SMITH, J. A decision of the question of the sufficiency of the testimony to support the conviction of appellant upon a charge of possessing intoxicating liquor for the purpose of sale is decisive of this appeal, and we consider no other question.

The testimony, competent or otherwise, tending to support the conviction of the appellant is to the following effect.

W. E. Archer testified that he went to appellant's home to search it for liquor. Appellant was not at home, and his wife objected to a search of the house in her husband's absence. Witness went to a back porch and found that some one had poured out some liquor, which

was running through a crack in the floor. Witness called for appellant, and they returned together to the house. Appellant admitted he had five gallons of grape juice, which he said he had made for his own use.

William Buchanan, the marshal of the city of Walnut Ridge, testified that he had had quite a bit of complaint about appellant as a "king" bootlegger. He and witness Archer went to the house together. When they were denied the right to search the home in the absence of appellant, witness went to town in his car and returned with appellant. Upon his return to the house he found that something had been poured out on the back porch which smelled like whiskey. They found nothing except a five-gallon glass jar filled with grape wine. Witness supposed appellant's wife destroyed something on the back porch which smelled like whiskey.

Cliff Wilkerson went with the officers to appellant's home, and he saw appellant's wife pour out something on the back porch which witness thought was whiskey. This witness also saw the wine.

The testimony did not show the kind or the capacity of the container out of which the whiskey was poured, whether a bottle, or a jug, or what not, and no witness testified that appellant had, at any time, ever sold any intoxicating liquor at his home or elsewhere.

The Supreme Court of the United States, in the very recent case of *Grau* v. *United States,* 287 U. S. 124, 53 S. Ct. 38, said that: "While a dwelling used as a manufactory or headquarters for merchandising may well be and doubtless often is the place of sale, its use for those purposes is not alone probable cause for believing that actual sales are there made."

This was a liquor case, and it will be observed that the Supreme Court of the United States said that the use of a dwelling as a manufactory or headquarters for merchandising was not even probable cause for believing that actual sales are there made, upon which an affidavit might be predicated to obtain a search warrant.

We are not required to go to this extent to reach the conclusion that there was no sufficient testimony to sustain the conviction of appellant for possessing liquor for the purpose of sale.

The testimony recited raises a serious suspicion that appellant had intoxicating liquor at his home for the purpose of sale; but convictions cannot be sustained upon suspicion merely. There must be testimony which, when given its highest probative value, proves that the accused had committed the offense charged. As was said in the case of *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604, (to quote the headnote in that case): "Mere circumstances of suspicion are not sufficient to support a conviction of crime, which must be established by substantial evidence to the exclusion of a reasonable doubt."

Having reached the conclusion that the testimony is insufficient to sustain the verdict, the judgment must be reversed, and the cause will be dismissed.

WILCOX *v.* MCCALLISTER.

4-2831

Opinion delivered February 6, 1933.

G. W. Botts, for appellant.
Ray S. Gibson, for appellee.

SMITH, J. In 1925, while J. C. Wilcox was county judge of Arkansas County, a contract was let, upon competitive bidding, for the erection of a bridge in that county. The lowest bid received was made by Ross Duckett, who offered to build the bridge for $177.75. The other bids ran as high as $375.

The contract appears to have been let by the county judge, and not by the county court; but the bridge was built, and is now in use, and was accepted by the county, and an allowance was made by the county court covering this claim, upon which a county warrant was issued and delivered in the sum of $177.75.

After the issuance of this warrant, an order was made by the county court calling in all outstanding warrants for the purpose of reissuance, and this warrant was taken up and a new warrant issued therefor, which Wilcox acquired in due course.

Wilcox had a contract with the St. Louis Southwestern Railroad Company to furnish the county scrip used by that company in paying its county taxes in Arkansas County. He sent the warrant in question, along with a number of others, to the railroad company, with a letter from the county collector reading as follows:

"Stuttgart, Ark., March 14, 1927.

"The county warrants as listed below on this sheet will be accepted for taxes at the face value for the taxes of 1926, provided the warrants do not exceed the amount due the county."

Under the contract for the sale of this scrip, Wilcox had agreed to refund to the railroad company the purchase price of any scrip which the collector refused, for any reason, to accept. The railroad company tendered this scrip to the collector in payment of its county taxes, and all of it was received for that purpose except the warrant in question, which the collector declined to receive for reasons later stated. The railroad company returned this piece of scrip to Wilcox, who also tendered it in payment of taxes, and, upon this tender being re-

fused, he brought suit to require the collector to receive it in payment of county taxes.

A few days after Wilcox retired from the office of county judge, his successor brought a suit, on the relation of the State for the use of Arkansas County, against the sheriff and collector, the county clerk and the treasurer of the county, praying that the warrant be canceled as having been issued without legal authority. Wilcox testified that he was not a party to this litigation, and was not advised of its pendency until the court had rendered a final decree. No defense was made to this suit, and the warrant was adjudged to have been illegally issued, and the officers named were enjoined from receiving it for any purpose, and it was decreed that it be canceled.

The defendants in the instant case, which is a suit to compel the collecting officers of Arkansas County to accept this scrip in payment of taxes, pleaded this decree of the chancery court as a bar to the suit, and also raised certain other questions which will be discussed.

Wilcox was not and is not bound by this decree, for the reason that he was not a party thereto. The proceeding in which the warrant was declared void was not a proceeding under the statute calling in and reissuing the county scrip, of which notice had been given.

It was alleged in the complaint filed in the chancery court, and is here alleged, that the contract to construct the bridge was let by the county judge, and not by the county court, and that § 2028, Crawford & Moses' Digest, relating to the allowance of demands against a county, was not complied with, in that a claim had not been made out and verified as required by that section of the statute.

The testimony does not show any fraud or collusion between the county judge and the contractor in letting the contract, and the undisputed testimony establishes the following facts:

There was no showing whether there had been an appropriation by the county court to build bridges. The bridge in question was built, and accepted by the county

judge, and used by the public. A claim covering the contract price, which Wilcox testified was not increased on account of the depreciated value of the county scrip, was filed with the county clerk. The same was presented to and allowed by the county court, and a warrant covering the allowance was issued on June 6, 1925. It is alleged, in the answer in the instant case, that the claim was issued for a sum $27.75 more than was due for the construction of the bridge and the material furnished therefor; but this allegation was not established by the testimony.

The court below denied the prayer for mandamus, and this appeal is from that judgment.

We think the court was in error in its judgment. The law is that the county court may ratify an unauthorized contract made by the county judge in behalf of the county if the contract is one which the court could have made in the first instance. *Greenberg Iron Co.* v. *Dixon,* 127 Ark. 470, 192 S. W. 379. The contract in question was clearly one which the county court had the power to make, and the undisputed testimony shows its subsequent ratification by the county court.

It was also held, in the case just cited, that, when an order has been made by the county court calling in for reissuance the outstanding scrip, the court is not authorized to review its original order allowing the claim upon which scrip was issued for mere errors in the allowance of the claim, but can only reject those warrants presented for reissuance which were illegally or fraudulently issued. It was there also held that "a claim would be illegal where it was one which, under no evidence that might have been adduced, could have been a valid claim against the county. *Izard County* v. *Vincennes Bridge Co.,* 122 Ark. 557, 184 S. W. 67, and *Monroe County* v. *Brown,* 118 Ark. 524, 177 S. W. 40. It will be readily seen that evidence might have been introduced to show that the levying court had made an appropriation for building bridges, and, upon the authorities just cited, it may be said that in the absence of such affirm-

ative showing the presumption is that such appropriation was made." See also *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, and *Howard County* v. *Lambright,* 72 Ark. 330, 80 S. W. 148. The case of *Shofner* v. *Dowell,* 168 Ark. 229, 269 S. W. 987, cites other cases to the same effect.

As has been said, the warrant here in question had been reissued by the county court under a calling-in order made by that court, and, as testimony might have been offered, when this was done, that an appropriation had been made for building bridges, the presumption must be indulged that there was such an appropriation. It may be said, aside from this presumption, that there was no testimony at the trial from which this appeal comes that no appropriation for building bridges had been made.

We conclude therefore that the warrant in question was and is a valid obligation of Arkansas County, and should be received as such.

The judgment of the court below is therefore reversed, and the cause will be remanded with directions to grant the writ of mandamus as prayed, and it is so ordered.

BIG ROCK STONE & MATERIAL COMPANY *v.* UNITED STATES FIDELITY & GUARANTY COMPANY.

4-2840

Opinion delivered February 6, 1933.

 [redacted]

Chas. A. Walls, for appellant.

Wm. M. Hall and *O. E. Williams,* for appellee.

HUMPHREYS, J. Appellant brought suit on October 21, 1931, against appellee in the circuit court of Pulaski County, Second Division, upon a surety bond to recover $1,188.40, with interest, for stone furnished by it to McWilliams Company, Inc., to complete certain work it had undertaken to do for Farelly Lake Levee District under written contract executed on July 21, 1926. The bond, made the basis of the action, is as follows:

"Whereas, Geo. C. Lewis and A. Lawrence Mills, receivers for the Farelly Lake Levee District of Arkansas and Jefferson counties, Arkansas, have on this date entered into a construction contract with McWilliams Company, Inc., for the performance of certain work, as shown by the supplemental contract attached hereto, and

"Whereas, said McWilliams Company, Inc., have agreed to execute a surety bond in the sum of fifty thousand dollars to guarantee the faithful performance of said supplemental contract;

"Now therefore we, the undersigned, McWilliams Company, Inc., as principal, and the United States Fidelity & Guaranty Company, a corporation, as surety, hereby acknowledge ourselves indebted to the State of Arkansas for the use and benefit of Farelly Lake Levee District of Arkansas and Jefferson counties, in the sum of $50,000 that the said McWilliams Company, Inc., a corporation, shall well and truly perform all and singular the several respective agreements set out in the supplemental contract made on this the 20th day of October, 1928, by and between the said Geo. C. Lewis and A. Lawrence Mills, as receivers of Farelly Lake Levee District of Arkansas and Jefferson counties, a copy of which agreement is hereunto attached and made a part hereof.

"Now, if McWilliams Company, Inc., a corporation, well and truly perform said agreement, this bond to be

null and void; otherwise, it is to remain in full force and effect from now and after this date.

"Witness our hands and seal of said corporation on this 20th day of October, 1928.

"McWilliams Company, Inc.,
a Corporation,
"By R. H. McWilliams, Jr.,
President, Principal,
"United States Fidelity & Guaranty Company, a Corporation,
"By Wylie B. Miller,
Surety."

The supplemental contract attached to said bond is as follows:

"This agreement made and entered into on this 20th day of October, 1928, by and between Geo. C. Lewis and A. Lawrence Mills, as receivers of Farelly Lake Levee District of Arkansas and Jefferson counties, Arkansas, parties of the first part, hereinafter referred to as receivers, and McWilliams Company, Inc., second parties, hereinafter referred to as contractor, witnesseth:

"1. That contractor hereby agrees with said receivers to complete the floodgates, point up the walls, and clean off floors as provided by a certain contract now existing between said Levee District and second parties, on or before November 15, 1928.

"2. That contractor hereby agrees with said receivers to reconstruct or repair Fin Wall No. 2, which is now cracked, so as to make it meet with the requirements of the plans and specifications governing said work under the original contract, which work is to be performed and completed on or before December 1, 1928.

"3. That contractor hereby agrees with said receivers to install and complete the rip rap stone work in accordance with the requirements of the plans and specifications governing said work under the original contract on or before December 15, 1928.

"4. That contractor hereby agrees with said receivers to construct the inlet and outlet channels to the

floodgates in accordance with the plans and specifications governing said work under the original contract, which inlet and outlet are to be completed on or before December 31, 1928.

"5. Contractor hereby agrees to execute and deliver surety bond executed by a reputable surety company in the sum of $50,000 to guarantee the faithful performance of the above conditions, which bond is to be delivered in five days.

"6. Receivers hereby agree that upon receipt of said bond they will execute and deliver necessary papers accompanying engineers' estimate covering all work performed to date, in order to obtain voucher for said estimate out of the Federal court at Little Rock, Arkansas.

"7. Receivers hereby agree that hereafter they will cause semimonthly estimates to be made on or before the 5th or 20th of each month, which estimates are to be paid in cash as the work progresses, until the cash is exhausted and then to make suitable arrangements for the payment of any balance, which arrangement is to be agreed upon mutually between the parties, the parties now contemplating the use of receivers' certificates, if permissible.

"8. This agreement and contract is intended to operate as a supplemental contract to the original contract, dated July 21, 1926, between Farelly Lake Levee District of Arkansas and Jefferson counties, Arkansas, and McWilliams Company, Inc., and is not intended to cancel, set aside or modify said contract in any manner except as herein set forth.

"Witness our hands on this the 20th day of October, 1928.

"Geo. C. Lewis,
"A. Lawrence Mills, receivers,
"Parties of First Part,
"McWilliams Company, Inc.,
"Party of Second Part."

In defense to the action, appellee pleaded a settlement and complete release from liability under the bond

by the receivers of the Farelly Lake Levee District and the statute of limitations as a bar to appellant's right to recover on the bond.

The cause was submitted to the court, sitting as a jury, upon the issues joined, testimony showing that the stone was furnished to McWilliams Company, Inc., and used in the construction of the work, the original and supplemental contracts, and the following stipulation and receipt:

"STIPULATION

"It is hereby stipulated and agreed by and between Chas. A. Walls, attorney for plaintiff, and O. E. Williams and W. M. Hall, attorneys for defendant, in the foregoing entitled cause of action, that:

"1. That McWilliams Company, Inc., became insolvent and went into the hands of receivers on the first day of March, 1929, and that the receivers for McWilliams Company, Inc., elected not to proceed with the performance of the contract, and abandoned the contract that McWilliams Company, Inc., had with Farelly Lake Levee District of Jefferson and Arkansas, for the construction of certain works, including the floodgates in said district.

"2. That the receivers of Farelly Lake Levee District, obligees on the bond, on or about March 10, 1929, took over the work and thereafter completed the work called for by the supplemental contract on or about December 12, 1929, at a cost exceeding the contract price by $15,398.04. There was included in said amount as part of the cost of completion additional engineering services of Ayres & Miller, engineers, amounting to $2,550, and the cost of leasing rails for a tramway needed in connection with the work from St. Louis Southwestern Railway Company, amounting to $858.29; and the cost of leasing right-of-way for the tramway from C. F. Rose, amounting to $50, and the receivers, having exhausted their available cash, requested United States Fidelity & Guaranty Company to pay those amounts to said parties pending final settlement with the receivers, which said guaranty company did.

"3. That the receivers thereafter made demand upon said United States Fidelity & Guaranty Company under its bond for payment of the balance of $11,939.35, and said guaranty company, on April 9, 1930, paid said amount, and said receivers thereupon executed the receipt exhibited with the guaranty company's answer herein.

"4. It is further agreed that the receipt exhibited to the answer, dated April 9, 1930, is a true and exact copy of the original executed by the receivers of said district.

"5. It is further stipulated and agreed that this stipulation may be read in evidence on behalf of either party desiring to introduce same in the record.

"(Signed) Chas. A. Walls,
"Attorney for Plaintiff,
"(Signed) Wm. M. Hall,
"O. E. Williams,
"Attorneys for Defendant."

"RECEIPT

"Received of the United States Fidelity & Guaranty Company eleven thousand nine hundred and thirty-nine dollars and seventy-five cents ($11,939.75) which with two thousand five hundred and fifty dollars ($2,550) paid to Ayres & Miller, engineers, covering balance due them as engineering fees, eight hundred and fifty-eight dollars and twenty-nine cents ($858.29) paid to the St. Louis Southwestern Railway Company covering amount due for lease of rails, and fifty dollars ($50) to C. F. Rose, covering amount due for lease of right-of-way is in full settlement, satisfaction and discharge of all liability of McWilliams Company and the United States Fidelity & Guaranty Company, its surety, under and by reason of a certain contract and bond executed on or about October 20, 1928, designated as supplemental contract to original contract of McWilliams Company dated July 31, 1926.

"Witness our hands this the 9th day of April, 1930.

"Geo. C. Lewis (s) and
"A. Lawrence Mills, receivers (s)
"Farelly Lake Levee District."

The court found against appellant and dismissed its complaint, from which finding and judgment an appeal has been duly prosecuted to this court.

Appellant contends that the trial court should have held, and this court ought to hold, that the bond sued on is a special bond which, in terms, guarantees the payment of all materials furnished and used by the contractor in completing the improvement. We are unable to discover any language in the bond itself which would warrant any such interpretation even from inference. It cannot be gleaned from the language used that the bond was intended to be a statutory bond; so we would not be justified in reading the statute, § 6913 of Crawford & Moses' Digest, into the bond; but, if it were possible, by a strained construction, to do so, it would and could not afford any relief to appellant because, if aided by the statute invoked, its right of action would be barred. Section 6914 of Crawford & Moses' Digest bars rights of action on bonds for materials furnished if not brought within six months after the completion of the improvement. Appellant argues that it brought the suit for materials furnished within six months after the improvement was completed, but the agreed statement of facts and the receipt show otherwise. According to the agreed statement of facts and the receipt referred to, the work contemplated by the supplemental contract was completed on December 12, 1929, and this suit was not commenced until October 21, 1931.

The trial court was correct in finding that the bond afforded no protection to appellant; hence the judgment is affirmed.

DENT *v.* ADKISSON.

4-2847

Opinion delivered February 6, 1933.

[redacted]

Patterson & Patterson and *George F. Hartje,* for appellant.

R. W. Robins, for appellee.

HUMPHREYS, J. This is a continuation of a foreclosure proceeding brought and tried in the chancery court of Faulkner County, and is the second appeal of the cause by appellant. Reference is made to the case of *Dent* v. *Adkisson,* 184 Ark. 869, 43 S. W. (2d) 739, for a full statement of the cause of action and all the proceedings had and done therein, including the directions of this court to the trial court upon a reversal of the original decree of confirmation of sale. On remand of the cause, the trial court set aside the confirmation of the sale and overruled the demurrer to the petition; whereupon appellee filed an answer to the petition denying each material allegation thereof and tried the cause upon the testimony adduced by the parties responsive to the issues joined, resulting in a denial of the petition and a rendition of a decree confirming the sale, from which is this appeal.

Appellants are not tendering the amount of the judgment, interest and costs but are standing upon the allegations of their petition in an effort to set aside the sale in order that the lands may be sold again, and that too, without any assurance that it will sell for more than it did at the first sale.

After a very careful reading of the testimony, we are unable to say that the lands sold for a grossly inadequate sum or that appellants were prevented from paying off the judgment through the fraudulent practices of appellee. In fact, there is no substantial evidence in the record tending to sustain these allegations in the petition. The decided weight of the testimony is to the contrary. It would extend this opinion to unusual length should we set out herein the substance of the evidence of each witness, and no useful purpose could be served by doing so, as each subsequent case must be governed by its own peculiar facts.

No error appearing, the decree is affirmed.

LYBARGER *v.* LIEBLONG.

4-2833

Opinion delivered February 6, 1933.

[redacted]

George W. Clark and *Clark & Clark,* for appellant.

R. W. Robins, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that appellant had for years been a customer and depositor of the bank where his notes and business papers were all kept, the bank looking after this business and making credits upon the notes of payments by the debtors; and also that the cashier, Mr. Harton, who afterwards became president of the bank, advised with him about the execution of papers, notes and mortgages securing the money loaned by him, that he prepared this particular mortgage for execution and it was taken out by appellant and the signatures procured at the distant town and returned by mail immediately thereafter to the bank. The president of the bank had prepared the mortgage, evidently knew that it had not been recorded, collected payments on the note secured thereby, and before the note became due the bank took a mortgage conveying the same property to it for further security on a pre-existing debt due it, knowing at the time

that the appellant's mortgage thereon had not been recorded.

These transactions established the agency of the bank, and it could not take advantage of the information thereby acquired, and, failing to record this mortgage as their relationship required should be done, the bank could not then take a mortgage on the same property to further secure a pre-existing indebtedness from the mortgagors to it and thus acquire a prior lien upon the lands already mortgaged to appellant for the security of his loan, in effect taking advantage of its own wrong and violating its duty to its principal for its own benefit and to the injury of appellant whose agent it was, and the court's finding to the contrary is not supported by the preponderance of the testimony, and it erred in holding otherwise. 21 R. C. L. 819-20; *Walthour* v. *Pratt,* 173 Ark. 617, 292 S. W. 1017; *Rose City Mercantile Co.* v. *Miller,* 171 Ark. 872, 286 S. W. 1010; *Moore* v. *Ziba Bennet Co.,* 147 Ark. 216, 227 S. W. 753; *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020.

Every one, whether designated agent, trustee, servant or what not, under contract or other legal obligation to represent and act for another in any particular business or line of business or for any valuable purpose must be loyal and faithful to the interests of such other person in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to that of his principal. "This is a rule of common sense and honesty, as well as of law." In 21 R. C. L. 825, it is also said: "He may not use any information that he may have acquired by reason of his employment, either for the purpose of acquiring property or doing any other act which is in opposition to his principal's interest." See also *Houston Rice Co.* v. *Reeves,* 179 Ark. 700, 17 S. W. (2d) 884; *Dudley* v. *Wilson,* 180 Ark. 416, 21 S. W. (2d) 615, where the court quoted with approval from *Trice* v. *Comstock,* 121 F. (C. C. A.) 620, 61 L. R. A. 176, the following: "Every agency creates a fiduciary relation, and every agent, how-

ever limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principal to accomplish the purpose for which the agency was established." See also 2 C. J. 692.

The fact that the agency is gratuitous does not affect the rule requiring good faith and loyalty on the part of the agent if he has entered upon or assumed the performance of his duties. *Walthour* v. *Pratt, supra.*

The bank could perform these duties, had been doing so for a long time, and certainly it could be expected to continue, under the circumstances of this case where appellant was a customer and depositor with a substantial account to his credit in the bank, the bank having charge of all his notes and securities and advising him as to the form of such instruments, actually preparing them, and receiving payments on said notes in settlement thereof.

The decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion holding appellant's mortgage constitutes a prior and superior lien to that of the bank on the property and applying the money received from the foreclosure to the payment of appellant's note accordingly. It is so ordered.

MASSENGALE *v.* MASSENGALE.

4-2842

Opinion delivered February 6, 1933.

J. M. Shinn, for appellant.

W. P. Spears and *V. D. Willis,* for appellee.

McHaney, J. Appellant and appellee were married in April, 1925, but their marital life was of brief duration, being separated in September, 1927, and later the same year, December 20, 1927, being divorced. In the decree of divorce appellant was ordered to pay appellee $15 per month beginning December 20, 1927, and a like sum thereafter on the 20th day of each month, and an attorney's fee of $15. Appellant failed to comply with the order of the court, and failed to make the payments of alimony so ordered to be paid, as well as the fee allowed the attorney.

By deed dated March 9, 1923, appellant conveyed to Laura E. Massengale, his former wife, his homestead, containing 160 acres, and described as the west half of the northeast quarter and east half of the northwest quarter in section 26, in township 17 north, range 21 west, Newton County, together with certain other lands in said county, but which was not delivered by the grantor to the grantee until after the separation above mentioned. Thereafter appellee brought suit against appellant and his then wife, Laura E. (he in the meantime having been married to his former wife), to cancel said deed and to subject same to her alleged lien for accrued alimony. On April 15, 1930, decree was entered canceling said deed as prayed, and judgment was rendered in her favor against appellant for accrued alimony in the sum of $450. Said deed was canceled because the court found it was executed for the fraudulent purpose of cheating and defrauding the appellee out of her dower rights and to prevent her from realizing any sums of money for attorney's fees, alimony and suit money in the divorce action, and from obtaining her portion of said lands in the divorce action. Decree was also entered in appellee's favor for a one-third interest in the lands described in said deed (the homestead lands included) for her life,

and that same be sold, subject to said interest, as might be necessary to pay the judgment rendered. A commissioner was appointed to sell said lands as ordered, sale was had, and appellee became the purchaser. Writ of possession was thereafter issued and delivered to the sheriff. Whereupon appellant filed his amended complaint, setting up the foregoing facts, claiming his homestead to be exempt from said sale, and praying that said writ of possession be quashed in so far as it relates to his homestead. Appellee demurred to the complaint, which was sustained, the complaint dismissed, and this appeal followed.

The learned court erred in so holding.

The statute, § 3511, Crawford & Moses' Digest, provides that in every final judgment for divorce granted the wife against the husband the court shall make an order that each party shall be restored to all property not disposed of at the commencement of the action which either party obtained from or through the other during the marriage and in consideration or by reason thereof; "and the wife so granted a divorce * * * shall be entitled to * * * one-third of the lands whereof her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property, both real and personal, to which such wife is entitled." The statute provides for sale of the property if same is not susceptible to division without great prejudice to the parties, and a proper division of the proceeds. It is then provided that "such order, judgment or decree shall be a bar to all claim of dower in and to any lands or personalty of the husband then owned or thereafter acquired on the part of said wife divorced by the decree of the court."

This court has several times held that a decree or order for future payments of alimony does not constitute a lien upon real estate; that only sums ordered to be paid at once and for which execution may then issue con-

stitute a lien upon lands as other judgments. *Kurtz* v. *Kurtz,* 38 Ark. 119; *Casteel* v. *Casteel,* 38 Ark. 477; *Whitmore* v. *Brown,* 147 Ark. 147, 227 S. W. 34; *Warren* v. *Moore,* 162 Ark. 564, 258 S. W. 361. The reason given for the rule denying liens for future alimony is that it would likely embarrass alienation.

At the time appellant delivered the deed to the land in controversy and other land to Laura E. Massengale, there was no judgment for accrued alimony or otherwise against him. The land here involved was his homestead. The decree of divorce granted in December, 1927, awarded alimony of $15 per month to appellee, but failed to designate any real or personal property to which appellee was entitled. It is not necessary to decide whether she acquired any title to the land other than the homestead by her purchase at the commissioner's sale, but certainly she did not acquire any interest in his homestead. He had previously conveyed it to Laura E. Massengale, at a time when it was free from any lien in appellee's favor, and, being a homestead, could be conveyed without regard to general judgment creditors.

Appellant made no defense to appellee's suit to cancel said deed, nor to the sale of his land, but when his possession of his homestead was sought to be interfered with, and he be ousted therefrom, he brought this action. His action was in time as provided by statute and many decisions of this court. Section 5543, Crawford & Moses' Digest, reads as follows: "A debtor's right of homestead shall not be lost or forfeited by his omission to select and claim it as exempt before the sale thereof on execution, nor by his failure to file a description or schedule of the same in the recorder's or clerk's office; but he may select and claim his homestead after or before its sale on execution, and may set up his right of homestead when suit is brought against him for possession, and, if the husband neglects or refuses to make such claim, his wife may intervene and set it up; provided, if the debtor does not reside on his homestead, and is the owner of more land than he is entitled to hold as a home-

stead, he or his wife, as the case may be, shall select the same before sale." See cases there cited and numerous others since decided. Appellee's judgment for accrued alimony in the sum of $450 was of no more force than any other judgment, and had no more validity against the homestead than any other judgment. Since appellee had no lien on the homestead and no decree for any interest therein when her divorce decree was granted, she had no cause to complain of any disposition appellant made of it, whether to his ex-wife or to any other person, and no matter with what intent he conveyed it.

Decree reversed and cause remanded, with directions to overrule the demurrer, and for further proceedings in accordance with this opinion.

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

4-2817

Opinion delivered January 23, 1933.

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

Partain & Agee, for appellee.

BUTLER, J. This action was brought by the appellee against the appellant in the circuit court of Crawford County to recover damages for personal injuries alleged to have been caused by an injury to his eye while cutting a cotter pin with a chisel and hammer at the shops of appellant company. There was a verdict and judgment for the amount sued for, from which is this appeal.

Several questions are presented which we find it unnecessary to decide, as it is our opinion that the first assignment of error urged by the appellant is well taken, and our determination of that question disposes of the case.

It is claimed, and we agree, that there was no actionable negligence shown by the evidence, and the court should have given the peremptory instruction requested by the appellant. In arriving at this conclusion, we do not overlook the rule that the evidence on appeal should be viewed in the light most favorable to the appellee and given the greatest weight to which it is entitled, if by so doing the verdict may be sustained. The appellee, Burns, at the time of the injury was at work in appellant's shops engaged in repairing a locomotive with the help of one O. N. Meeks. These two were the only persons present at the time of the injury and the only witnesses testifying regarding the occurrence. Their testimony is not in conflict except in one particular.

The evidence, which is undisputed, establishes the following facts: Appellee was 29 years old and his position with the appellant was that of a "second-class mechanic", in which position he had worked for approximately five years. Meeks was his helper at the time of the accident, which occurred during the night, as they were preparing to put truck wheels on the engine. Meeks was working under the direction of the appellee, and was told to place a cotter pin on the rail and hold it there while Burns cut off the end of it. The cotter pin was a round pin about three or three and a half inches long and about three-eighths of an inch in diameter, with a slit down the middle so that when the pin was placed through a hole in the shaft the protruding ends of the pin could be bent back on either side and prevent it from slipping out. Meeks testified that he was holding the pin with his hand with the end lying on the rail as he had been directed to do; that he did not turn the pin at all, and that it had not moved in any way at the time the appellee struck the final blow cutting off a portion of the pin, which flew out and

injured him. Meeks stated that as the blow descended he turned his head to one side.

Appellee testified, in substance, that he directed the pin to be placed and held so that the slit in it would rest upon the rail, and, when it was so placed and held, he adjusted the cutting edge of his chisel on the pin and fixed it in place by striking with his hammer two light blows upon the head of the chisel, thus "setting" it. He then prepared for the blow by which he proposed to sever the end of the pin, and stated that, as the hammer was falling, "it seemed as if something attracted the attention of Meeks, and he turned his head, and at the same time the pin was turned"; that he had already started down with the blow, and it was impossible to stop it then. At this time he was standing down in a pit, and, when the pin turned as he delivered the blow, one side of it was cut off, which flew out, striking him in the eye; that the chisel and hammer were his own tools, and that he had had five years' experience and understood the work.

The question presented by this evidence is, does it show that Meeks, while helping the appellee, failed to exercise ordinary care? No fixed rule can be stated as to what constitutes "ordinary care," except that it is that degree of care which an ordinarily prudent person would exercise under the circumstances of the case. Care in one case would be negligence in another, and *vice versa.* That degree of care must be exercised commensurate with the danger reasonably to be anticipated. Therefore, ordinary care is a relative term, dependent upon the facts and circumstances of each particular case, and the degree of care required must always be measured by the exigencies of the case under consideration. *Meeks* v. *Graysonia N. & A. R. Co.,* 168 Ark. 966, 272 S. W. 360; *Evans* v. *B. L. & A. Ry. Co.,* 147 Ark. 28, 227 S. W. 257; *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. (2d) 391. The chisel was set in the pin by two preliminary blows, and it is difficult to see how the pin could turn without turning the chisel also, or indeed how the pin could turn except by some considerable effort, as the chisel was set in it and held in

place by Burns as he was striking the head of it. This would seem more sufficient to hold the pin steady than the hold Meeks had upon it, since it must be remembered that the pin was round, only three-eighths inch in diameter and not more than three or three and one-half inches long. A considerable portion of the pin must have been resting on the rail, so that the projecting end which was held by Meeks could not be held very firmly, and without the support of the chisel the pin was likely to turn by a very slight muscular contraction. The fact that Meeks turned his head as the blow descended is not disputed, but that he was not attending to his business, because of his attention being attracted by something else, as suggested by the appellee, is not warranted, for there are no circumstances related which would cause his attention to be attracted elsewhere. It appears to us that the turning of his head was the natural and instinctive act of one in his position, for his head and face could not have been very far from where the impact of the hammer upon the chisel would fall.

There is no contention that Meeks wilfully moved the pin, and the mere fact that he turned his face aside as the blow was descended does not seem to us to be sufficient to show that he was failing to exercise ordinary care. The cutting off of the end of the cotter pin was a simple operation, attendant with no particular danger, although, in the light of common experience, it was to be expected that the end of the pin, when cut by a violent blow, would fly off some appreciable distance. Ordinarily this would be attended by no particular danger, for it is not to be doubted that, if the fragment had struck the person of the appellee anywhere else but in the eye, no injury would have resulted. That it did strike his eye was a remote mischance which no one contemplated, or else the appellee, who was experienced, would have taken some precautions other than shown to protect his eyes from flying fragments.

In the case of *Booth & Flynn Co.* v. *Pearsall,* 182 Ark. 854, 33 S. W. (2d) 404, the plaintiff sued for personal

injuries sustained while working for the defendant by being struck in the eye by a sliver broken from an iron gas pipe. While the plaintiff was bending over a metal pipe, a fellow-servant working next him threw a block of wood from his shoulder on the pipe, causing a sliver to fly off and strike the plaintiff in the eye. In commenting upon the testimony, it was said: "It cannot be said that, even though the sliver which struck the plaintiff in the eye came from the iron pipe, when his fellow-servant threw down the block of wood on it, the master or fellow-servant was guilty of negligence. The work was being done in the ordinary and customary way of doing such work, and there is nothing to show that it was not reasonably safe. * * * It was an unanticipated and unexpected occurrence which no reasonable person would have likely foreseen." It is a matter of ordinary observation that frequently there is some danger attendant upon the most common and ordinary transactions, but the care required is only to provide against such dangers as ought to be foreseen in the light of the attendant circumstances, and the ideal "prudent person" will therefore not neglect what he can foresee as probable nor divert his attention to the anticipation of events barely possible, but will order his conduct by the measure of what appears likely in the ordinary course of events. *Walloch* v. *Heiden,* 180 Ark. 844, 22 S. W. (2d) 1020; *Booth & Flynn Co.* v. *Pearsall, supra; Mo. Pac. Rd. Co.* v. *Medlock,* 183 Ark. 955, 39 S. W. (2d) 518; *Mo. Pac. Rd. Co.* v. *Richardson,* 185 Ark. 472, 47 S. W. (2d) 794.

It may be that Meeks could have held the pin more firmly and prevented its slightest movement, had he foreseen the consequences, but were they such as would reasonably be expected to probably flow from a slight turning of the pin? We do not think so. Hence, although he might have exercised greater care, it does not appear that he should have ordered his conduct by a measure of prudence against every possible risk, but only as to what would ordinarily likely occur.

From the views expressed it follows that the judgment of the trial court must be reversed, and, as the cause appears to have been fully developed, it will be dismissed. It is so ordered.

CROWE *v.* FUTRELL.

4-2937

Opinion delivered February 6, 1933.

Ingram & Moher, for petitioner.

Frank C. Douglas, for respondent.

MEHAFFY, J. W. S. Davidson and J. R. Crowe, on May 10, 1930, entered into a contract to exchange lands. The contract provided that Davidson was to convey to Crowe, free of all incumbrances, certain lands in Mississippi County, Arkansas, and Crowe agreed to convey, and did convey, to Davidson certain lands in Prairie County, Arkansas, subject to a government loan in the sum of $7,000, which Davidson assumed and agreed to pay. The contract also provided that Crowe was to retain possession of the Prairie County land for the years of 1930 and 1931, rent free, and further, as a part of the consideration, Crowe agreed to lease the Prairie County land for the year 1932 for the sum of $3,600, and agreed to execute and deliver a note for this amount. There are several other paragraphs in the contract, but it is unnecessary to set them out here.

Crowe did not pay the $3,600, but sometime in October, 1930, Davidson filed his complaint in the chancery court of Mississippi County against J. R. Crowe and Mrs. J. R. Crowe, and, at the time of filing the suit Davidson filed *lis pendens* notice, setting forth the nature of his suit

and his effort to secure lien on the 160 acres of land in Mississippi County, which he had deeded to Crowe.

At the time complaint was filed, and for several years prior thereto, J. R. Crowe and Mrs. J. R. Crowe had been citizens and residents of Stuttgart, in Arkansas County, and summons was issued by the clerk of Mississippi County, directed to the sheriff of Arkansas County.

On November 23, 1932, the petitioners appeared specially and filed a motion to quash the service. In said motion they did not enter their general appearance, but appeared specially for the purpose of filing the motion to quash the service. In said motion they alleged that they are both citizens and residents of the northern district of Arkansas County, Arkansas, and were citizens and residents of Arkansas County at the time of filing the suit; that they were served by the sheriff in Arkansas County, and that the court acquired no jurisdiction over them by virtue of the service of the summons, and that the court had no jurisdiction of the cause of action, and prayed that the service of summons upon them be quashed, and the cause dismissed.

The court heard the motion, overruled the same, and required the defendants to answer within 20 days. They excepted to the ruling of the court. Petitioners then filed their petition in this court, praying that summons and service thereof be quashed, and that said court be prohibited from proceeding further therein.

It is the contention of the petitioners that the suit filed in Mississippi County by respondent is a suit to collect $3,600 as rent, and is a transitory action, and must be brought in the county in which the defendant or one of several defendants resides or is summoned. They rely on § 1176 of Crawford & Moses' Digest, which reads as follows: "Every other action may be brought in any county in which the defendant or one of several defendants resides or is summoned."

If this were a transitory action and no right to a lien on the land in Mississippi County existed, this section would apply.

Davidson and Crowe agreed to an exchange of lands. Davidson assumed and agreed to pay an indebtedness of $7,000, which was a lien on the lands in Prairie County. Crowe agreed to keep the lands and rent them for the year 1932 for $3,600. The contract, however, expressly states that, as a part of the consideration of this exchange of properties, the party of the second part agrees to rent or lease the land from the party of the first part for the year 1932 for $3,600. In the suit brought in the Mississippi court, the plaintiff alleged that this $3,600 was a part of the consideration, that it had not been paid, and that he was entitled to a lien on the lands in Mississippi County to secure the payment. If this was a part of the consideration entitling the plaintiff in the case to a lien on the lands in Mississippi County, the court had jurisdiction.

We have held: "It is well settled that, if the existence or nonexistence of jurisdiction depends on contested facts which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the opinion that the claims of fact had been wrongfully determined by the lower court, and, if rightfully determined, would have ousted the jurisdiction." *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421.*

The chancery court, in the action brought in Mississippi County, had jurisdiction of the subject-matter, and it had jurisdiction to inquire into the fact whether the $3,600 was as alleged in plaintiff's complaint, a part of the consideration for the Mississippi County land, entitling plaintiff to a lien on said land.

We must take the cause of action as it was alleged in the original complaint. Otherwise, we would try the merits of the controversy for the purpose of determining whether or not we have power to try them.

If the allegations in the complaint are true, the court had jurisdiction, not only of the subject-matter, but of the person of the defendants; and, since the allegations in the complaint depend upon the proof, the chancery

*See *Roach* v. *Henry, ante* p. 884 (Rep.).

court had a right to pass upon the facts, and the writ of prohibition is denied.

ABSTON-WYNNE & COMPANY *v.* WASSON.

4-2850

Opinion delivered February 6, 1933.

Maddox & Greer and *J. Brinkerhoff,* for appellant.

J. G. Waskom, for appellee.

McHANEY, J. At the time of his death, Aaron McMullin was indebted to the Bank of Tyronza on nine promissory notes in the sum of $15,542 and accrued interest. Said bank was or became insolvent and was taken over by the State Bank Commissioner for liquidation. The notes had been hypothecated with a Memphis bank to secure a loan from it. On June 10, 1931, the Commissioner caused a claim to be prepared and presented to the executors of the estate of Aaron McMullin with copies of said notes attached to the claim and exhibited to the executors who allowed the claim. This claim, as allowed by the executors, was filed in the probate court on July 24, 1931, and in December following, the claim was presented to, allowed and properly classified by the probate court. Appellants, who claim to be creditors and devisees under the will of Aaron McMullin, objected to the allowance of the claim in the probate court on several grounds, the principal one being that the original notes were not exhibited to the executors in compliance with § 100, Crawford & Moses' Digest. From the order allowing the claim in the probate court, appellants appealed to the circuit court, where the appeal was dismissed on the grounds. (1) that appellants made no showing that they or either

of them had any right to be made parties to the proceeding in the probate court, or to appeal from the judgment of such court; and (2) that the executors had knowledge of the existence of the original notes, although copies only were exhibited, and the allowance of the claim was based on such knowledge.

Assuming for the purpose of this opinion that appellants were proper parties and had the right to appeal, we are of the opinion that the judgment of the court in dismissing the appeal, which amounts to an affirmance of the judgment, is correct.

The undisputed proof is that the executors were familiar with this indebtedness, knew of the existence of the notes, that they had not been paid, and that it was a valid subsisting claim against the estate. Whether we say the statute was substantially complied with, or that the executors waived the requirement of "exhibiting the original," the result would be the same.

This court has at least three times held that the administrator may waive the copy required by the statute. *Borden* v. *Fowler,* 14 Ark. 474; *Grimes* v. *Bush,* 16 Ark. 647; *Grimes* v. *Booth,* 19 Ark. 224. Section 100 of the statute reads as follows: "Any person may exhibit his claim against any estate as follows: If the demand be founded on a judgment, note or written contract, by delivering to the executor or administrator a copy of such instrument, with the assignment and credits thereon, if any, exhibiting the original, and if the demand be founded on an account, by delivering a copy thereof, setting forth each item distinctly and the credits thereon, if any."

If the executor or administrator may waive the copy required by the statute, we think it necessarily follows that he may waive the exhibiting of the original. It is true that we held in *Friend* v. *Patterson,* 150 Ark. 577, 234 S. W. 978, that the provision of the statute requiring the original to be exhibited is mandatory, but in that case the administrator, Friend, contested the allowance of the claim on the ground that the original written instrument was not exhibited. The court there stated the reason for

the rule and the purpose of the statute as follows: "The statute conserves a wise purpose, inasmuch as it was intended to prevent possible mistakes, frauds, or forgeries, by giving to the executor or administrator the opportunity to examine the original instrument which is the basis of the claim before approving or rejecting it." The court, in the cases above cited, gave a similar reason for the provision of the statute relating to a copy. In the case of *Friend* v. *Patterson,* there was no evidence of waiver, and no substantial compliance. Here, however, when the claim was presented to the executors, they promptly allowed it, knowing of its justice, and made no demand for the original notes.

There was substantial evidence to support the findings of the circuit court, and its judgment is affirmed.

CLARK *v.* BOWEN.

4-2844

Opinion delivered February 6, 1933.

O. A. Featherston, for appellant.

P. L. Smith, for appellee.

BUTLER, J. This is an appeal from the action of the trial court vacating a judgment of that court made and entered on the 15th day of September, 1930, which was appealed to this court and affirmed.

In the court below the appellant filed a motion to dismiss the petition on the ground that the subject-matter involved had been adjudicated, and the plea of *res judicata* was interposed in said motion. This motion was overruled, and issue was joined. The court, having heard the evidence adduced, vacated its former judgment, and the appellant here urges the same grounds for reversal as those contained in his motion to dismiss.

The judgment sought to be vacated has been before this court on appeal and here affirmed. The appellant invokes the rule that matters involved and litigated in a former suit, or which might have been litigated therein, are *res judicatae,* and cites a number of our cases in support of the rule. It is our opinion that the rule and the decisions have no application here, for the reason that this is a special statutory proceeding authorized by the first subdivision of § 6290 of Crawford & Moses' Digest and prosecuted under § 1316 of the Digest, which section provides that, where grounds for new trial are discovered after the term at which the verdict was rendered, an application for vacating the judgment may be made by petition filed with the clerk on which a summons shall issue as on other complaints requiring the adverse party to appear and answer. By that section it is also provided that the case shall be summarily decided by the court upon evidence, either in form of depositions or the testimony of witnesses examined in the court.

It was alleged, and the court found, that the plaintiff (appellee) had discovered new evidence material to the issue in the former suit, and that, if the evidence was true, it constituted a valid defense. The court thereupon granted the prayer of the petition and vacated and set

aside the judgment and set down the case for trial. Subsequently, the case was again tried, and the verdict of the jury and judgment of the court were adverse to the appellant.

There appears to have been sufficient testimony to justify the action of the court in vacating the judgment and to sustain the verdict of the jury in the subsequent trial. In the matter of vacating judgments on the ground of newly-discovered evidence, a wide discretion is given the trial court, and its judgment should not be disturbed unless it is manifest that there has been an arbitrary abuse of that discretion. The right to have a judgment vacated on the ground of newly-discovered evidence, or for any other of the grounds mentioned in § 6290, *supra,* is not affected by an appeal to this court or a reversal or affirmance. It is an independent action to be instituted and conducted as in ordinary actions at law, and is not affected by whatever might have been done with respect to the judgment sought to be vacated.

In the case of *Foohs* v. *Bilby,* 95 Ark. 302, 129 S. W. 1104, there had been a trial and judgment in the lower court, from which Bilby had appealed to this court, in which court the judgment of the trial court was affirmed. Afterwards, proceeding under the statute was instituted to vacate the judgment. It was there said: "It is next insisted by counsel for appellant that, Bilby having appealed from the judgment of the circuit court and the judgment having been affirmed, he was precluded from instituting proceedings to vacate it. This objection is not tenable. The appeal was merely a continuation of the suit below. An appeal does not have the effect of vacating the judgment of the court below. Even where a supersedeas is granted, an appeal does not have the effect of vacating a judgment, but only stays proceedings thereunder. *Miller* v. *Nuckolls,* 76 Ark. 485 [89 S. W. 88, 113 Am. St. Rep. 101, 6 Am. Cas. 513]. If supersedeas is granted, the judgment of the court below is suspended pending the appeal; and, if the cause is reversed, the rights of the parties stand as though no action had ever

taken place in the court below. *Harrison* v. *Trader,* 29 Ark. 85. On the other hand, if the judgment is affirmed, the rights of the parties will stand as if no appeal had been taken. Therefore we do not see how the rights of a party to have a judgment set aside for the grounds set out in § 4431 of Kirby's Digest can be affected by an appeal taken from the judgment. The appeal and the proceedings to set aside the judgment for the grounds mentioned in § 4431, *supra,* are wholly separate and independent proceedings, and are intended to effectuate different purposes. Therefore it is difficult to perceive how the use of the one remedy will preclude the right to exercise the other."

From the record before us, we are of the opinion that the action of the trial court in vacating the judgment was not an arbitrary exercise of his power, and, since on a new trial there was substantial evidence to warrant the verdict, the judgment will be affirmed.

DALTON *v.* HUSKEY.

4-2841

Opinion delivered February 13, 1933.

Bush & Bush and *McRae & Tompkins,* for appellant.

William F. Denman, for appellee.

SMITH, J. Appellant was engaged in constructing a concrete highway near Prescott, and was operating under the trade-name of D. H. Dalton Construction Company—not incorporated. A concrete mixer was placed on the

highway, and a number of trucks hauled sand, cement and gravel to it. At a distance of about 150 feet from the mixer there was what was called a "turn-around," at which point the trucks were driven on to the highway, which was 18 feet wide, and were then backed down to the mixer. About half way between the mixer and the turn-around, at a curve in the road, the plaintiff was engaged in lining up the forms. He described his work as follows: "My duties were as form liner. The forms were on each side, about 18 feet across, and they are first pinned down in a straight line. It was my job to go back and straighten them out and make them cross-section straight, and make them 18 feet in between forms, and then level them up on top, and the forms are 10 feet long and 9 inches high."

To do this work it was necessary for plaintiff to lie down so as to sight along the forms and to signal to his helpers to raise or lower the forms in order to level them. There was a constant stream of trucks backing down to the mixer or going back to the turn-around. While plaintiff was lying down in the performance of his duties, as stated, a truck was backed from the turn-around upon him, inflicting the serious injuries, to compensate which this suit was brought.

There was a verdict and judgment for the plaintiff, and for its reversal it is insisted, among other assignments of error, that the testimony is not sufficient to sustain the verdict. We do not pass upon this question, for the reason that the testimony does not appear to have been properly and fully developed upon this controlling question of fact. Indeed, the judgment must be reversed for this failure.

The defendant offered several witnesses by whom he proposed to prove that Deaton, the driver who ran over appellee, was a good, capable and efficient driver, but the court only permitted these witnesses to answer that Deaton drove the truck in the same manner that the other drivers customarily drove their trucks.

We think the court should have permitted the defendant to prove that Deaton was careful and efficient. In the case of *Missouri Pacific R. Co.* v. *Riley,* 185 Ark. 699, 49 S. W. (2d) 397, a headnote reads as follows: "On the issue of contributory negligence, evidence of witnesses acquainted with the skill and experience of plaintiff automobile drivers that they were careful and competent drivers, *held* admissible."

In the instant case the issue is not whether Deaton, the truck driver, was negligent, for, being plaintiff's fellow-servant, no liability would arise from that fact. The plaintiff, to establish his case, must prove something additional, and that is, that the master knew, or, in the exercise of ordinary care, should have known, that Deaton, the driver, was inexperienced or incompetent, or so reckless that a careful man would not have employed him as a truck driver. In other words, that it was negligence to have employed such a driver.

It was said, in the case of *Duff* v. *Ayres,* 156 Ark. 17, 246 S. W. 508, that the common-law rule as to responsibility for the negligent acts of fellow-servants has not been changed by statute, so far as concerns individuals who are employers of servants, but the master is liable for the act of an unskillful fellow-servant where he has been negligent in the employment, on the theory that the negligence in employing such a servant is the proximate cause of the injury. Certainly, upon such an issue it was competent to prove that the driver was efficient and careful.

It is insisted that this error of the court was invited by the defendant, in that the court excluded testimony offered by the plaintiff on this issue upon the motion of the defendant. In developing his case in chief, the plaintiff called Mr. Blakely, the foreman of the truck drivers, who testified that he did not think Deaton had had any experience in driving such a truck as the one which inflicted the injury, and that he knew he had not been using such a truck. The witness was then asked: "Did you think it would be dangerous to turn that boy loose?" An

objection was sustained to the question, and the court also excluded the following question and answer: "Q. You then say he was too small to look over and properly operate that truck? A. Yes, sir." Other questions and answers to which objections were sustained appeared to be directed to the alleged negligence of Deaton at the time of the injury.

The excluded testimony was to the effect that Deaton lacked only a few days of being 19 years old, and had been driving trucks for from 2½ to 3½ years to the knowledge of the witnesses, and that they regarded him as a capable and efficient driver. The father of Deaton would have testified that his son had been driving trucks since he was 12 years old, and had driven many different kinds of trucks.

The defendant should have been permitted to offer testimony tending to show that he was not guilty of negligence in giving young Deaton employment as a truck driver, and, for the error in excluding this testimony, the judgment must be reversed, and the cause will be remanded for a new trial.

SYDEMAN BROTHERS, INC., *v.* WHITLOW.

4-2852

Opinion delivered February 6, 1933.

I. J. Friedman and *Cravens & Cravens,* for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

MEHAFFY, J. On April 30, 1930, the appellee and appellant entered into a written agreement whereby the appellee let, rented and leased to the appellant certain property in the city of Fort Smith, Arkansas, for the term of five years, commencing on June 1, 1930, at a yearly rental of $2,400, payable monthly in advance.

One clause in the lease reads as follows:

"That said lessee shall keep the premises in good repair, reasonable use, wear and tear and damage by the elements excepted, except that the lessee shall not be required to make repairs to the roof or structural repairs and the lessor agrees to keep the roof and the structural parts of the building in good repair."

A later clause in said lease reads as follows:

"In case the premises are destroyed by fire, or so damaged by fire or any unavoidable casualty as to make

them uninhabitable or unfit for use and occupation, the lessor agrees to repair such damage as promptly as possible, and the rent shall be abated until the completion of such repairs. In the event that the said premises are completely destroyed and the lessor decides not to rebuild, then this lease shall terminate and come to an end."

The above are the only clauses in the lease about which there is any controversy.

The appellant conducted a retail clothing business in said building, and the building was damaged by fire on September 10, 1931. Immediately after the fire, the lessor employed the contractors to restore said building. The contractors made a survey of the general damage to the building, and made notes of the damages, prepared an estimate of loss and damage caused by the fire, water and smoke. The contractors were ready to go to work the day after the fire.

The manager for the appellant, Mr. Frazier, told the contractor that Mr. Schachter would be there in a few days; that he was the road manager, and that the goods could not be removed until Mr. Schachter came. When Mr. Schachter came, he insisted that no repairs be made until they got their goods out of the building. He asked the contractor not to do anything until after everything had been moved out.

The insurance adjuster undertook to adjust the loss. He directed the contractor to make separate estimates for the papering, painting and all fixtures, and all interior work; that the appellant had that covered by insurance, and would collect for it, and he should make separate estimates, which he did, and the appellant collected for the damage to these items.

The appellant concedes that, if the appellant was to make repairs, its failure to do so and to continue to pay rent would constitute a breach of the contract, and justify the judgment against it. But if it was the duty of the appellee to make these repairs, then her failure to do so constituted a breach of the contract.

The question for our determination therefore is, whether the lessor or lessee was to make repairs on the items upon which appellant carried insurance.

The two clauses of the contract or lease must be construed together. There is no conflict between the two clauses; and, if we had nothing but the two clauses and had to determine from them alone, the appellee would be required under them to repair all the damage done by the fire.

A contract of lease is construed like any other contract, and the rule is, in the interpretation of contracts, to ascertain the intention of the parties, and give effect to that intention, where this can be done consistently with legal principles. 6 R. C. L. 835, 13 C. J. 520; *Coca-Cola Bottling Co. of Ark.* v. *Coca-Cola Bottling Co.,* 183 Ark. 288, 35 S. W. (2d) 579.

In ascertaining the intention of the parties, this court, in the last case cited, quoted with approval the following:

"It is a well-established principle of law that, in the interpretation or construction of contracts, the construction the parties themselves have placed on the contract is entitled to great weight and will generally be adopted by the courts in giving effect to its provisions."

It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken about its intentions. *Temple Cotton Oil Co.* v. *Southern Cotton Oil Co.,* 176 Ark. 601, 3 S. W. (2d) 673; *Gauss Sons* v. *Orr & Lindsey,* 46 Ark. 129; *Keopple* v. *Nat. Wagonstock Co.,* 104 Ark. 466, 149 S. W. 75; *Craig* v. *Golden Rule Life Insurance Co.,* 184 Ark. 48, 41 S. W. (2d) 769.

Courts may acquaint themselves with persons and circumstances that are subjects of the statement in a written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and judge of the meaning of the words and clauses used by the parties, and the conduct of the parties should

be considered in determining what they meant by the contract. 13 C. J. 546.

The appellant secured a policy of insurance protecting it from loss or damage by fire, on certain items of the interior. It suggested that separate estimates be made, one for the landlord, including the items that she was to repair, and one for the tenant, on the items insured, for its benefit and in its name.

We therefore think that the parties themselves, and especially the appellant, understood the contract to mean, and construed it to mean, that it was to repair the damage to these items. We are therefore of opinion that, when the two clauses of the contract are considered together, and the conduct of the parties and all the attendant circumstances are considered, it was the intention of the parties that the appellant should repair the items insured in its name for its benefit.

It also appears from the evidence that the landlord would have repaired the building immediately, but for the objection of the appellant. The contractor offered to go to work at once, and to give the appellant a bond to protect its goods and its interests while repairs were being made, but the appellant declined to permit repairs to be made until it had disposed of its goods.

About the time the repairs were completed, the appellant, after disposing of all of its property in Arkansas, and after requiring the appellee to spend considerable money purchasing linoleum for the floor, wrote to the Secretary of State that it had disposed of its last store in Arkansas, and wished to retire from business in the State of Arkansas. When this suit was brought, it filed a petition in this court for a writ of prohibition, alleging that about four months before the appellee instituted her suit, it, a foreign corporation, had withdrawn by discontinuing its business in the State of Arkansas, and by notifying the Secretary of State of such cessation of business, and its retirement from the State, alleging that, by reason of these facts the chancery court acquired no jurisdiction by service of summons upon the Secretary of State.

We do not think that the contract as construed by the parties, shows that the repairs to the interior were to be made by the appellee, but we think appellant is estopped by its conduct from claiming that the appellee breached the contract.

We think it evident from the proof that the appellant did not intend to occupy the building, nor did it intend to sublet it.

Whether the appellant had breached the contract, and whether, under the contract, the appellant was to make the interior repairs, were questions of fact, and the chancellor's finding will not be disturbed unless we can say it is against the preponderance of the evidence; and, in determining these questions the chancellor had a right, not only to consider the testimony of the witnesses, but the conduct of the parties and all the attendant circumstances.

The conclusion we have reached as to the interpretation of the lease makes it unnecessary to decide the other questions discussed by counsel.

We find no error, and the decree is affirmed.

BARNES *v.* HOPE BASKET COMPANY.

4-2856

Opinion delivered February 13, 1933.

E. F. McFaddin, for appellant.

McRae & Tompkins, for appellee.

BUTLER, J. The Hope Basket Company, appellee, is a corporation, and was engaged on the day of the injury suffered by the appellant, Clarence J. Barnes, in loading its products into railroad cars for shipment. As a car was loaded, it was moved forward by the employees of the company, and an empty car put in place to be loaded. The loaded cars were moved by Barnes and other employees by means of crowbars. The employees would get at one end of the boxcar and place the crowbars under the rear wheels and raise them up. This would cause the car to move forward, and was called "pinching" the cars. In moving one of the cars, Barnes was using a crowbar under one of the rear wheels and other employees were assisting in the operation. It was discovered that the brake was set on this car. Some one called attention to this fact, and one of the employees started to crawl onto the car for the purpose of releasing it. Before he had gotten on the car however, a boy not in the employ of the company and who had been forbidden to meddle or trespass on the property of the company, suddenly appeared and voluntarily climbed up and reached the brake. The brake was kept in place by an appliance called a ratchet, to release which another appliance, called the brake wheel, would be turned. The boy did not seem to have enough strength to turn the wheel without the use of a lever. While he was attempting to move the wheel, some one from the ground below handed him a canthook handle which he inserted in the spokes of the wheel and thus was able to move it. When he did this, the ratchet was released, causing the wheel to move suddenly with sufficient violence to wrench the canthook from the boy's grasp, propelling the same

downward in such manner that it struck the appellant Barnes on the head, causing the injury and damage for which he brought suit.

The negligence alleged in the complaint was that the Hope Basket Company failed to provide a safe place in which Barnes might do this work, and "that the foreman of the crew gave the order to trip the brakes, knowing Barnes' position and knowing that there was in the wheel at the time a canthook plainly visible to the foreman, if he had looked, and not visible to Barnes on account of his position." The answer denied the allegations of negligence and alleged that the injury was not the result of any negligent act of an employee, but of a boy fifteen years of age not in the employ of the company who, without having been directed by any one in authority, and of his own volition, hurriedly climbed to the top of the boxcar, and, using a stick as a lever, performed the act which occasioned the injury to the appellant. On the trial of the case there was but little conflict in the testimony, which established the facts heretofore stated. After a number of witnesses had testified, the court asked if all the testimony relative to liability on the part of the defendant had been introduced, and, on being advised that it had, indicated that the court was of the opinion that the evidence failed to establish a cause of action against the defendant and declined to hear any testimony regarding the extent of the injury or the amount of damage. Thereupon the defendant moved for a directed verdict. Counsel for plaintiff objected on several grounds, and asked that he be given the right to amend the complaint to conform to the proof, and asked the following question: "Will the court let the record show that the request of the plaintiff to amend the complaint to comply with the evidence is granted?" The court answered, "Yes, sir." Counsel then continued, saying: "And the plaintiff excepts to the ruling of the court at this time in granting a peremptory instruction for the defendant for the reasons herein stated and generally."

The jury returned a verdict for the defendant at the direction of the court, from which is this appeal.

The record before us shows that the trial judge granted the request that the complaint be amended to conform to the proof, but clearly indicates that in his opinion in any view of the evidence no negligence attributable to the defendant was shown, and, without waiting for any amendment to be offered or made, instructed a verdict for the defendant. It is suggested by the appellee that the appellant's failure to amend the complaint precludes him from now complaining, but it is manifest that the amendment would have been unavailing in the trial court and a vain thing to suggest what the amendment would be as the court had all the evidence in mind. It is always within the sound discretion of the court to permit a complaint to be amended to conform to the proof; and where the allegations in the complaint are insufficient, it is proper at the conclusion of the evidence to treat the complaint as amended to conform to the proof, where there are no objections to the introduction of the evidence and no claim of surprise is made. *K. C. Sou. Ry. Co.* v. *Rogers,* 146 Ark. 232, 225 S. W. 640; *L. & C. Co* v *Sanders,* 173 Ark. 362, 292 S. W. 657; *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. (2d) 553.

It must have been the view of the court that, in any view of the testimony adduced, there was no liability, and, if this be true and all reasonable minds would have drawn the same conclusion from the facts in evidence, the action of the court was proper. *C. R. I. & P. Ry. Co.* v. *Daniel,* 169 Ark. 23, 273 S. W. 15. But a case should not be withdrawn from the jury or a peremptory instruction given unless the conclusion follows as a matter of law that no recover can be had upon any view of the facts which the evidence tends to establish. *S. W. Bell Tel. Co.* v. *Shelby,* 167 Ark. 488, 268 S. W. 860; *Gladys Belle Oil Co.* v. *McGee,* 172 Ark. 1176, 291 S. W. 72. It is apparent that the boy who released the brake did so of his own motion and without the suggestion from any one, and that he was a mere trespasser for whose sole

act the company was not responsible. Neither can we see any negligent act on the part of the foreman, and the complaint made that his absenting himself from the work and his failure to supervise it was the evidence of lack of ordinary care for the safety of the employees who were doing the work. He was nearby preparing a boxcar for loading, and the particular operation in which the men were engaged was a simple one; they were experienced in this and required no supervision. The appellee insists that there is no testimony to the effect that any of the employees at the boxcar had authority to employ the boy or that under the circumstances the boy could be deemed to have been an emergency servant. To this we agree. If there is any negligence for which the company is responsible, it was no act of the boy alone, but there is evidence that he was seen by the employees as he was engaged in the attempt to turn the brake wheel, that none of them forbade him to do this act, but that some one from the ground below made it possible for him to perform the act in a negligent way by handing him a canthook handle to aid him in his efforts. If this was done by one of the employees of the company engaged in the work of the company, this would present a question for the jury to say whether or not under all the circumstances this was negligence, concurring with the act of the unauthorized volunteer, which was the proximate cause of the injury.

This being our view, we are of the opinion that the court erred in giving the peremptory instruction to find for the defendant. The case will therefore be reversed, and the cause remanded for such further proceedings as the appellant may be advised in accordance with the law and not inconsistent with this opinion.

McHaney, J., dissents.

TAYLOR *v.* CALAWAY.

4-2819

Opinion delivered January 30, 1933.

S. F. Morton and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

R. H. Peace and *H. G. Wade,* for appellees.

SMITH, J. Suit was brought by the Farmers' & Merchants' Bank of Bearden, Arkansas, against M. E. Calaway, who is the widow of J. C. Calaway, deceased, and certain persons as garnishees, and the following facts were alleged as constituting its cause of action.

The bank recovered a judgment on October 23, 1930, for $1,045.28 against M. E. Calaway and one E. C. Hawkins, upon which judgment an execution was issued and returned unsatisfied. Mrs. Calaway had indorsed a note for Hawkins at the bank.

The Stout Lumber Company made a contract to sell certain lands in Calhoun County, which was evidenced by its bond for title to J. C. Calaway, and another to C. L. Witherington, which last-named contract was assigned by Witherington to J. C. Calaway. The payments contracted for were finally made, but before their completion Calaway contracted to sell the lands to William and Emma Boyett for the sum of $2,600, evidenced by ten notes each for $260, payable one note each year, and the last maturing November 1, 1934. Calaway gave the Boy-

etts a bond for title, which obligated him to convey the lands to them upon the completion of the payments. The Boyetts paid the first five of these notes to mature. Mrs. Calaway, the wife of J. C. Calaway, did not join her husband in the execution of this contract to convey to the Boyetts. The complaint alleged that Mrs. Calaway had acquired the title of her husband to these lands by a deed to her from him, or, if not so, that she had acquired the equitable title by the indorsement and delivery to her of the unpaid purchase money notes executed by the Boyetts.

Attached to the complaint were certain interrogatories which it was prayed that Mrs. Calaway and the Boyetts be required to answer under oath, showing the interest now owned by Mrs. Calaway in the lands and the balance of purchase money still due on the notes.

It was prayed that the lumber company be required to execute deeds to Mrs. Calaway, and that the Boyetts be required to pay into court the balance of purchase money due by them, or that their interest in the lands be sold, to the end, that the plaintiff bank have satisfaction of its judgment.

The contract of sale between J. C. Calaway and the Boyetts provides that, if they shall fail to make the payments, or any of them, within thirty days after maturity, the contract should then and in that event be considered and declared a rental contract, "and the said William Boyett and Emma Boyett shall pay the said J. C. Calaway, or to his heirs and assigns, the sum of two hundred dollars per year as rent on said lands, and the said J. C. Calaway shall have a lien on any and all crops raised on said lands for his said rent;" but that, if the payments were made as contracted, he, Calaway, would convey, or cause to be conveyed, to the Boyetts the said lands with warranty of title.

A separate answer was filed by Mrs. Calaway, in which she admitted that the plaintiff bank had a judgment against her which she had not paid. She alleged that, if her husband had executed a bond for title to the

Boyetts, she was not a party thereto; "that she did not sign away any of her rights in and to said lands, and she specifically claims her dower rights in and to said lands as the widow of the said J. C. Calaway, deceased." She alleged that default had been made in the payment of the notes to her husband's order, and that the bond for title to the Boyetts had forfeited on that account, and that the lands now belong to her children, the heirs at law of her husband, subject to her dower. She therefore prayed that the complaint against her be dismissed, and that the lumber company be required to execute deeds in accordance with its bonds for title, and that dower be assigned to her.

An intervention was filed in the case by Ella Stringfellow and Docia Bailey, who alleged that they were the only heirs at law of J. C. Calaway, which pleading recited the execution of the bonds for title to J. C. Calaway and C. L. Witherington, and the assignment to Calaway of the bond for title by Witherington, and alleged the payment in full of the purchase money due under both contracts. This pleading also alleged the execution of the contract by Calaway to convey the lands to the Boyetts, and that instrument was made an exhibit to their intervention. Interveners alleged the default of the Boyetts in making their payments, and prayed that the lumber company be required to execute deeds to them as the heirs at law of their father, subject to the dower right of their mother.

The Boyetts filed an answer to the plaintiff's interrogatories in which they denied that they were indebted to Mrs. Calaway in any sum. They also filed a separate answer in which they alleged that they had paid $1,300 of the $2,600 purchase money which they had agreed to pay, and that four of these payments had been made to Mrs. Calaway after the death of her husband, and they therefore alleged that Mrs. Calaway was not entitled to dower in said lands. They alleged that they were at all times ready, willing and able to pay the balance of purchase money, but did not make the payments because the

notes were in the possession of the plaintiff bank and the title to the lands was in dispute, and that Mrs. Calaway had refused to join in the execution of a deed to them. They therefore prayed the return to them of the $1,300 which they had paid.

The lumber company filed an answer, in which it admitted the receipt in full of the purchase money due it, and prayed the direction of the court as to the execution of the deeds, which it offered to make.

The plaintiff bank filed an amendment to its complaint, in which it admitted that it had possession of the five notes remaining unpaid by the Boyetts, but alleged that the possession thereof had been delivered to it by Mrs. Calaway for safekeeping. It was prayed that any proceeds of the notes be impounded and applied to the bank's judgment.

Mrs. Calaway filed an answer to the amended complaint of the bank, in which she admitted delivering to the bank five notes of the Boyetts payable to the order of her husband, but disclaimed any interest in them.

The interveners, Ella Stringfellow and Docia Bailey, filed an answer to the bank's amended complaint, in which they alleged that any unpaid notes of the Boyetts are a part of the estate of J. C. Calaway, deceased, and are not subject to the debts of his widow.

Mrs. Calaway filed a response to the intervention of her daughters and to the amended and substituted answer of the Boyetts. In this pleading she alleged that the Boyetts were at all times aware of her interest in the lands, and denied their offer to pay the balance of purchase money, and denied their right to recover payments made, but alleged that, under the contract which they failed to perform, the payments made should be treated as rent. She denied that she had received any payment from the Boyetts. She prayed that, if the Boyetts be allowed to recover payments made, they be charged with the rent upon the lands which they had contracted to buy.

The Boyetts filed an amended and substituted answer and cross-complaint, reciting many of the facts

hereinabove stated and alleging that, inasmuch as Mrs. Calaway had not signed the contract to them, and refused now to execute a deed conveying her interest, their contract was rescinded, and they prayed judgment for the payments of purchase money made, and it was prayed that this sum be decreed to be "prior and paramount, in point of equity, to the rights of the plaintiff or to those of the widow and heirs of J. C. Calaway," and, in the alternative, it was prayed that, if the right of rescission is denied, the court decree them a title free from the dower claim of Mrs. Calaway.

Upon the issues raised by the pleadings, much testimony was taken in support of the respective allegations. The plaintiff bank became insolvent, and was taken over for liquidation by the State Bank Commissioner, who was substituted as party plaintiff.

The decree in the cause recites an extended finding of facts upon the testimony as follows: The lumber company has been paid the purchase money due it. Mrs. Calaway never at any time conveyed or contracted to convey, her right of dower, and never received a deed to the land from her husband. This was the principal question of fact in the case. It appears that Calaway, in his lifetime, executed a deed to his wife for all the lands. But the deed was never recorded, and the court found that it was never delivered. This deed was dated September 27, 1926, and Mr. Calaway died on January 23, 1927, but the deed was found in 1929 in a different bank at Bearden with other papers belonging to Mr. Calaway, where he kept a number of important papers, among these being a fire insurance policy. The insured property was destroyed by fire, and in searching for the policy the deed was found. Mrs. Calaway testified that she knew nothing of the execution of the deed, and that it had never been in her possession.

The law as to the delivery of a deed is that, in order to constitute a delivery of a deed, it must be the intention of the grantor to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over

the deed. *Davis* v. *Davis,* 142 Ark. 311, 218 S. W. 827. There is some conflict in the testimony, but we think the finding of the chancellor that Mr. Calaway had not delivered the deed to his wife, but had retained dominion over it, is not contrary to the preponderance of the evidence.

It was also contended by the plaintiff bank that the purchase money notes which the Boyetts had not paid had been assigned to Mrs. Calaway by her husband, but the decree indicates that the court did not sustain that contention. The notes executed by the Boyetts appear to have been made payable to J. C. Calaway or Ella Calaway. These unpaid notes are copied into the transcript and read as stated, but it is stated in the briefs that the originals of these notes, which are not before us, show that the name of Mrs. Calaway was added by interlineation, was written in a different handwriting and with different ink. However this may be, Mrs. Calaway testified that the notes were never in her possession, and were never claimed by her. Note No. 6, executed by the Boyetts, was not indorsed, but the name of J. C. Calaway was written on the back of notes Nos. 7, 8 and 9, and on the back of note No. 10 appears the following indorsement: "For value received, I hereby transfer and assign note to Mrs. M. E. Calaway. (Signed) J. C. Calaway." No explanation appears as to the time when nor the purpose for which Mr. Calaway indorsed notes Nos. 7, 8 and 9. It may have been when using them as collateral.

The fact remains, however, that these notes were given for purchase money of lands the title to which, under the findings of the court, has failed, and the notes are without consideration and are therefore void, and we are not therefore required to pass upon the conflicting testimony as to whether Mrs. Calaway ever owned any interest in them during the lifetime of her husband. She testified that she had never at any time been in possession of any of these notes, and had never claimed any interest in them. Mrs. Calaway has no dower interest in these notes which can be subjected to the satisfaction

of the bank's judgment, for the reason that the notes are void as being without consideration.

As Mrs. Calaway declined to convey her dower interest in the lands, for the reason that she had never contracted to do so, the Boyetts could not be required to accept a deed which did not convey that interest, and the Boyetts have not appealed from the decree.

The court found that twenty acres of land, which constituted a part of Mr. Calaway's homestead, had been conveyed by him and his wife to their children, and that they had the right to make this conveyance "free and clear of all rights of creditors," and this part of the decree does not appear to be challenged.

Having found that the contract to convey to the Boyetts could not be performed, the court gave them judgment for the payments made by them, and charged them with the rental value of the lands.

It is argued that the Boyetts were not charged enough rent, and that judgment was rendered in their favor for an excessive sum, and that, if judgment was rendered against them, and not for them, Mrs. Calaway's interest in this judgment would be subject to the judgment of the bank.

The decree of the court declared the sum due the Boyetts was a lien upon the lands, "which is superior and paramount to all rights and interests of all parties to this suit except the dower interest of Mrs. Calaway." The bank therefore insists that it is vitally interested in the amount of a judgment to be rendered in favor of the Boyetts, and that the judgment rendered in their favor was excessive. The testimony as to the amount for which the Boyetts should have judgment is undisputed, and may be arrived at by simple calculation. The testimony is in conflict, however, as to the amount for which they should be charged for rent, and, without reviewing this testimony, we announce our conclusion to be that the finding of the chancellor upon this subject does not appear to be contrary to the preponderance of the evidence.

It was decreed that the heirs of J. C. Calaway, his daughters, Ella Stringfellow and Docia Bailey, have title to the lands, subject to the dower right of their mother and to the lien of the Boyetts, and neither the Boyetts nor the heirs have appealed.

The court decreed that an attachment which had issued should be discharged except as to the dower interest of Mrs. Calaway. As to this interest, the attachment was sustained, and it was ordered that that interest be sold in the manner there provided.

Upon the whole case we are of opinion that the findings of fact made by the chancellor are not contrary to the preponderance of the evidence, and that the decree accords with the principles of equity. It is therefore affirmed.

CARTER *v.* FINCH.

4-2792

Opinion delivered January 30, 1933.

[redacted]

E. B. Downie, for appellant.

W. E. Rhea and *Cazort & Cronkrite,* for appellee.

SMITH, J. The St. Louis Joint Stock Land Bank, hereinafter referred to as the bank, made a loan upon a farm in Pulaski County of $25,000, which was secured by a deed of trust describing the farm and reciting that there were 620.41 acres of land, more or less. The borrower made default in meeting his payments, and, to save the expense and delay of foreclosure proceedings, executed a deed to one W. L. Bacon under the direction of the bank. The fact appears without serious question that Bacon was only a nominal purchaser and paid nothing for his deed. The obvious purpose was for the books of the bank to show the ownership of the loan, rather than of the land. On July 29, 1927, Bacon conveyed the land to Mrs. Mary S. Finch, the wife of W. P. Finch, an employee of the bank. Mrs. Finch paid nothing for the land, although she apparently assumed the payment of the mortgage debt. This was also a mere bookkeeping transaction.

W. P. Finch, the husband of the last-named grantee, as the agent of the bank, negotiated a sale of this farm to E. L. Carter. The bank denied that Mr. Finch was its agent, but the court found that he had acted in that capacity, and we think the testimony fully sustains that finding. Finch, as the apparent agent of his wife but as the actual agent of the bank, negotiated the sale of the land to Carter, pursuant to which Mrs. Finch executed a deed on September 6, 1927, to Carter, with the usual covenant of warranty. This deed described the farm as "containing in all 620.41 acres, more or less." Carter made a cash payment and assumed the payment of the balance due on the original loan made by the bank, which he testified he would not have done had he known of the deficiency in acreage.

Carter entered into the possession of the land and began to cultivate it, and in April, 1931, wrote the bank

that there was a large deficiency in acreage. The bank denied that it was Carter's grantor, and suit was filed on August 1, 1931, by Carter against the Finches and the bank, in which a rescission of the contract was prayed on the ground of fraud, with the alternative prayer that, if rescission were denied, the purchase price be abated to accord with the actual acreage.

Mrs. Finch filed an answer, in which she alleged that she knew nothing about the farm, and had no interest in it, and that she had received and conveyed the title at the request of her codefendant, the land bank, "without consideration, and without the hope or promise of any compensation; that she was willing and anxious to be of service and to accommodate her husband's employer, the St. Louis Joint Stock Land Bank," and that the check which she had received from Carter as a cash payment had been indorsed and delivered by her to the bank at the time she executed her deed. She prayed that she have judgment against the bank for the amount of any judgment rendered against her. The cause, however, was dismissed as to Mrs. Finch.

The bank defended upon the grounds: (1) that it was not the grantor in the deed; (2) that the plaintiff had bought the farm in bulk, without reference to its actual acreage, and (3) that plaintiff had received the acreage described. As to the right of rescission, the bank pleaded the laches of the plaintiff in bringing this suit praying that relief.

We concur in the view of the court below that Carter is barred by laches from maintaining a suit for rescission, for the reason that this relief was not prayed in apt time.

We concur in the findings of the court below on the other questions in the case except as to the extent of relief which should be granted the plaintiff, Carter, on account of the deficiency in the acreage.

The fact that Carter has delayed too long to be granted relief by way of rescission does not affect his right to recover for the shortage in the acreage. It was said in the case of *Fort Smith Lumber Co.* v. *Baker,* 123

Ark. 275, 185 S. W. 287: "A party who has been induced to enter into a contract for the purchase of property by the false representations of the vendor concerning the quantity or quality of the property sold may have either of these remedies which he conceives is most to his interest to adopt. 'He may annul the contract, and, by returning or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract, or he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, and in this event the measure of damages would be the difference between the real value of the property, in its true condition, and the price at which he purchased it; or, to avoid a circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped from the price he agreed to pay.' *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546."

In the present case we have not only the testimony of Carter that he was induced to buy the land through the false representation as to the acreage, but we have a confirmation of this testimony as to the supposed acreage by the recitals of the deed itself.

It is true the bank was not the grantor in the deed, but its agent was, and its liability for the misrepresentation as to the acreage rests upon elementary principles.

As to the defense that the plaintiff Carter bought the farm without express warranty as to acreage, and without reference to the exact acreage, we have to say, as was said by Mr. Justice RIDDICK in the case of *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418, that in a deed conveying a certain number of acres "more or less," the words "more or less" are precautionary, and are intended to cover slight or unimportant inaccuracies, but do not weaken or destroy the indications of quantity, when no other guide is furnished. Slight discrepancies may be ignored when there is no express warranty as to quantity.

The appellant bank insists that the sale was not made at a given price per acre, but at a fixed price for 620.41 acres, "more or less," but, even so, the deficiency in the instant case is too great to be treated as immaterial. In the case of *First National Bank of Belleville, Ill.*, v. *Tate,* 178 Ark. 1098, 13 S. W. (2d) 587, it was said: "Appellant calls attention to *Harrell* v. *Hall,* 19 Ark. 108, 68 Am. Dec. 202, and there are a number of other Arkansas cases to which attention might be called. In all of them, however, the words 'more or less' were used after the mention of the number of acres, and it is generally held that 'more or less' simply means approximately. And, if there is a very small discrepancy or insufficiency, that a statement of 'more or less,' or 'estimated,' will prevent the purchaser from recovering where the difference is trifling or small. But, even where the words 'more or less,' or 'estimated,' or 'approximately' are used, or either of them, if there is a very great discrepancy, the purchaser is entitled to recover."

The court below found that the purchase price of the land which plaintiff Carter agreed to pay, including the cash payment, was approximately $25,000, and that there is a deficiency of 56 acres, for which credit should be allowed at $48.86 per acre, and that credit for this acreage, at that price per acre, should be applied on the principal indebtedness in the same manner as an advance payment upon the principal indebtedness. We concur in this finding, except that we are of opinion that the deficiency in acreage was greater than that found by the court below. We have before us the evidence of an engineer who twice surveyed the land and made a plat of each survey. The first survey was made in March, 1926, and, according to this survey, the farm then contained 511 acres. This survey was made before the flood of 1927, and the undisputed testimony shows that this flood occurred before the purchase of the land by plaintiff and had caused the caving of 56 acres of the land into the Arkansas River. This river forms one of the boundaries of the land, which is described as lying

south of that stream. The court appears to have allowed credit only for the 56 acres which caved into the river in 1927; but there is equal reason for allowing for the shortage which previously existed.

There was testimony as to certain accretions which, it is claimed, equal the shortage shown to exist by the two surveys. There appears to have been an island in the river near the farm, but the testimony shows that the main channel of the river was originally south of the island, that is, between the island and the original farm. The original owner of the farm claimed no title to this island, but stated that he paid taxes on his original acreage under the expectation that the channel of the river would change and run north of the island and that the old river bed might fill up. This appears to have occurred, and there are certain accretions to this island which equal, in acreage, the shortage claimed, but the testimony does not show that the accretions were made to the farm itself. And there is still a channel of the river, except in very low water, between the farm and the island and the accretions.

The court below did not find, nor do we, that any account should be taken of the alleged accretions, as that land now constitutes no part of the farm.

We conclude therefore that credit should be allowed both for the 56 acres of land lost through the caving banks prior to plaintiff's purchase, and for the shortage previously existing, amounting, altogether, to 165 acres, at the proportionate price per acre, which appears to be $40.30 per acre, and the decree will be reversed and the cause remanded, with directions to allow this additional credit as in the nature of an advance payment upon the purchase money.

UNITED ORDER OF GOOD SAMARITANS *v.* BRYANT.

4-2851

Opinion delivered February 6, 1933.

[redacted]

H. B. Mixon, for appellant.

Smith & Fitzsimmons, for appellee.

BUTLER, J. This is an action brought by appellant order under subdivision 7 of § 6290 of Crawford & Moses' Digest, in accordance with the procedure prescribed in § 6292 of the Digest to vacate a judgment of the Lee Circuit Court rendered at a former term. To the petition filed to vacate, response was made, and the court, after hearing the testimony on the issues joined, entered its judgment, denying the prayer of the petition and refusing to vacate the judgment theretofore rendered. To that action of the court, the appellant petitioner filed the following exceptions:

1. Defendant, United Order of Good Samaritans, excepts to the ruling of the court on the ground that the record shows an unavoidable casualty or misfortune preventing the defendant from presenting his defense, together with a *prima facie* showing of meritorious defense.

2. Defendant excepts on the ground that the judgment was partially void on the uncontradicted face of the record as shown by the by-laws of defendant society.

Whereupon, the defendant prayed an appeal to the Supreme Court, and was by the court allowed ninety days within which to file bill of exceptions. Bill of exceptions were filed July 9, 1932.

The appellant here argues that the judgment of the lower court refusing to vacate its former judgment should be reversed for the reasons, (1) that the undisputed record showed that the appellant was prevented from appearing and presenting his defense because of unavoidable casualty within the meaning of § 6290, *supra;* and (2) that the records of the company and the statements in the proof of death established the liability of the company, if any, in a sum not to exceed $150.

The appellee takes the position that it is necessary in proceedings of this nature to file a motion for a new trial as in other suits at law, and obtain the ruling of the court upon that, in order that the testimony taken on the petition to vacate may be brought into the record here and considered by us. Under § 6292, *supra,* the proceeding to vacate or modify a judgment on the grounds mentioned in the seventh subdivision of § 6290, *supra,* are the same as in ordinary adversary proceedings, *i. e.,* by verified complaint upon which a summons shall issue and be served and other proceedings had as in an action at law. It therefore appears that the procedure prescribed by § 6292, *supra,* makes this an independent proceeding, and the judgment rendered upon it is final and appealable, and, in order that we may be able to review the judgment of the trial court vacating a former judgment, a motion for a new trial is necessary, and the same must be incorporated with the action of the court thereon in the record; and, when such motion is not made and a rehearing on it obtained, it must be presumed that the judgment of the trial court was based upon sufficient evidence. *Martin* v. *Pierce Petroleum Corporation,* 174 Ark. 1161, 298 S. W. 494; *Loyal Protective Ins. Co.* v. *Edwards,* 124 Okla. 240, 255 Pac. 700.

The policy sued on provided that, in the event of death of the insured after he had passed a certain age, the

beneficiary would be entitled to recover only one-half of the policy, which would be $150, and it is insisted that the record on its face shows that the insured had reached that age before he died. However, it appears in the judgment sought to be vacated that the court heard testimony on this issue, and we must presume that the testimony was sufficient to warrant the finding that the beneficiary was entitled to the sum awarded.

Even should the exceptions filed to the judgment appealed from be treated as a motion for a new trial, we still think that the same should not be disturbed. The trial court is clothed with sound judicial discretion in such matters, and, if we may consider the evidence, we are of the opinion that it was sufficient to warrant the court in its finding that no unavoidable casualty within the meaning of § 6290, *supra,* has been shown.

Judgment affirmed.

McDaniel *v.* Davis.

4-2859

Opinion delivered February 13, 1933.

Duke Frederick, for appellant.

SMITH, J. Appellee recovered judgment in the court below for the sum of $150, and, for its reversal, it is insisted that the court erred in giving instructions numbered 1 and 3 at the request of the plaintiff. It is insisted also that the verdict of the jury and the judgment thereon are not supported by any substantial evidence.

The nature of the case appears from these instructions, to which reference has been made, and which read as follows:

"No. 1. If you find from a preponderance of the evidence in this case that the defendant warranted the seed sold to plaintiff to be orange sorghum seed and seeded ribbon cane seed, and that the plaintiff, in reliance on said warranty, bought and planted said seed and cultivated the crop raised therefrom, and, if you further find that the seed sold to plaintiff was not orange sorghum seed and seeded ribbon cane seed and was unfit for growing cane to make molasses, you are told that the plaintiff is entitled to recover from defendant a sum equal to the value of the crop at maturity which would have been raised from orange sorghum seed and seeded ribbon cane seed less the value of the crop actually raised and the cost of cutting the same and having it made into molasses."

"No. 3. You are instructed that a sale of seed by name raises an implied warranty that it is true to name; and the fact, if a fact, that the buyer did not inspect the seed before purchasing is immaterial where its character, if shown, cannot ordinarily be ascertained by reasonable inspection."

It appears that instruction numbered 1 was drawn to conform to the law as declared in the case of *Earle* v. *Boyer,* 172 Ark. 534, 289 S. W. 490, whereas instruction numbered 3 appears to be based upon the case of *Kefauver* v. *Price,* 136 Ark. 342, 206 S. W. 664.

It is insisted that the plaintiff should have been required to recover, if at all, upon either an express or an implied warranty, and that it was error to submit the question whether, if there was an express warranty, there may not also have been an implied one, for the reason that there could not be both an express and an implied warranty.

It was held in the case of *Earle* v. *Boyer, supra,* that an express warranty in a sale of seed excludes an implied warranty, but it was said in that case that the allegations of the complaint were broad enough to support a recovery upon either an express or an implied warranty.

In the later case of *Reed* v. *Rea-Patterson Milling Co., ante* p. 595, it was said: "Appellants cannot therefore base their action on implied warranty. The only warranty attempted to be proved was an express one, as already stated, and, of course, there could not be both an express warranty and an implied warranty of fitness or satisfaction in the sale of the flour. 'The reason is,' said this court in *J. S. Elder Grocery Co.* v. *Applegate,* 151 Ark. 565, 237 S. W. 92, 'that, if there was an express warranty upon this subject, it would govern as being the contract between the parties. There would be no room for an implied warranty if there was an express warranty on the same subject.' "

We are of opinion that no error was committed in giving these instructions, when the testimony in the case is reviewed. Plaintiff testified that he told defendant he wanted "seeded ribbon cane" and "orange cane," and the defendant said he had it. Plaintiff was accompanied to defendant's place of business by one McKinney, who examined the seed and expressed the opinion that they appeared to be mixed, and defendant's salesman spoke up and said, "No, they ain't." Plaintiff did not examine the seed, as he did not have his glasses and could not see without them. Plaintiff testified that, when the seed came up, there was cane of several kinds, maize, Kaffir corn, and Egyptian wheat, and "some other stuff I could not pronounce, a various mixture of various kinds."

The testimony of the defendant was to the effect that there was no representation as to the kind or quality of the seed, and that they were bought after inspection by the plaintiff and the plaintiff's friend who accompanied him.

Under these conflicts in the testimony, there was no error in giving the instructions set out above. The first instruction declared the law of a case where the seller had warranted the seed sold to be orange sorghum seed and seed ribbon cane and suitable for raising sorghum cane for making molasses. If there was such an express warranty, and breach thereof, the plaintiff would be entitled to recover upon that theory. It is also the law that, if planting seed be sold by a name known to the trade, there is an implied warranty that seed so sold are true to the name. The instruction numbered 3 not only presents this view of the law, but declares the law as favorably as defendant could ask in regard to inspection, this statement being to the effect that the purchaser's right to recover is not to be defeated by a failure to inspect if the character of the seed could not be ascertained by reasonable inspection.

These conflicts arose in the testimony of the different witnesses called in the case, and are concluded by the verdict of the jury in the plaintiff's favor.

The law appears to have been correctly declared as applicable to the different theories of the case; and, as there is sufficient testimony to support the verdict, it must be affirmed, and it is so ordered.

NEW NETHERLANDS' AMERICAN MORTGAGE BANK, LTD., *v.* LITTLE RED RIVER LEVEE DISTRICT NO. 1.

4-2860

Opinion delivered February 13, 1933.

Golden Blount, for appellant.

Brundidge & Neelly, for appellee.

HUMPHREYS, J. Appellee herein, a levee district in White County, brought a suit on the 21st day of April, 1931, in the chancery court of White County to enforce the collection of delinquent annual benefit tax assessments in the total sum of $1,866.45 for the years of 1923 to 1930, inclusive, against the following described lands owned by T. J. Pryor in said district, to-wit:

West one-half, southeast one-fourth, sec. 5, Twp. 6, range 5. Southwest one-fourth, sec. 5, Twp. 6, range 5. South one-half, northwest one-fourth, sec. 5, Twp. 6, range 5. Southwest one-fourth, northeast one-fourth, sec. 5, Twp. 6, range 5.

Appellant, to whom T. J. Pryor mortgaged the land, intervened in the suit and specifically pleaded the statute of limitations in defense of the collection of the delinquent taxes.

The trial court ruled that the delinquent assessments were not barred by the statute of limitations and dismissed appellant's intervention for the want of equity, from which is this appeal.

Section 6831 of Crawford & Moses' Digest controls, and by it a lien is created upon the lands within the district for the assessment of benefits until paid.

The decree is therefore affirmed.

UNION TRUST COMPANY *v.* BERRY.

4-2853

Opinion delivered February 13, 1933.

Charles S. Harley, for appellant.

Pace & Davis and *Walter L. Pope,* for appellee.

KIRBY, J. This appeal challenges the correctness of a decree holding appellee entitled to the proceeds of a check given for the purchase price of cattle sold for him as against appellant and others.

Magness, a member of the firm of Magness & Barham, cattle dealers, and who was also the president of the Bank of Western Grove, sold 100 head of cattle belonging to appellee at an agreed price and commission for making the sale to Evans Brothers of Pulaski County, Missouri. The buyer, Evans, after the cattle had been weighed, being in a hurry to get back home on that day, gave a single check for the balance of the purchase price, instead of two checks, a separate one for the balance of the commission Magness was to receive, Magness remarking at the time that he only had $65 coming. There being no bank in Yellville, Magness said he would take the check and collect it. He deposited the check in his name the next day in the bank at Western Grove, telling the cashier when making the deposit slip that he only had $65 interest therein, and he gave a check on his account to appellee for the balance, $2,786.72.

The Western Grove bank immediately sent the check to its correspondent bank, appellant, "for collection and credit," and the check was sent on for collection, and payment was stopped, and suit was brought by appellant bank, and an attachment issued and the proceeds of the check was paid into the registry of the court here on stipulation of the parties.

The court found that appellee was the rightful owner of said fund, that appellant had wrongfully prevented its payment to him by its suit in Missouri, and decreed accordingly, directing the clerk of the court to turn over the fund in the registry, $2,786.72, to appellee. A decree was also rendered against appellant for interest and costs, and from this decree the appeal is prosecuted.

Appellant bank, to which the check was sent for collection and credit, did not collect it, and had no other right to it than as agent, and, not being bound by an entry of credit, it had no power to bind the real owner thereby. The owner or holder of the paper, who delivered it to the bank for collection and credit, was at liberty to treat the bank as an agent "until the proceeds are collected by the bank in money, and authority of the bank to credit the customer does not arise until it has actually received the money," as said by this court in *First State Bank* v. *Taylor,* 183 Ark. 967, 39 S. W. (2d) 519. See also *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557.

When payment of Evans Brothers' check was stopped because of the insolvency of the Western Grove bank and the check returned to appellant, it charged the amount of the check back to the Western Grove bank, and should have returned the check to the Bank Commissioner in charge of the bank for delivery to the owner. The Western Grove bank had to its credit in appellant bank during December, when the check was received, a balance of nearly $5,000 the day after it was received, and it never fell below the amount of the check, and on December 14th, when the check was returned and charged back, the balance was more than the amount of the check. The owner sending the paper for collection could have controlled the disposition thereof until it was paid in full. *Branch Bank* v. *U. S. Nat. Bank of Omaha,* 50 Neb. 470, 70 N. W. 34.

Magness, the president of the Western Grove bank, told Berry, the appellee, who was entitled to the money for which his cattle had been sold, that he would deposit

the check for collection, which was done, the cashier being told, when he was making the deposit slip therefor, that he, Magness, only had an interest of $65 therein, the remainder belonging to Berry, for which a check was sent him by Magness, which was never presented or paid. Magness was but a trustee for the collection of the money, and his written transfer, assignment and authority authorized Berry to sue for the purchase money in his own name, completing the collection thereof himself.

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

CROPPER *v.* TACKETT.

4-2868

Opinion delivered February 13, 1933.

Kent K. Jackson and *Perry C. Goodwin,* for appellant.

Northcutt & Northcutt, for appellee.

McHANEY, J. By special act 211 of 1905, Fulbax School District was created, composed of what had been School District No. 10 in Fulton County and School District No. 29 in Baxter County. By agreement, the county superintendent of schools in Fulton County has supervised said school, and all the funds accruing to said district have been transferred to the Fulton County school funds and administered and expended by the proper officials of that county. Thereafter, on March 13, 1931, the county board of education of Fulton County made an order consolidating said district with Viola Special School

District No. 15 and Union Ridge No. 59, under the name of Viola, or extended the boundaries of the Viola District to include the others. Since that time, Viola Special School District has functioned as a school district according to law and the order of the county board of education of Fulton County. On March 1, 1932, eight men, a small minority of the electors of the old Fulbax District, held a school election in said district, in which appellants were elected directors, who thereafter employed a teacher who taught a term of school, and was paid from funds belonging to the Viola District, collected from taxes on property in that part of Viola District in Baxter County and what was formerly district No. 29 of Baxter County before Fulbax District was created.

To a complaint setting out the above facts and that said fund was being unlawfully appropriated by appellants, who have no legal status, a demurrer was interposed by appellants, which was overruled, and, upon their declining to plead further, they were perpetually enjoined from performing any duties as directors, and from paying out any funds or otherwise interfering with the affairs of said Viola District.

Appellants contend for a reversal on the ground that the order made by the county board of education of Fulton County consolidating the Fulbax District with Viola and another was not binding as to that part of the territory of the Fulbax District lying in Baxter County, and that said order of consolidation, being improvidently made, could not be cured by § 54 of act 169, Acts of 1931, known as the "School Law."

Conceding without deciding that the demurrer to the complaint raises the question of the validity of the order of the county board of Fulton County extending the boundaries of the Viola District to include the others above mentioned, we think the court correctly overruled the demurrer. The applicable portion of said § 54 is that "any errors, omissions or defects in the procedure of creating such district are hereby cured, and the action creating such district is hereby ratified." While it is

true that the applicable statute provided for the action of both county boards to form a school district of lands in two counties, act 156 of 1927, p. 549, still the Fulbax District was created by the Legislature of 1905, and, by common consent and mutual agreement, the Fulton County board and the county superintendent of that county supervised it and managed its affairs as if it were a Fulton County district in its entirety. After the order of consolidation was made, all persons in the district acquiesced in it, and no appeal was prosecuted from such order. The order was not void, but voidable. Its only defect was the omission to have the action of the county board of Baxter County. A similar case is that of *White* v. *Board of Education of Independence County,* 184 Ark. 480, 42 S. W. (2d) 989, where districts in one county were annexed to a district in another county with the action of the county board in one county only. We there denied a petition for certiorari to quash the order of consolidation because of delay in bringing the action for ten months. Here appellants did not appeal, and brought no action contesting the validity of the order, but assumed authority to act as a board of directors in a district that had been abolished for 26 years.

Their action in so doing was without authority of law, and the court correctly enjoined them. Affirmed.

HARAWAY *v.* MANCE.

4-2869

Opinion delivered February 13, 1933.

Moore, Daggett & Burke, for appellant.

John C. Sheffield, for appellee.

BUTLER, J. The appellee, Henry Mance, was a negro laborer who lived in the city of West Helena and was employed as a cotton picker on the farm operated by the appellant, Al Haraway, and a Mr. Latten, which farm was about forty miles from Helena. Haraway owned a

Model A, 1½-ton Ford truck which was used to haul cotton pickers from their homes to the plantation and return. This truck was operated by a negro, Granville Shields, who was hired by Haraway to secure cotton pickers, telling them how much they would receive for their work and transporting them to and from the plantation.

On the morning of the 4th of January, 1932, Shields secured about thirty cotton pickers in West Helena, among whom was the appellee, and conveyed them from West Helena to the plantation, where all engaged in picking cotton until about three or four o'clock in the afternoon, when it began to rain. Mr. Latten, whose business it was to weigh and pay for the cotton picked, paid the appellee and the others for the cotton picked that day, and Shields then loaded them into the truck and started on the return journey. On the way there was a collision between the truck driven by Shields and a truck driven by one Harvey Wallace, belonging to and engaged in the business of the Grear Trucking Company, which truck was coming in the opposite direction from that in which the truck driven by Shields was traveling. The appellee was severely injured, and brought suit against both Wallace, the driver of the Grear truck, and the appellant.

The appellee alleged negligence on the part of the drivers of both trucks as the proximate cause of the injury he received. The trial resulted in a verdict and judgment in favor of the appellee against both defendants, from which judgment is this appeal.

For reversal, it is urged that the trial court erred in refusing to direct a verdict for the defendant, Haraway, the grounds for the alleged error being, first, that the appellee and the truck driver employed by the appellant were fellow-servants; second, that the undisputed facts disclosed by the evidence established contributory negligence on the part of the appellee; and, third, that there was no substantial testimony tending to show any negligence on the part of Shields, the driver of the appellant's truck.

1. The appellant insists that the facts in the instant case bring it within the rule announced in *St. Louis, A. & T. Ry. Co.* v. *Triplett,* 54 Ark. 289, 15 S. W. 831, 16 S. W. 266, and therefore there was no responsibility on the part of the appellant for injuries inflicted upon the appellee for the reason that, if there was any negligence on the part of the driver, it was the act of a fellow-servant. The fellow-servant doctrine has been abrogated by statute as to corporations, but still obtains where the employer is an individual or a partnership such as in the case at bar. The important question is whether Shields was the fellow-servant of the appellee. If so, there could be no recovery against the employer for his negligent act. This is well settled by the decisions of this court which, at an early date, recognized the fellow-servant doctrine in the case of *Fones* v. *Phillips,* 39 Ark. 17, 43 Am. Rep. 264, which has been followed and approved in all subsequent cases.

It is not easy to lay down a well-defined rule as to who are and who are not fellow-servants, so that it may be universally applicable. The ordinary definition of fellow-servant is that those engaged under the control of the same master, in the same common business, the purpose of which is to accomplish a single result, are deemed to be fellow-servants, and negligence of one fellow-servant resulting in injury to another fellow-servant will not render the master liable; but, as is said in *Ry. Co.* v. *Triplett, supra,* at page 294: "When we undertake to determine what is essential to render the service common to all, we find the cases numerous and contradictory." It therefore seems that the tests approximately applicable to all cases can be found only in the reason in which the rule itself is based, which is that one who voluntarily engages in the service of another presumably assumes all the risks ordinarily incident to that service, including that of the negligent acts of those who are his fellows while they are engaged in the prosecution of a common purpose, which negligent acts are not the result of some breach of duty which the master primarily and personally owes to

the servant. In regard to the last-mentioned duty, we find also, as in determining who are fellow-servants, no rule which will cover all classes of cases and be of universal application. The generalization which most nearly approaches to it is quoted with approval in *Fones* v. *Phillips, supra,* as follows: "Whenever a master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and, to the extent of the discharge of these duties by the middleman, he stands in the place of the master; but, as to all other matters, he is a mere co-servant, and the question is not whether the master reserved oversight and discretion to himself, but whether he did in fact clothe the middleman with power to perform his duties to the servant injured." Wood on Master & Servant, p. 860. This rule was approved by the court in the following language: "This seems to us to embrace all the conditions under which, by the current and superior weight of authority, the master has been held liable for the acts of negligence of one employee, by which another has been injured."

In order to determine the question, we must therefore examine the relation which the evidence showed Shields sustained to the master and to the appellee. On this phase of the case there is no conflict. Shields testified that he was employed by the appellant, Haraway, to drive the truck and transport cotton pickers to and from the plantation; that he would go out in the morning and get a load of people, none of whom he knew by name, and getting different ones each morning; that he would tell those he met that they would receive fifty cents per hundred for picking cotton, and be taken to and from the plantation; that these were all his duties, for which he was paid $1.50 per day by Mr. Haraway, the owner of the truck and the man who had hired him. Appellee testified that he lived in West Helena, and that every morning

Shields was out "hollering for cotton pickers"; that witness asked him what he was paying, and Shields said, "Fifty cents a hundred and carry you there and bring you back."

The testimony of Mance and Shields regarding the duties of the latter was not disputed, and these facts, it is insisted by the appellant, make the fellow-servant doctrine applicable to this case, and that to hold otherwise would call for the abrogation or modification of the rule announced in *Ry. Co.* v. *Triplett, supra,* and in *Walsh* v. *Eubanks,* 183 Ark. 34, 34 S. W. (2d) 762; *Williamson & Williams* v. *Cates, Ib.* 579, 37 S. W. (2d) 88, and *Parham* v. *Parker, Ib.* 674, 37 S. W. (2d) 879. To further sustain this contention, reliance is had on the case of *St. L. S. W. Ry. Co.* v. *Henson,* 61 Ark. 302, 32 S. W. 1079. We do not think, however, that the proved facts in the case at bar bring it within the fellow-servant doctrine, but rather establish a state of case where a duty which the master has impliedly contracted to perform in person is performed by another under authority from the master for whose negligent act the master is liable as if he were present personally and himself breached the duty. In all the cases cited from our court and relied upon by the appellant, there is a marked distinction between them and the instant case. In *St. L. S. W. Ry. Co.* v. *Henson, supra,* the plaintiff was employed by the railroad company in the bridge-building department, and the servant who injured him was an engineer in the transportation department. Plaintiff was furnished a boxcar for his use while engaged in the discharge of his duties, which car was hauled from place to place on the defendant's line whenever necessary. The car, while thus being hauled, was derailed, and the plaintiff injured and a part of his goods destroyed, the immediate result of the negligence of an engineer on another train which occasioned a head-on collision. The court held that the fact that the employees belonged to separate departments was of no consequence other then tending to show whether or not the injury complained of was a risk ordinarily incident to the ser-

vice undertaken. After discussing the relative duties of the two employees, the court concluded as follows: "There was nothing of the master's duty in the work of running the engine. The doctrine announced by this court in *Railway Co.* v. *Triplett,* 54 Ark. 289, [16 S. W. 266, 11 L. R. A. 773], applied to the facts of this record, determines the relation of the plaintiff and the defaulting engineer as that of fellow-servants."

In *Walsh* v. *Eubanks, supra,* the negligent employee, who was held to be a fellow-servant of the one injured, was a common laborer and engaged in performing such duties as he was bidden at whatever place necessary to carry into effect the common purpose for which they were both employed and in which they were both engaged. A part of his duty was to drive a truck to haul material to be used in the work, and, at the time of the injury, he and the employee injured, with other employees, were going from the place of work in a truck driven by him, to unload a car of cement to be used in the construction of the work.

In *Parham* v. *Parker, supra,* it was shown that Parker was employed by Parham and was injured while attempting to board a moving truck in which he and other employees were riding. There was a conflict in the testimony as to who employed the driver and whether he bore any relationship to Parham. The point decided in that case, as stated in the opinion, was that there was "no evidence that the master was guilty of any negligence in any respect," and "this injury occurred when the appellee attempted to get back on the truck while it was moving, and his foot was caught in the wire, causing it to be run over by the truck. It was an unfortunate accident for which no one was liable." The reference in that case regarding liability of a servant injured by the negligent act of a fellow-servant is *dictum.*

In *Williamson & Williams* v. *Cates, supra,* the contention was that one Mitchell was for the time being the foreman of the injured employee under whose direction he was working and for whose negligence the

master was liable. The evidence, however, on that contention was merely that Mitchell showed his fellow-servant the place where they were to work and informed him of the character of the work to be done, which was to cut down bushes. Mitchell did not show his fellow how to cut the bushes, and the injury which resulted was not because of failure of duty on the part of Mitchell as the representative of the master, but the negligence, if any, was the failure of Mitchell to use ordinary care in cutting the bushes at the same time and place with such fellow in which work they were merely fellow-servants.

In the instant case, when the master undertook to transport the laborers from their homes to his plantation and to return them when the day's work was done, there rested upon him the duty imposed by law to exercise ordinary care for their protection, and, while they were not passengers within the common meaning of the term, this duty still remained, and for the breach of such duty he was responsible. *St. L. I. M. & S. Ry. Co.* v. *Harman,* 85 Ark. 503, 109 S. W. 295; *St. L. I. M. & S. Ry. Co.* v. *Wiggam,* 98 Ark. 259, 135 S. W. 889; *Oak Leaf Oil Mill Co.* v. *Smith, Ib.* 34, 135 S. W. 333. The discharge of this duty was intrusted to Granville Shields, who not only acted as the agent of the appellant in the transportation of the laborers, but in the employment of the cotton pickers, and his default was that of the master. *Bloyd* v. *Ry. Co.,* 58 Ark. 66, 22 S. W. 1089; *Bryant Lbr. Co.* v. *Stastney,* 87 Ark. 321, 112 S W. 740; *Archer-Foster Const. Co.* v. *Vaughan,* 79 Ark. 20, 94 S. W. 717; *Western C. & M. Co.* v. *Buchanan,* 82 Ark. 499, 106 S. W. 694; *Headline* v, *G. N. Ry. Co.,* 113 Minn. 74.

In every case in which the facts are clearly established and show precisely what were the respective duties of the injured and delinquent employees and what relation they bore to each other and to the master, it is for the court to say whether or not the negligent employee was a vice-principal or a fellow-servant, and, as such is the state of case in the record before us, the court

did not err in declining to declare the law to be that Shields was the fellow-servant of the appellee.

It will be remembered that the plantation was some forty miles from the home of the appellee, and that, late in the afternoon of a rainy day early in January, 1932, Shields started from the plantation on his return journey to West Helena with a load of cotton pickers. After he had proceeded approximately half of the distance his truck was overturned and badly damaged on account of some happening, the particulars of which the testimony does not disclose. The truck was righted by the driver assisted by the passengers. The sides and top of the truck had been broken, and the debris was piled on the floor of the truck. Into this thirty negro laborers loaded and disposed themselves as best they could. As stated, this was a Model A, 1½-ton truck, and it is apparent that it was overloaded by actual weight, for these thirty negroes must have weighed approximately 1,000 pounds beyond the capacity of the truck. It is reasonable that it must have been difficult for them to find room in the truck even before the wreck and before the broken top and sides of the truck had been piled upon the floor of the same. The evidence shows that some of the laborers were sitting with their feet hanging off the end, some were standing, and others disposed themselves about in various positions. The defendant, with several others, took a place on the left edge of the truck with their legs hanging down on the outside. It is because he took this place and remained in this position as he continued the journey and until he was hurt, that appellant contends he was guilty as a matter of law of contributory negligence.

In considering this contention, it must be borne in mind that it seems to have been reasonably necessary for some of those on the truck to ride in this manner and through no fault of theirs. In the first place, it is clear that more persons were invited by appellant's agent to ride on the truck than it could accommodate, and, secondly, the overturning of the truck and the placing of the

wreckage on its floor aggravated the situation and made it still more inconvenient for the laborers to ride upon it. It seems that it was a choice of two evils which appellee and his companions had to make; either ride on in the place and manner, which as subsequently proved was fraught with danger, or be left on the roadside, far from home, on an inclement winter night to pursue their homeward journey as best they might. Appellee's choice proved disastrous to him, but under the circumstances created through no fault of his, and, in part at least, by appellant's agent, can it be said that all reasonable minds would agree, that no ordinarily prudent person, situated as was appellee, would have acted as he did? As we view the evidence, we are of the opinion that the court below rightly left that question for the jury to answer.

It is contended, in the last place, that the testimony is insufficient to establish any negligence on the part of Shields in the operation of the truck. On this question the evidence is in direct conflict. That on the part of the appellant tends to show that Shields was traveling on his side of the road, and, as he approached the truck of the Grear Company, he swerved still further to the right until his right-hand wheels were off the pavement and on the shoulder of the highway, and that, while in this position, the truck of the Grear Company swung to the wrong side of the road causing the injury to the appellee. All of this is strongly disputed by the driver of the Grear Company truck, and his testimony is corroborated by that of other witnesses to the effect that it was the Grear truck which was being driven on the proper side of the road, and that it was the improper driving of the truck of the appellant which caused the injury. There is other testimony which we think sustains the finding of the jury that they were both negligent, and that this concurring negligence was the proximate cause of the injury.

These were all questions for the jury, which, under well-settled rules, is the sole judge of the credibility of witnesses and the weight to be given their testimony,

and, since there was some substantial evidence to justify the verdict, it must stand.

It follows that the judgment of the trial court is correct, and it is therefore affirmed.

BOTTS *v.* ARKANSAS COUNTY.

4-2832

Opinion delivered January 30, 1933.

G. W. Botts, for appellant.

Ray S. Gibson, for appellee.

HUMPHREYS, J. Appellant sought a judgment against appellee in the county court of Arkansas County and again, on appeal, in the circuit court, Southern District, of said county for $459.44 on account of having recovered a judgment for appellee against M. F. Montgomery, former treasurer of said county, and his bondsmen in the sum of $2,679, which he retained out of his fees in excess of $5,000, contrary to the Constitution of Arkansas.

The cause was submitted in the circuit court on the testimony adduced, and a judgment was rendered in favor of appellant against appellee for $52.60, from which is this appeal.

Appellant contends for a reversal of the judgment on the ground that, according to the undisputed facts, he was entitled to judgment in the full amount claimed.

The facts are, in substance, as follows:

Appellant and his law partner entered into a written contract with the county court of said county, by and with the advice and consent of the prosecuting attorney, to obtain adjustments and settlements of the amounts due the county by the county officers, which involved an audit and the institution and prosecution of many suits. An order of such employment was made and spread of record in the county court. The order, in part, is as follows:

"Wherefore the court on this day hereby entered into an agreement and employed the law firm of Botts & O'Daniel for the purpose of securing and assisting in an adjustment of the settlements of the above-named former officers of Arkansas County, and for their services it is agreed that the law firm of Botts & O'Daniel shall receive $250 and expenses for their services, and the further sum of 25 per cent. of all adjustments and collections made in the accounts of the above-named officers."

In the course of the employment, the firm of Botts & O'Daniel obtained a judgment in favor of said county for $2,679 against M. F. Montgomery and his bondsmen, from which no appeal was taken, which was collectable and which they were prevented from collecting by the incoming county judge, who discharged them as attorneys in the case. After discharging them, the incoming county judge settled and satisfied the judgment for payment of $500 to the county by M. F. Montgomery.

Appellee contends, first, that the county court had no authority to enter into the contract because no appropriation had first been made to defray the expenses of the litigation, and, second, that, if the county court had authority to make the contract, the judgment should be affirmed because same was settled for $500.

(1) By reference to the order of employment, it will be seen that the fee was contingent and was, together

with the retainer and expenses, to be paid out of adjustments and settlements. This kind of contract is not the character of contract inhibited before an appropriation has been previously made therefor under § 1976 of Crawford & Moses' Digest.

(2) It is argued that, because the contract uses the words "settlements and adjustments," the contingent fee must be based on the amount actually collected, and not upon the amount of the judgment recovery, notwithstanding the judgment could and would have been collected. The undisputed evidence shows that the only reason the judgment was not collected by the attorneys for the county was that they were discharged without cause by the incoming county judge. We think the provisions of the contract were substantially complied with when a judgment was obtained which was collectable in full. It is true that parties may compromise suits without the consent of their attorneys, but such settlements are binding upon the parties only and do not prejudice the right of an attorney to a lien on the judgment for his fee.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to the trial court to enter a judgment in favor of appellant for $459.44, the full amount claimed.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* KING.

4-2865

Opinion delivered February 20, 1933.

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

Sam T. Poe and *Tom Poe,* for appellee.

SMITH, J. Appellee was employed in the shops of the Missouri Pacific Railway Company in North Little Rock, and, by virtue of this employment, had two certificates which had been issued to him under separate group insurance policies issued by appellant, Missouri State Life Insurance Company, to the railway employees. One of these certificates provided for a weekly indemnity, in case of disability to perform the duties of the insured's avocation, of $15 per week, but not to exceed twenty-six weeks. The other certificate provided for the payment of $2,000 in the event the insured should, after six months' disability, be found to be permanently disabled.

Appellee, after making claim and proof of his disability under the first-named certificate, filed suit on August 26, 1931, to recover on the first-mentioned certificate providing for the payment of $15 per week. A physician representing the insurance company examined appellee, and certified that, while he was affected with syphilis, he was not disabled at that time, and upon this examination and report the company filed an answer, denying liability.

The insured's disability continued, and on December 5, 1931, his attorney, residing in Little Rock, wrote the company the following letter: "In re: Rome King, G-2377, Missouri Pacific Railroad Company, Certificate No. 1101.

"Gentlemen: Rome King, the insured, had been totally and permanently disabled for six months, and we now make demand under the above policy and certificates.

"Please advise immediately your intentions in this matter."

On December 10th the company answered and stated that the matter had been referred to their local attorney in Little Rock for investigation and report, and on December 11th the local attorney referred to wrote the insured's attorney saying that, in order to determine whether the insured was totally and permanently disabled, they would ask to have the insured examined by a physician, whose name was stated. No response being received, a second letter was written, reading as follows:

"Please let us have a response to our letter of recent date. If your client will submit to an immediate examination, we will give you an early decision as to whether the company is liable for the payment of total and permanent benefits."

In the meantime, the company had furnished the insured's attorney the blanks used in making proof of claims of this character, and on December 16th these blanks, properly filled out, were sent to the company, showing that the insured was then totally disabled, and had been so for a period of six months.

On December 17th the insured's attorney wrote the company's attorney that it would be agreeable for the insured to be examined, provided a representative of the insured be permitted to be present at the examination, and provided also that a copy of the report be promptly furnished insured's attorney. This letter was answered the day it was received, and the name of the physician selected for the examination, with his office address, was given. This letter concluded with the following statement:

"Just as soon as he can furnish us his report of his findings, we will admit or deny liability for the total and permanent disability benefits. In the meantime, please refrain from filing suit. We feel that we are entitled to a reasonable opportunity to pass upon the claim without being subjected to the statutory penalty and attorney's fees."

This letter advised that arrangements for the examination to be made on December 18th had been perfected, but the insured did not report for the examination until December 22d. On the day on which this examination was held, the insured's attorney wrote the company's attorney as follows:

"Claimant was examined at Trinity Hospital today, and we wish you would furnish us with a copy of the report as soon as it is received. Please file your answer in this case as soon as possible, so it can be set down for trial."

On the same day on which this letter was written, to-wit, December 22, 1931, an amendment was filed to the original complaint, in which the plaintiff alleged his permanent disability, and prayed judgment, not only for the weekly disability benefits as was originally prayed, but for the face of the policy for permanent disability.

The final report of the examining physician was mailed to the company's attorney on December 26th, and a copy thereof transmitted to appellee's attorney December 28, 1931. The letter transmitting this report reads as follows:

"There is inclosed the original report which we have received from Trinity Hospital. In view of the findings, the company admits liability, and is willing to pay the sum of $2,000 with interest from the date the claim was filed. Kindly inform us if this is acceptable. If so, Mr. Broadaway will be instructed to deliver a draft to you at once."

This offer was not acceptable, and was not accepted, and the cause went to trial upon the records stated on the issue whether the insured was entitled to receive, in addition to the face of the policy and the interest thereon, the statutory penalty and the attorney's fee on the two thousand dollar policy. It was not questioned that the insured was entitled to his weekly benefits at the time of the trial, together with the penalty and attorney's fee in that case, and the judgment rendered in the insured's favor for these items is not questioned and has been paid.

Upon rendering judgment upon the amended complaint for the amount of the two-thousand dollar policy, with the penalty and the attorney's fee thereon, the court said:

"It seems to me that this statute ought to be strictly construed as to this policy. Of course, being prepared by the defendant, it ought to be construed more strongly against the defendant than the plaintiff. Under the terms of the policy as written, it required the defendant to pay the insured whenever it receives due proof of loss. I think that that part of the policy was substantially complied with by the plaintiff when he sent in the proof of loss by the doctor's certificate. There is nothing in the policy, unless you give it a very liberal construction, that would give the company any absolute right to require him to submit to an examination. I think, under our statutes, the plaintiff is entitled to the attorney fee and penalty if the insurance company fails to pay the claim within the time specified by the statute. I think now, according to the construction given to that statute in other cases, that the attorney is entitled to his attorney fee and penalty."

The declaration of law by the court that, under the terms of the policy as written, the company was required to pay when it received due proof of loss, without having the right to make additional investigation, presents the issue in the case, as there appears to be no substantial dispute in the testimony.

The policy sued on contained no provision requiring the insured to submit to a physical examination at the hands of the insurer, but the undisputed testimony was to the effect that this practice was pursued in all cases, and had been followed in a number of cases in which the attorneys here appearing had represented—the one the appellant insurance company, the other policyholders making claims for disability benefits against that company.

The policies or certificates here sued on contained the following provision in regard to the time when the insurance should be paid.

"If the employee shall furnish the company with due proof that * * * he * * * has become totally and permanently disabled by bodily injury or disease, and that he * * * is then, and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation, * * *, the company will immediately pay to the employee in full settlement of all obligations hereunder the amount of the insurance in force hereunder on the employee at the time of the approval by the company of the proofs as aforesaid. * * *"

Appellee insists that the sum for which he here sues was payable immediately upon the delivery of the proof of disability, as the proof furnished was made in conformity with the requirements in this behalf, and that he was not required to wait for any additional investigation to be made by the company, and that especially was this true, inasmuch as the company had filed an answer to the original complaint, before it was amended, denying liability for the weekly benefits for temporary disability. This answer had been filed upon the report of the company's physician, made some months before the original complaint was amended to embrace and to sue for the permanent disability.

We are not required to decide whether, in all cases or in any case, an insured is required to submit to an examination by the company physician, the policy not having imposed that requirement. But here, whether required to do so or not, the insured had so agreed, and he appears to have been responsible for such delay as occurred in connection with his examination.

We are of the opinion, however, and do decide, that the proof of disability furnished by the insured was not conclusive of that fact. The company had the right to make an investigation. Disability is not a fact, like that of death, which either exists or does not exist. It may be, and frequently is, a question about which there is a doubt, and, if the company had the right to investigate this fact, it was, of course, entitled to a reasonable time within which to exercise the right. This investigation

should be made expeditiously and in good faith, but the undisputed testimony shows both expedition and good faith.

Now, as we have said, we do not decide that the right to investigate embraced the right to subject the insured to a physical examination at the company's hands, but, had that right not been conceded, other means of investigation might have been employed. Nor do we think that the action of the insurer in denying liability under the weekly indemnity certificate is conclusive of the question here presented. The cases arose under different certificates of insurance, and the denial of the existence of liability some months previously would not be conclusive evidence that the same action would be taken later on the second certificate.

The insurer has paid a penalty and an attorney's fee in the first case, and the second case must be disposed of on its own merits. When so considered, the undisputed facts are that, when the investigation was made, which we think the company had the right to make, it confessed liability and made tender of the full amount of the certificate to which the insured was entitled, and this was done without any delay on its part.

The language of our statute imposing a penalty and an attorney's fee applies only when payment is refused at the time specified in the policy for the payment to be made, and our construction of the policy here sued on is that the payment was due, not upon the filing of the proof by the insured, but "at the time of the approval by the company of the proofs as aforesaid," filed by the insured with the company. In this connection, we repeat that this approval was due when the company, acting expeditiously and in good faith, had been afforded a reasonable opportunity to investigate the proofs submitted. The company had incurred the expense of an examination of the insured, and had done this with his consent. He had consented to this method of investigation, whether the company had the right to make this demand or not, and on the very day of the examination the com-

plaint was amended to add the additional cause of action of a claim for judgment on the two-thousand dollar certificate, with a penalty and an attorney's fee for delay in making the payment.

We think the statute allowing a penalty and an attorney's fee should not be so construed as to allow a penalty and an attorney's fee in this case, and the judgment must therefore be reversed. As the claim of the insured has been paid in full, less the penalty and attorney's fee, the cause of action thereon is now dismissed.

BECK *v.* LITTLE ROCK.

Crim. 3830

Opinion delivered February 20, 1933.

Robert J. Brown, Jr., for appellant.

HUMPHREYS, J. Appellant was convicted in the Little Rock Municipal Court for transporting liquor, and, on appeal to the criminal division of the Pulaski Circuit Court, where the case was tried *de novo,* he was again convicted of said offense and adjudged to pay a fine of $100, from which is this appeal.

The record reflects that appellee lived at 408 West Markham Street and had walked from his house onto the sidewalk and was approaching a taxicab which had stopped near the curb a short distance from the entrance to his home, where he was stopped and searched by officers, who found a small flask of whiskey upon his person. The record is silent as to where he was going and what he was going to do with the whiskey. Under the rule an-

nounced in the case of *Locke* v. *Fort Smith,* 155 Ark. 158, 244 S. W. 11, the evidence detailed above is insufficient to show that he was transporting liquor within the meaning of the statute prohibiting the transportation thereof.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

FRENCH *v.* CHERRY.

4-2863

Opinion delivered February 20, 1933.

J. C. Brookfield, for appellant.

Walter Killough and *Giles Dearing,* for appellee.

KIRBY, J. This appeal is prosecuted from a directed verdict in appellant's suit for damages for personal injury caused by the wrecking of appellee's truck and trailer, in which appellant, with other cotton pickers, were being transported to and from their homes to the place of work in appellee's cotton fields.

The undisputed testimony shows that appellee, a cotton planter near Parkin, sent his truck, driven by Charley Jones, his regular driver, to Wynne to gather up cotton pickers and transport them to the farm, as was the custom. The driver of the truck announced, as always, that appellee was paying 30 cents per hundred for picking cotton and transporting the cotton pickers to and from his plantation for their work. The driver of the truck did not pick cotton himself.

Appellant had been going with the others picking cotton on the farm prior to this particular morning. On this morning, after the cotton pickers were loaded into

the trailer, it began raining while they were *en route* to Parkin, and Mr. Cherry, the appellee, ordered the driver of the truck to return the cotton pickers to Wynne as it was too wet to pick cotton. On the return trip, the truck pulling the trailer, in which appellant was standing with the others, turned a short corner rapidly, turning the trailer over and injuring appellant and others seriously. The negligence alleged consisted of driving too rapidly, making too short a turn at the corner on the wet pavement, thereby causing the injury.

The testimony was virtually undisputed, and the court directed a verdict against appellant on the ground that the driver of the truck was a fellow-servant of the other cotton pickers, for whose negligence appellee was not liable.

It is insisted that the court erred in holding that the suit for all the injuries could not be brought together and requiring appellant to try his suit separately; and it is also insisted that the court erred in directing a verdict against appellant, and this contention must be sustained.

This case is controlled by the ruling in *Haraway* v. *Mance, ante* p. 971, wherein it was held that the driver of a truck engaged in collecting and hauling cotton pickers to the plantation, who were paid so much for picking cotton and transported to and from the cotton fields by the employer, was not a fellow-servant of the cotton pickers, and they did not assume any risk on account of the negligence of such driver.

The undisputed testimony shows here that the driver of the truck pulling the trailer was employed by appellee to gather and transport the cotton pickers to and from the fields, they being paid so much in addition for picking cotton; that the driver of the truck did not pick cotton. He was ordered, on the morning of the accident herein, to take these people back to their homes because of rain having made the fields too wet for picking. On the return journey, the driver, at a rapid rate of speed, turned a corner too sharply on the wet pavement, turning the

trailer over, in which appellant was riding, and seriously injuring her and others.

The driver of the truck here necessarily represented the master or employer, and was not a fellow-servant of appellant, within the doctrine well established by opinion in *Haraway* v. *Mance, supra,* and our other cases reviewed therein. The case is unlike *Walsh* v. *Eubanks,* 183 Ark. 34, 34 S. W. (2d) 762, where the driver of the truck transporting other employees of the master for the purpose of assisting him in unloading a car of cement was held a fellow-servant for whose negligence, causing injury to one of such employees, the master was not liable.

The cases might well have been consolidated, as all the injuries complained of by the different cotton pickers arose out of the same transaction and from the one act of negligence; but, since we are reversing the case for an erroneously instructed verdict, we do not determine here whether error was committed in requiring a separation of the trial of the cases.

For the error designated, the cause is reversed and remanded for a new trial.

BRIDGES *v.* SHAPLEIGH HARDWARE COMPANY.

4-2872

Opinion delivered February 20, 1933.

Oliver & Oliver, for appellant.

Ward & Ward, for appellee.

MEHAFFY, J. The appellant is a retail merchant at Corning, Arkansas, and the appellee is a wholesale merchant in St. Louis, Missouri. About August, 1929, the appellant wanted to purchase a number of radios to sell to his country trade. Mr. Bond was a traveling salesman for appellee, and appellant ordered through this salesman, Bond, two battery sets, which were received and sold, and proved entirely satisfactory. The appellant then ordered ten other sets of the same kind, and sold some of them, but they were unsatisfactory. Appellant then asked permission to return the radios, which the appellee refused. He then made some efforts to repair the radios or adjust them so that they would perform, and he employed a radio expert, but the expert was unable to adjust them or rebuild them.

Appellant made some payments, paying at one time $268, and at another time $75, leaving a balance of $290, for which suit was brought in the justice of the peace court.

The appellant filed answer, in which he alleged that the radios were worthless, and that he did not owe anything except $14 for some other merchandise, and offered to confess judgment for this amount. The case was tried, and judgment rendered against appellant.

An appeal was prosecuted to the circuit court, where it was tried before the circuit judge, sitting as a jury, and

the trial resulted in a judgment in favor of appellee for the amount sued for. The case is here on appeal.

Two witnesses testified on behalf of appellee about the sale of the radios, the price and the payments, and as to the balance due. The appellant testified that appellee first sent him one radio set, and that he, expecting to get similar sets and ones that would perform similarly, ordered the other radios, for the payment of which this suit is brought. He received the radios and sold two of them, but they were returned to him because they did not perform. He then employed Luster King, a radio man, but King was unable to do anything with them. Appellant could not sell the sets because they would not perform. He bought batteries and tubes with the sets, and sold them and remitted to appellee, all except $14, for which he offered to confess judgment. Mr. Bond, appellee's salesman, called on him, and he paid him $75 for batteries and tubes, and told him he would pay the balance in a short time. He had never offered to pay a penny on the account for the radio sets that would not perform; that he was able to sell one of the radios after working with it repeatedly, and able to make it perform to a point where it stayed sold; that the radios were worthless. He never did tell appellee to send a man to fix the radios, for the reason that before they arrived it was evident from the crop conditions, and from the drouth, and also from the fact that the radios were still cheaper than the year before, that he would be unable to sell the radio sets that fall. If the radio sets had been in marketable condition when he purchased them, he could have sold them, but it was a different story in the fall of 1930. These sets were intended for sale to farmers, and, since it was evident in the summer of 1930 that there would be no crops, he knew he could not sell them; he could have sold them in 1929 if they had been marketable.

Luster King testified that he had had experience with radio sets, and he tried to adjust these, and was unable to make them so they would perform with any degree of satisfaction. There was something lacking which made

it impossible to rectify them. They had very little value, if any market value at all.

This was all the evidence, except the correspondence. Appellee wrote numerous letters to appellant, which appellant ignored. It wrote to him on August 16 that it had passed for shipment a day or two prior an order for ten radios, amounting to approximately $500. It asked in the letter for more information about his business. It again wrote him on August 20th. On August 21 appellant wrote appellee about his financial condition. On November 9, 1929, appellee again wrote appellant, calling his attention to his overdue account of $568. On December 17, 1929, appellee again wrote appellant acknowledging receipt of $268, and urging him to pay the balance. It again wrote him on January 13, 1930, calling his attention to his account of $312, and asking for payment, and again on February 4, 1930, it wrote him about his account. Again on February 25, 1930, appellee wrote appellant urging him to pay his account. On March 11 it wired him that it must have settlement. March 24, 1930, it again wrote him about his account, and on March 25, 1930, appellant wrote appellee, complaining about the defects in the radios, and that they would not stay sold, but in the letter appellant stated that he found one of the ten that performed, and finally made a sale of it. He also stated in this letter that he would be lucky and satisfied if he could get enough money out of them to break even.

On April 3, 1930, appellee again wrote appellant and again on April 14, urging the payment of his account, and wired him on April 25 and again on May 1st. On May 8, 1930, appellee again wrote appellant, calling his attention to his account, and on May 8 appellant wrote to appellee, complaining somewhat about the radios, stating that, if appellee undertook to force collection, it would not be able to realize anything.

Appellee again wrote to appellant on May 12, and on May 16 he wrote to appellee, stating that he would like to have appellee's man come down and fix the sets, if he could make them acceptable so that he would not be held

responsible. Appellee again wrote him on May 19 and on June 16. In the last letter it told appellant it could send a man down in the next few days. Again, on July 1, it wrote him, asking if he would be ready for it to send the man down.

On July 14, Bond, the traveling salesman, collected $75, which he sent to appellee. On July 22 appellee wrote to appellant, acknowledging receipt of the $75. On August 6 it wrote him again, urging payment, and also on August 13. It again wrote him on August 28 and on September 15. It again wrote him on September 22 and on September 29 and on October 6.

Appellee did not respond to any of these letters, except as mentioned above. While he complained that the radios were defective, and wanted a man to come down and adjust them, when appellee wrote him requesting him to name the time when it would suit him for the man to come down and adjust the radios, he did not reply to its letter.

Appellant first contends that the sale was made by a sample, and that there was therefore an implied warranty that the radios would be as good as the samples. We think it wholly immaterial whether the sale was made by sample or not, because there would be an implied warranty that the radios were suitable for the purpose for which they were purchased.

A buyer may rescind a contract, but he must do so within a reasonable time after the discovery of facts which justify a rescission. 55 C. J. 286. The appellant in this case did not rescind the contract, but he made payments long after he had complained about the defects. Failure to exercise the right to reject goods purchased within a reasonable time usually implies an acceptance. The implied warranty may be waived by the buyer, either by express agreement or by conduct inconsistent with its assertion. 55 C. J. 798. As to whether there was a waiver, and also as to whether there were defects in the radios, were questions of fact to be determined by the trial court.

When a case is submitted to the trial judge, his finding of fact is as conclusive as the finding of a jury. *American Ins. Co.* v. *Brannan,* 184 Ark. 978, 44 S. W. (2d) 346; *Hargis* v. *Jordan,* 184 Ark. 1136, 45 S. W. (2d) 525; *Price-Snapp-Jones Co.* v. *Brown,* 184 Ark. 1143, 45 S. W. (2d) 517; *Little River County* v. *Buron,* 165 Ark. 535, 265 S. W. 61; *Road Imp. Dist. No. 1 of Howard County* v. *Bank of Commerce & Trust Co.,* 169 Ark. 43, 272 S. W. 834; *Prairie County* v. *Harris,* 173 Ark. 1182, 295 S. W. 725; *C. A. Blanton Co.* v. *First Nat. Bank,* 175 Ark. 1107, 1 S. W. (2d) 558; *Arkla Sash & Door Co.* v. *Fair,* 176 Ark. 1203, 5 S. W. (2d) 308.

Appellant, however, contends there was no dispute about the facts, and no facts for the trial judge to decide.

The testimony of a party to an action who is interested in the result will not be regarded as undisputed in determining the legal sufficiency of the evidence. *Elmore* v. *Bishop,* 184 Ark. 243, 42 S. W. (2d) 399; *McGraw* v. *Miller,* 184 Ark. 916, 44 S. W. (2d) 366; *Warren & Saline River Rd. Co.* v. *Wilson,* 185 Ark. 1063, 50 S. W. (2d) 976.

The trial court not only had a right to weigh the testimony given by the appellant, but it had a right to consider appellant's conduct and all the attendant circumstances, and like the finding of a jury, if there is any substantial evidence to support the finding of the court, the judgment will not be disturbed.

There appears to be substantial evidence to support the finding of the circuit judge, and the judgment is affirmed.

CORMACK *v.* MISSOURI STATE LIFE INSURANCE COMPANY.

4-2838

Opinion delivered February 20, 1933.

Emmet Vaughan and *Sam T. & Tom Poe,* for appellant.

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

McHaney, J. This is an appeal from an order of the circuit court setting aside a judgment in appellant's favor against appellee on a motion for a new trial filed by it. Appellant failed to file a stipulation on his part to the effect that, if the order of the circuit court be affirmed, judgment absolute may be rendered by this court against him, as provided by § 2129, Crawford & Moses' Digest. The applicable portion of the second subdivision of the above section reads as follows: "But no appeal to the Supreme Court from an order granting a new trial, in a case made or bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contains an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant."

No final judgment has been rendered in the lower court from which to appeal, and this court has many times held in such cases that an appeal which failed to comply with the above-quoted provision of the statute must be dismissed. *Osborn* v. *LeMaire,* 82 Ark. 490, 102 S. W. 372; *St. L., I. M. & S. R. Co.* v. *Hix,* 101 Ark. 90, 141 S. W. 492; *McPherson* v. *Consolidated Casualty Co.,* 105 Ark. 324, 151 S. W. 283; *Yowell* v. *Ft. Smith Pure Milk Co.,* 118 Ark. 448, 177 S. W. 4; *Matyski* v. *Buczkowski,* 152 Ark. 89, 237 S. W. 694.

Appellant has, since the original submission of this case, petitioned the court to permit him now to file such

stipulation, or to permit him to file same in the trial court and bring up an amended record. Neither course could avail appellant anything, for it was held in *Osborn* v. *LeMaire, supra,* that such course was not available to appellant. We there said: "Appellant now asks that such assent be noted of record, and consents that judgment absolute shall be rendered against it in the event that judgment should be affirmed. Without determining whether such assent can be made in this court after appeal has been granted by the circuit court, it is sufficient to say that it is more than one year since the appeal was granted and before such assent is filed herein. An appeal must be taken within one year." Citing cases. "If it were proper to perfect this appeal in this court in the manner now sought, it is too late to do it. The statute requires the noting of assent to judgment absolute as a condition to obtain an appeal from such order, and it must be complied with."

The statute now requires an appeal to be taken within six months. Therefore appellant could not now file the stipulation here, as more than six months have expired from the date of judgment. Nor could he accomplish anything by filing it in the court below, as the time for appeal has long since expired.

Appellant's case is still pending in the court below for a new trial. The appeal will be dismissed.

HORNE *v.* PARAGOULD SPECIAL SCHOOL DISTRICT NO. 1.

4-2873

Opinion delivered February 20, 1933.

L. P. Biggs, Wallace Townsend and *Elcock & Martin,* for appellant.

W. F. Kirsch and *Horace Sloan,* for appellee.

McHaney, J. Appellee, an urban special school district, of Paragould, Arkansas, brought this action against appellant, county treasurer of Greene County, in which the city of Paragould is located, to enjoin him from paying out on bond issues of the district, both maturities and interest, that part of the 18-mill school tax voted by the electors of the district, under Amendment No. 11 to the Constitution, for general school purposes, in the year 1931, payable in 1932. A 6-mill tax was voted for the building or bond payment fund and 12 mills for general school purposes. The bonds were all issued prior to the passage of act 169, Acts of 1931, and totaled approximately $400,000 now outstanding. The complaint alleged that "said bond issues (were) secured by various pieces of real estate belonging to said district, and, in addition, by an attempted pledge on the part of the district of all of the income of the district for the purpose of paying off and retiring said bonded indebtedness, together with the interest thereon." It was further alleged that the collector of the county had collected school taxes in the district, so voted, as above stated, in the year 1932 for the tax of 1931, in the sum of $33,061.86, and that additional revenues to accrue to the district from the State for the school year 1932-1933 are estimated at $7,518.64, or a total revenue of $40,580.50, one-third of said sum of $33,061.86, or the sum of $11,020.62 being

voted by the electors of the district and set aside for the retirement of bonds and interest, and the remainder being available for general school purposes; that during the school year 1932-1933 bond maturities and interest will amount to $40,567.50, just $13 less than the total gross revenue of the district from all sources; that the whole of the sum voted by the electors for bond retirement had been paid out by appellant for such purpose, and that, unless restrained, he would pay out the remainder of the funds now in his hands, $15,605.75, thereby using all the 18-mill tax so voted and all other available revenue, so that no schools could be conducted in said district.

To this complaint a demurrer was interposed by appellant, which was overruled by the court, and, on his declining to plead further, he was perpetually enjoined in accordance with the prayer of the complaint.

The issue to be determined by this court on this appeal is succinctly stated by counsel for appellee as follows: "Whether or not the directors of an urban special school district under the law as it stood at the time of the issue of the said bonds had authority of law to make, without submission of the question to the electors of the district, a pledge of all the proceeds of the 18-mill tax for the sole purpose of paying bonds and interest when future levies thereof were not and could not be within the control of the school board (or of the Legislature itself, for that matter) but depended for their existence on the favorable annual vote of the electors of the district."

Only the 12-mill tax voted by the electors is involved. Appellant claims the right, by virtue of the pledge of all the income of the district for the payment of bonds, made by the directors of appellee district when the bonds were issued, to pay out the proceeds of said 12-mill tax to the retirement of bond maturities and interest, thereby closing the schools. Whereas appellee contends that the directors had no power to pledge revenue or income of the district, which was uncertain and contingent on a vote of the electors of the district annually. It appears to be conceded by appellee (a point we do not decide) that all revenue, save and except the amount voted annually by

the electors for general school purposes, including the State tax of 3 mills, the tobacco and severance taxes and the amount voted for bond purposes, is subject to the payment of bonds and interest.

The framers of the Constitution of 1874, recognizing the great importance of educational advantages for all the children of the State through a system of free public schools, imposed on the State the duty of establishing and maintaining such schools in the following eloquent language in § 1, article 14: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

The same Constitution by § 3, of article 14, provided for the levy of a tax for such purpose as follows: "The General Assembly shall provide by general laws for the support of common schools by taxes, which shall never exceed in any one year two mills on the dollar on the taxable property of the State, and by an annual *per capita* tax of one dollar, to be assessed on every male inhabitant of this State over the age of twenty-one years. Provided, the General Assembly may by general law authorize school districts to levy by a vote of the qualified electors of such district a tax not to exceed five mills on the dollar in any one year for school purposes. Provided, further, that no such tax shall be appropriated to any other purpose nor to any other district than that for which it was levied."

By amendments adopted in 1907 and 1917, the maximum rate that might be voted was increased to 7 and 12 mills respectively, and by Amendment No. 11, adopted in 1927, it was provided as follows: "The General Assembly shall provide by the general laws for the support of common schools by taxes which shall never exceed in any one year three mills on the dollar on the taxable property in the State, and by an annual *per capita* tax of one dollar, to be assessed on every male inhabitant of this

State over the age of twenty-one years. Provided, that the General Assembly may, by general law, authorize school districts to levy by a vote of the qualified electors of such districts a tax not to exceed 18 mills on the dollar in any one year for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness for buildings. Provided, further, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied."

By act 63 of 1927, p. 177, enacted pursuant to Amendment No. 11, it is provided: "That the qualified electors of the school districts at any annual school election may, in accordance with election procedure provided for by law, levy any rate of school tax they may desire. Provided that no rate voted shall exceed 18 mills on the dollar." It will be noticed that the act is not so explicit as the amendment itself, in that it fails to designate the purpose for which the electors may vote the tax up to 18 mills. Three purposes are named in the amendment (1) "for the maintenance of schools"; (2) for "the erection and equipment of school buildings"; and (3) for "the retirement of existing indebtedness for buildings." And it is then provided "that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied." This appears to be very simple language, unambiguous, and not difficult of comprehension. The electors of any school district may vote a tax at any rate they wish for any or all said purposes, provided the tax voted for all does not exceed 18 mills. For instance, they might vote 6 mills for bond and 12 mills for school purposes, as they did in this case, and, when so levied and collected, neither sum could "be appropriated for any other purpose * * * than that for which it is levied." In other words, the 12 mills voted for school purposes could not lawfully be appropriated for payment of bonds or the interest thereon, nor could the 6 mills voted for bond purposes be appropriated for schools. Such is the plain language of the amendment. No other construction can be given, and any other

in the present case would probably work disaster to both parties. For, since the voting of any tax for any purpose is optional with the district's electors, the taking of the 12 mills voted for general school purposes to pay bonds would close the schools and keep them closed for many years, it would seem reasonably certain the electors would not vote a tax on themselves and have no schools. The bondholders would lose the 6-mill tax now being received, a substantial loss to them, and the district would be without a free public school for years to come, which would be disastrous to it and its people.

Appellant contends that § 8977, Crawford & Moses' Digest, and the decisions of this court in *Schmutz* v. *Special School District of Little Rock,* 78 Ark. 119, 95 S. W. 438, and *Am. Ex. Trust Co.* v. *Trumann Special School Dist.,* 183 Ark. 1041, 40 S. W. (2d) 770, support his contention that all the revenue may be pledged. Said section provides: "To borrow money and mortgage the real property of the district as security therefor under such conditions and regulations as to amount, time and manner of payment as the board of directors of said school district shall prescribe." This section authorizes the directors to mortgage the real property of the district to secure the money borrowed, and permits them to fix the time and manner of payment. It does not authorize them in specific terms to pledge any revenue, and it could not authorize them to pledge any part of the 18-mill tax voted for any other purpose. Neither the Schmutz nor the Trumann Special School District case, *supra,* discussed the exact question now under consideration. In the latter case, after quoting from the former, it is said: "The board of directors could not have limited the liability of the district to the payment of the bonds out of the revenues set aside for 'the building fund,' if one had been provided, since they were and are a charge against the whole revenues of the district."

What the court meant by a "charge against the whole revenues of the district" was the whole of its certain revenue, or revenue from fixed sources, such as the 3-mill

State tax, poll tax, tobacco tax, severance tax, such bond fund tax as might be, if and when voted, but not that part of the optional tax voted for school purposes. We think these and other cases cited by appellant are not in point, for the reason they do not have the same background of fact.

Nor is this repudiation as contended by appellant. It is merely postponement of payment of an obligation because of lack of available funds legally bound therefor. It is quite probable, although the complaint fails to show the date of the bond issues outstanding, that, when many of said bonds were issued, the maximum amount permitted to be voted was 5 mills or 7 mills; if so, certainly when the electors tax themselves 6 mills for such purpose at this time, the bondholders are getting all they could in equity and good conscience demand.

Affirmed.

[redacted]

COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* JORDAN.

4-2725

Opinion delivered November 7, 1932.

[redacted]

Buzbee, Pugh & Harrison, for appellant.

Edward Gordon, John B. Gulley and *Lewis Rhoton,* for appellee.

MEHAFFY, J. The appellee brought suit in the Conway Circuit Court alleging that in August, 1931, he purchased a bottle of Coca-Cola which contained a decayed

or rotten cockroach; that the appellant negligently and carelessly caused to be sold in the regular course of trade the bottle of Coca-Cola which contained the decayed cockroach.

Appellee drank part of the contents of the bottle before he discovered the cockroach. As the result of drinking part of the contents, he became a victim of ptomaine poison, from which he suffered, and is still suffering, and will suffer to some extent the rest of his life.

Appellee further alleged that, since swallowing the contents of the bottle, he had been unable to eat and digest any normal meal, but was subject to violent vomiting, which caused him great pain and humiliation; that he was permanently injured. There were other allegations of suffering and inability to sleep.

The defendant filed answer denying all the material allegations of the complaint.

The evidence offered by appellee tended to show that he bought a bottle of Coca-Cola from the Arkansas Bottling Works on West 7th Street, Little Rock, Arkansas, and drank a part of it. It was bought from the Johnson Grocery Company. He drank part of it and swallowed something that was in the bottle, and called attention to Mrs. Johnson. She examined it and said that there was a bug in the bottle. Appellee showed the bottle to the manager of the appellant, who examined it and said that there was a bug in the bottle. Later appellee delivered the bottle to Dr. Scoggin.

The drinking from the bottle made appellee sick. Before he drank it he weighed 207 pounds, and now weighs 35 pounds less. Mrs. Johnson testified corroborating the statement of appellee, and physicians testified as to his physical condition.

The appellant's testimony tended to show that a cockroach in the bottle would not produce the effect testified to by appellee and his witnesses. Appellant also introduced evidence showing the manner in which the Coca-Cola was manufactured and bottled, and showed that it

was impossible for anything to get into the bottle unless some of the inspectors were negligent.

There was a verdict and judgment for $4,000, and the case is here on appeal.

Appellant insists on a reversal of the judgment because of remarks made by appellee's counsel in the opening statement to the jury.

Several depositions had been taken by the appellee before the trial, and immediately before the trial began the appellant's attorney called the attention of the court to the depositions, and objected to them as incompetent and irrelevant, and objecting at that time to counsel for appellee in making his opening statement to make any reference to said depositions.

The court, at that time, overruled the objections of appellant, but did not pass on the competency or admissibility of the depositions.

In making the opening statement to the jury the appellee's attorney said: "They claim that no foreign substance gets into it. You can see what that is (here exhibits bottle). A reputable citizen of Little Rock, Mr. Bellingrath, testifies—he will just tell you it is absolutely impossible for any foreign substance to get in and remain in a bottle of Coca-Cola. We propose then to produce that."

Appellant objected, and the attorney for appellee stated that he wanted the record to show the depositions would only be offered in rebuttal if they undertake to show that it can't get in.

The appellee's attorney further said in his opening statement: "The deposition of Quinn Glover, son of Congressman Glover, will tell you that he bought a Coca-Cola—bought it from these people, with foreign substance in it. I will not go much in detail about it. You understand the situation."

The appellant's attorney then objected and excepted to counsel's statement. After this the evidence was introduced, and at the close of appellant's testimony the appellee offered the depositions that had been referred to

before the beginning of the trial. The court examined the depositions and held the testimony incompetent. The court did not state why the depositions were incompetent, and it is not necessary for us to pass on the admissibility of this evidence.

Appellant cites *Kansas City Sou. Ry. Co.* v. *Murphy,* 74 Ark. 256, 85 S. W. 428, and quotes at length from the opinion in that case. The court said in that case: "The control of argument is in the sound judicial discretion of the trial judge, and it is his duty to keep it within the record and within the legitimate scope of the privilege of counsel, and this he should do on his own initiative; if he fails to restrain counsel, then it is the right of opposing counsel to object to the argument. This should be a definite objection to the alleged improper remarks, and call for a ruling of the court thereupon, and if the court then fails to properly restrain and control the argument within its proper bounds, and to instruct the jury to disregard any improper remarks and admonish the counsel making it, then an exception should be taken to the action of the court. A mere exception to argument interposed to make a record in the appellate court, and not calling for a ruling of the trial court, is insufficient."

The court also said in that case: "However, a wide range of discretion must be allowed the circuit judges in dealing with the subject, for they can best determine at the time the effect of unwarranted argument; but that discretion is not an arbitrary one, but that sound judicial discretion the exercise of which is a matter of review."

In the instant case objection was made before the appellee's attorney had begun his opening statement; the attorney for appellant had objected to the depositions that had been taken, and objected to the counsel for appellee in his opening statement making any reference to the depositions. The court overruled this objection, and did not at that time pass on the question of the admissibility of the depositions.

The appellee's attorney then, in his opening statement to the jury, made the statement above set out, but

the appellant did not take the steps which the case referred to by it, *K. C. S. Ry. Co.* v. *Murphy,* says must be taken.

One of the things required is that he should call for a ruling of the court upon his objection. No ruling of the court was made, and none called for. No request was made by appellant to instruct the jury to disregard the remarks of the attorney, or to admonish counsel making it. Moreover, there was nothing in the remark of the attorney that could have prejudiced the jury against the appellant. The circuit judge, not having passed on the admissibility of the depositions up to that time, probably was uncertain himself as to whether or not they were admissible. When the depositions were finally presented to the circuit judge, he held that they were incompetent. Certainly up to that time the appellee's attorney had not intentionally stated anything that he expected to prove which he thought was incompetent. In making opening statements to the jury, the attorneys should confine themselves to a statement of the facts. Apparently this is what the attorney for the appellee was endeavoring to do.

Appellant then calls attention to *Scripps* v. *Reilly,* 35 Mich. 371, 24 Am. Rep. 575. In that case the court said: "The trial judge must always have a very large discretion in controlling and managing the routine proceedings at the trial, and it is not necessary to specify the matters to which such discretion extends. It applies beyond doubt to the addresses of counsel as well as to other incidents. But it must be a reasonable, a legal, discretion, and whether it be so or not must depend upon the nature of the proceeding on which it is exercised, the way it is exercised, and the special circumstances under which it is exercised. It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and, unless it turns out that he has not merely misstepped, but has departed widely and injuriously, an appellate

court will not re-examine. It will not do it when there is no better reason than its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been."

We call attention to the fact that in the *Scripps* v. *Reilly* case, *supra,* the attorney in making his opening statement, read at length to the jury a series of articles published in the newspaper during the course of several months. About 20 articles were read to the jury as part of the opening statement, and the court held that they were calculated from their character to influence the minds of the jurors against the plaintiff in error.

Appellant then calls attention to *German-American Insurance Co.* v. *Harper,* 70 Ark. 305, 67 S. W. 755. They quote from that case: "These remarks were gravely prejudicial. True, they were not made under the sanction of an oath as a witness. But the statement of matters of fact by counsel of high character and excellent standing in the profession might be as readily accepted and believed by the jurors, and make as profound and ineradicable impression upon their minds, as if they had been uttered under oath." The counsel in that case made the following statement to the jury: "Gentlemen of the jury, if you knew Marshall's business methods, you would say, 'God save the plaintiffs, and God save all those who deal with him'!" The court held that these remarks were prejudicial.

This court has often held that the trial court must have a very large discretion in managing and controlling the proceedings at the trial, and, even after objection had been made, if the court had overruled the objections, and the appellant had taken exceptions, it would not be cause to reverse the case, because we are of the opinion that there was no abuse of discretion.

Appellant next insists on reversal because the court refused to give its instructions numbers 2 and 3. They are as follows:

"No. 2. You are instructed that no presumption of negligence arises against the defendant, and, before the plaintiff is entitled to recover against it, he must affirmatively prove by a preponderance of the evidence that his injuries, if any, arose on account of the negligence of said defendant."

"No. 3. You are instructed that the defendant is not a guarantor or insurer of the purity of the drink prepared by it and placed on the market for sale. It is only bound to use ordinary care and prudence in the preparation of said drinks and in the selection of the materials from which it is made."

The court gave several instructions requested by appellant and several requested by appellee, and these instructions given by the court make it so plain that the plaintiff could not recover unless the preponderance of the evidence showed that the defendant was guilty of negligence, the jury could not have been misled.

They were repeatedly told that they could not find for the plaintiff unless they found from a preponderance of the evidence that the foreign or poisonous substance in the Coca-Cola was put there through, or on account of, the negligent acts of the defendant.

This court has uniformly held that a judgment will not be reversed for a refusal to give an instruction where the matter is fully covered by other instructions.

Appellant calls attention to the case of *Drury* v. *Armour & Co.*, 140 Ark. 371, 216 S. W. 40. We do not think this case supports the contention of appellant. In that case the trial court directed a verdict, and the court held that this was error; that the testimony was sufficient to warrant submission of the question of negligence to the jury.

The instructions in the instant case constituted a correct guide for the jury. There is no contention that the evidence was not sufficient in this case to justify the submission to the jury, and to sustain the verdict.

The judgment is affirmed.

MAGEE *v.* STATE USE MILLER COUNTY.

4-2767

Opinion delivered December 12, 1932.

Pratt P. Bacon, for appellant.

Millard Alford, Will Steel and *James D. Head,* for appellee.

KIRBY, J. It will suffice to say that this case is ruled by the decision in *Yates* v. *State use of Miller County,* (*ante* p. 749) and it must be held that the court erred in not surcharging the sheriff's account with the fees retained for the automobile licenses collected, which should have been charged, of course, in his report to the circuit judge for the first year, and also his report to the circuit judge for both years, and the approval of such accounts without any disclosure made would not prevent surcharging the account as could be done in this proceeding.

It appears, however, that the officer collected these fees, including an amount beyond the salary which he

was entitled to retain the first year, but that the fees from which his salary was to be collected in the second year were not sufficient to pay it after the necessary expenses allowed by law were credited to him without the amount of the fees for automobile licenses retained by him on the first year's settlement. The court allowed the account accordingly with this credit claimed on the second year's salary and committed error in doing so. He could, of course, have been charged interest on the amount wrongfully retained on the first year's salary, which should have been paid into the county treasury by the sheriff, up to the time of its credit on the second year's salary.

The allowance for the purchase of the automobile was not a proper one, as said in the other case, and no error was committed in refusing or rejecting it.

The purchase of the disinfectant for the jail would appear to be a proper expenditure for the jail, but it should have been authorized by the county court before said purchase was made and certainly approved by such court before the allowance thereof as a claim against the county.

The decree is accordingly affirmed on the appeal, and reversed on the cross-appeal with directions to enter a decree in accordance herewith. It is so ordered.

BUTLER, J., dissents on cross-appeal.

SIMON *v.* GIRARD FIRE & MARINE INSURANCE COMPANY.

4-2880

Opinion delivered February 27, 1933.

James G. Coston, J. T. Coston and *F. C. Douglas,* for appellant.

Reid, Evrard & Henderson and *Verne McMillen,* for appellee.

SMITH, J. Suits were brought by appellant on four fire insurance policies, which, for convenience, were consolidated and tried together. Three of the insurance companies made defendants carried policies of fire insurance on the seats in the Home Theatre in Blytheville, Arkansas, owned by the appellant. The other defendant insured the appellant against loss of rents resulting from the fire. The fire occurred about two o'clock on Sunday morning in a building adjacent to the theatre building, and as a result of this fire the roof covering the theatre was damaged. The damage to the roof was serious enough to require its repair, but not serious enough to prevent the use of the theatre for the usual purposes, and pictures were shown in the building each day up to and including the Saturday following the fire. On this Saturday, while the roof was being repaired and a portion of it open for that purpose, a heavy rain occurred, and the seats were damaged as a result of the rain.

The trial court submitted the question of loss of rents to the jury, and there was a verdict for the appellant on that account. The appellant complains, however, that this verdict was inadequate, and was made so by the instruction of the court on that issue. In the suits

for damage to the seats a verdict was returned under the direction of the court for the defendants, this being upon the theory that the damage was the result of the intervening negligence of the insured in repairing the roof, and the plaintiff has appealed from the judgment of the court on both issues.

The undisputed testimony is to the effect that there was no damage to the seats either from the fire or from water used in extinguishing it. There was a damage to the roof which made its repair necessary, but there was no leak in the roof as a result of the fire, and the use of the building was continued for its usual purposes notwithstanding the fire. There was testimony to the effect that a representative of the insurance companies directed the owner to repair the roof as a part of the fire loss; but this direction was general, and the owner was left to use his own judgment in this respect.

The fire made the repair of the roof necessary, but the undisputed testimony is to the effect that the repair could have been made at a time and in a manner which would have occasioned no damage to the seats. This damage was the result of tearing off the roof and letting in the rain, whereas the roof might have been repaired without this result.

Appellant insists, however, that his right to recover should not be defeated, although the negligence of his contractor may have contributed to the damage, for the reason that the fire was the primary cause of the damage. The case of *Beavers* v. *Security Mutual Ins. Co.*, 76 Ark. 595, 90 S. W. 13, is cited to support this view.

The trial court, in the case just cited, had instructed the jury that "if the loss occurred either through the negligence of the plaintiff or was the result of his own wrong, the insurer would not be liable." In condemning this instruction this court said: "The law is well settled that the insurer is liable, even though the negligent act of the insured or his servants be the proximate cause of the damage through the fire," and a number of cases were cited to support that declaration of law.

There is in the instant case, however, no insistence that the negligence of the insured was the proximate cause of the fire; nor is it questioned that the insurer is liable for all damage of which the fire was the proximate cause. The insistence is that, the fire having occurred, the insurer is not liable for any damage thereafter occurring through the negligence of the insured. Upon this issue the case of *Benson* v. *Firemen's Ins. Co.*, 150 Ark. 532, 234 S. W. 628, appears to be decisive.

We said there that we could easily imagine a case where the insurer in a fire policy might be liable for damage done by rain as a direct damage by fire, and that such would be the case if rain followed so closely after the fire that no reasonable opportunity was afforded to protect the property from that damage, for the reason that the fire continued to be the proximate cause of the damage. But it was also said in that case that, where subsequent to the fire there had been a failure to exercise care and to use reasonable means to protect the property after the fire, this failure broke the causal connection between the fire and the subsequent damage, and that such subsequent damage was not a direct loss or damage by fire against which the insurer had contracted to indemnify the insured.

It is ordinarily a question of fact for the jury as to whether the original fire or the subsequent negligence of the insured is the proximate cause of the damage; but there appears to be no such question of fact in the instant case. Numerous witnesses testified that there would have been no subsequent damage to the seats, had the roof been repaired in a proper time and manner, and the contractor employed to do the work admitted that there would have been no damage if he had cemented and waterproofed the roof as he tore the old roof off and put the new roof down. It is not only a matter of common knowledge that roofs may be repaired without damage to the contents of the buildings which they cover, but the undisputed testimony here shows this to be true. One contractor testified that he had repaired and re-

placed something over eleven thousand roofs without damage to the contents of the buildings in any case, and that there was no occasion for damage in the instant case.

The insuring clause in the rent policy was in the form of a rider attached to a standard fire policy, and contains the following provision: "If said premises or any part thereof, whether rented at the time or not, shall be rendered untenantable by fire or lightning occurring during the continuance of this policy, this company shall become liable for the rental value of such untenantable portions, loss to be computed from the date of fire or damage by lightning, until such time as the building could, with reasonable diligence and dispatch, be rendered tenantable."

This rider further provided that this "loss is to be computed from the date of fire or damage by lightning, until such time as the building could, with reasonable diligence and dispatch, be rendered again tenantable, although the period may extend beyond the termination of this policy."

The original policy to which the rider was attached provided that the insurer shall have the option to repair, rebuild or replace the property lost or damaged with other of like kind and quality; but these provisions do not appear to be applicable to the loss of rents, as they could not, of course, be repaired or replaced.

Upon the issue of the rents recoverable, the court instructed the jury to find for the plaintiff "for such amount as you may find, from a preponderance of the evidence, to be the rental value of the building during the time it would have taken the plaintiff, with reasonable diligence and dispatch, to repair the damage caused by the fire which was necessary to restore the building to the same tenantable condition as before the fire."

It is insisted that this instruction was too narrow, and that the court failed to instruct the jury with reference to contingencies and conditions beyond the control of the insured. But we think the instruction correctly defines the measure of damages for loss of rents and did

not exclude from the jury any circumstances which the jury had the right to consider. The instruction appears also to have conformed to the obligations which the insurer assumed in this respect.

The testimony shows the rental value of the property to have been $475 per month, and the jury returned a verdict for $1,425 for loss of rents, this being for a period of three months.

We conclude therefore that there was no error in this respect, and, as we are also of the opinion that the court was correct in holding that there was no liability for the damage to the seats caused by the rain, the judgment must be affirmed, and it is so ordered.

GUARDIAN LIFE INSURANCE COMPANY *v.* JOHNSON.

4-2837

Opinion delivered February 27, 1933.

James D. Head, for appellant.

Pratt P. Bacon and *Shaver, Shaver & Williams,* for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Miller County to recover $1,000 penalty and attorney's fee for total disability benefits on two policies issued to him by appellant. It was alleged in the complaint that appellee suffered total disability on March 5, 1932, within the meaning of the disability clauses in said policies. The total disability clauses were defined in the policies to be "disability caused by * * * disease which wholly prevents the insured from engaging in any business or occupation or performing any work for compensation, gain, or profit."

A petition in proper form was filed by appellant to remove the cause to the Federal court on account of diversity of citizenship and the amount involved, which was

overruled by the trial court over appellant's objection and exception.

A demurrer was also filed by appellant to the complaint on the ground that each policy provided for the payment of $50 a month on account of total disability, and that each month's alleged default in payment constituted a separate and distinct cause of action which could not be joined in order to confer original jurisdiction upon the circuit court. The demurrer was overruled over the objection and exception of appellant.

Appellant also filed an answer denying that appellee had been totally disabled by disease within the meaning of the disability clauses in the policies.

The cause was submitted upon the pleadings, testimony and instructions of the court, resulting in a verdict against appellant for $1,000, and a consequent judgment for said amount, 12 per cent. statutory penalty, and an attorney's fee of $150, from which is this appeal.

Appellant contends for a reversal of the judgment because the court denied its petition to remove the cause to the Federal court. It is argued that, in addition to the amount of $1,000 sued for, there was also involved the contingent loss to appellant of premiums amounting to $360 per annum for an indefinite length of time, as well as the validity of the policies, so that the future effect of the recovery sought would carry the amount in dispute beyond $3,000. It was ruled in the case of *Elgin* v. *Marshall,* 106 U. S. 578, 1 S. Ct. 484, that the collateral effect of a judgment is not the test of jurisdiction, but that the amount involved in the suit is the test. The same jurisdictional test was applied in the cases of the *New England Mortgage Security Company* v. *Gay,* 145 U. S. 123, 12 S. Ct. 815, and the *Mutual Life Insurance Company* v. *Wright,* 276 U. S. 602, 48 S. Ct. 323. In the Gay case, *supra,* the court said: "When the jurisdiction of this court depends upon the amount in controversy, it is determined by the amount involved in the particular case, and not by any contingent loss either one of the parties may sustain by the probative effect of the judg-

ment, however certain it may be that such loss will occur."

The same jurisdictional test was applied by this court in the recent case of *Standard Life Insurance Company* v. *Robbs,* 177 Ark. 275, 6 S. W. (2d) 520. It is true that in both the Wright and Robbs cases, *supra,* recovery was sought under the death clause, instead of the total disability clause as in the instant case, but that does not change the principle that should be applied. In fact, under the death clause involved in those cases, the ultimate amount of recovery was certain; whereas, in the instant case, the ultimate amount that may be recovered is uncertain, being contingent upon a continuation of total disability. The trial court correctly ruled that the amount involved in the instant case did not exceed $3,000.

Appellant also contends for a reversal of the judgment because the court overruled the demurrer to the complaint. It is argued that appellee improperly joined separate and distinct causes of action on each installment or monthly payment in an attempt to increase the amount sufficiently to give the circuit court original jurisdiction of the cause of action. This is not an action to recover installments of $50 each as they became due, but was for past-due installments under two written instruments, and constituted a single cause of action. This court said in the case of *Ft. Smith Paper Company* v. *Templeton,* 113 Ark. 490, 168 S. W. 1092, that: "All of the separate installments due under the contract constitute a single cause of action, for the contract is not separable, as where the obligations are represented by different instruments of writing. It is true that an action may be maintained upon each installment as it becomes due, the same as upon different items of an account in the course of accrual; but, when the enforcement of the right of action is postponed until succeeding installments become due, a suit upon them all constitutes a single cause of action." The court did not err in overruling appellant's demurrer to appellee's complaint.

The facts in this case are, in substance, as follows: On the 20th day of July, appellee, a hotel clerk and cotton buyer, took out two life insurance policies for $5,000 each, making representations in the application therefor that he was in good health. Each policy contained a disability clause in the language set out above. The policy provided that, in case of total disability caused by disease, appellant would pay appellee $100 a month during the period of such disability. The premiums on the policies were either paid in cash or else the time for payment was extended beyond the month of August, 1930. Proof was filed with appellant on March 5, 1931, to the effect that appellee was unable to do any work which required him to stand on his feet for any length of time. The testimony is in slight conflict as to whether appellee was in good health at the time the policies were delivered. There is a dispute in the testimony as to whether appellee was totally disabled after the month of August, 1930, within the meaning of the total disability clauses in the policies The testimony introduced by appellee tended to show that, on and after that date, he was unable to do any work which required him to be upon his feet for any length of time, caused by a chronic case of sacroiliac joint inflammation and arthritis, and that the only remedy for the trouble or disease was to keep off his feet and to keep his body in a rigid position. In addition, it appeared from the evidence that, on account of the disease, appellee was compelled to wear day and night a specially constructed steel belt and use a specially built mattress to sleep on.

In the course of the trial, appellant offered testimony tending to show that the disability clauses related to general disability insurance, and not to disability preventing one from carrying on a particular occupation, which testimony was excluded over the objection and exception of appellant. The admission of certain other testimony of experts was objected and excepted to by appellant.

Appellant contends for a reversal of the judgment on the ground that the testimony tends to show only that appellee was unable to perform the business of a cotton buyer or hotel clerk; whereas, under the terms of the disability clauses in the policies, appellee must show by testimony that his disability prevented him from carrying on any kind of work for compensation, gain, or profit. In the first place, we think a fair interpretation of the testimony tends to show that appellee's ailment prevented him from engaging in any kind of work in the due exercise of common care and prudence. The remedy for this ailment was to keep off his feet, hold his body in a rigid position, and lie down and rest. Just how one could do this and engage in any kind of labor or business for profit is hard to imagine. In the next place, we do do not think the disability clauses, as defined in the policies, mean that one must become helpless before he can claim the benefit from or under them. In the case of *Ætna Life Insurance Company* v. *Spencer*, 182 Ark. 496, 32 S. W. (2d) 310, this court said, in construing a disability clause not materially different from the definition of the clauses in these policies: "Total disability is generally regarded as a relative matter which depends largely upon the occupation and employment in which the party insured is engaged. This court has held that provisions in insurance policies for indemnity in case the insured is totally disabled from prosecuting his business do not require that he shall be absolutely helpless, but such a disability is meant which renders him unable to perform the substantial and material acts of his business or the execution of them in the usual and customary way." The clause the court construed in the case referred to is as follows: "That if the insured becomes totally and permanently disabled and is thereby prevented from performing any work, or conducting any business for compensation or profit." In the very recent case of *Missouri State Life Insurance Company* v. *Johnson, ante* p. 519, this court reiterated the interpretation given such disability clauses in the case referred to, as

well as other cases, in the following language: "That total disability, as used in contracts of this character, exists when the injury of the insured prevents 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 him, in his condition, not to do." The trial court correctly instructed the jury as to the meaning of the total disability clauses in the policies.

Appellant also contends for a reversal of the judgment because the trial court refused to give its requested instructions Nos. 7, 8 and 11. These instructions were fully covered by instruction No. 1, requested by appellee and given by the court.

Appellant also contends for a reversal of the judgment because the trial court refused to give its requested instructions Nos. 14, 15 and 20. These instructions presented issues not involved because the undisputed evidence shows that the premiums had been paid in cash or the time for payment of them had been extended beyond the time appellee had become disabled. In other words, that the policies were in full force when disability occurred and proof was filed. Appellee was released from any obligation to pay premiums after becoming totally disabled. *Ætna Life Insurance Company* v. *Phifer,* 160 Ark. 98, 254 S. W. 335.

Appellant also contends for a reversal of the judgment because the trial court excluded its offered testimony tending to show that the disability clauses related to disabilities for all kinds of labor or business and not to disabilities preventing the pursuit of occupations. This testimony was not admissible because the clauses in question have received judicial interpretation by this court. Under that interpretation, there is no ambiguity as to their meaning.

Appellant also contends for a reversal of the judgment on account of the admission of the testimony of Dr. Dale relative to appellee's case being chronic. He testified that he examined appellee on the 7th day of January,

1932, for the purpose of treating him, at which time he obtained a history of his case, and that, based upon the examination and history of the case, he regarded his ailment as chronic. The doctor qualified as an expert, and his opinion was admissible as expert testimony. *Great Western Land Co.* v. *Barker,* 164 Ark. 587, 262 S. W. 650.

Appellant also contends for a reversal of the judgment because its expert witness, Dr. Caldwell, was not permitted to testify that many persons not knowing that they were afflicted with appellee's ailment, when enlightened by a physician, continued their manual labor, and that in his opinion, if compensation were in sight, some persons afflicted as appellee would exaggerate the extent of their pain and suffering. We do not think what others might or might not do, afflicted as appellee, had any relevancy to the issue of whether appellee was totally disabled, so the testimony of the doctor on this point was properly excluded.

Appellant also contends for a reversal of the judgment on the ground that the policies were not delivered during the good health of appellee. No fraud was shown on the part of appellee in procuring the policies, so his statement that he was in good health in his applications for the policies was a representation only, and, if made in good faith, will not avoid the policies. *Modern Woodmen of America* v. *Whitaker,* 173 Ark. 921, 293 S. W. 1045; *American National Insurance Co.* v. *Chavey,* 185 Ark. 865, 50 S. W. (2d) 245. These policies themselves provide that, in the absence of fraud, all statements of the insured shall be deemed representations and not warranties. Under the provisions of the policies and the authority of the cases last cited, the court properly submitted this question to the jury, and the adverse finding of the jury on the disputed question of fact is binding upon appellant. Appellant argues that instructions 3 and 4 bearing upon this issue, given at its request, are in direct conflict with instruction 4 given at appellee's request. We think not. Appellant's requested instructions 3 and 4 were more favorable than it was entitled to under

the facts, and were based on the theory that the statements were warranties, and should not have been given. Appellee's instruction No. 4 was based upon the theory that the statements were representations, and was a correct instruction, and announced the true rule of law applicable to the facts in this case.

No error appearing, the judgment is affirmed.

SCHOOL DISTRICT No. 28 *v.* E. H. STAFFORD TRUST.

4-2879

Opinion delivered February 27, 1933.

Cunningham & Cunningham, for appellant.

Moore, Gray & Burrow and *G. M. Gibson*, for appellee.

MEHAFFY, J. The appellant, School District No. 28 of Lawrence County, purchased from Charles A. Wood, doing business as Wood School Supply Company, certain school furniture. Wood ordered the school furniture from the E. H. Stafford Manufacturing Company in Chicago, whose business was manufacturing school furniture.

On April 3, 1928, the school district issued its warrant, payable to Wood School Supply Company, for $655,

the purchase price of the furniture. On April 23, 1928, the warrant was indorsed by Wood and delivered to the E. H. Stafford Manufacturing Company.

On May 8, 1928, the warrant was presented for payment to the county treasurer of Lawrence County, and was not paid because the treasurer did not have sufficient funds on hand at the time it was presented, and the warrant was registered by the treasurer as No. 1.

On May 9, 1928, the E. H. Stafford Manufacturing Company sold the warrant to the E. H. Stafford Trust, a common-law trust. The warrant was duly indorsed to the order of E. H. Stafford Trust by E. H. Stafford Manufacturing Company.

The warrant was presented to the treasurer for payment at intervals, but it was never paid. There were many occasions, however, when there were sufficient funds in the treasury to the credit of the district for the payment of the warrant. The warrant was at all times, after the transfer by the manufacturing company, in the possession of the E. H. Stafford Trust.

On December 28, 1928, Wood, who had sold the warrant to the E. H. Stafford Manufacturing Company, represented to the school district and the county treasurer that he was still the owner of the warrant, and requested that a new warrant be issued for the amount with interest, stating that, if this were done, he would procure the old warrant, the one dated April 3, 1928, and return it to them. He gave a receipt to this effect.

At the time the new warrant was issued in December, 1928, Wood was not the owner of the warrant, but had sold and transferred it to the E. H. Stafford Manufacturing Company, who had in turn sold and transferred it to E. H. Stafford Trust.

Wood did not have possession of the warrant issued on April 3d at the time the new warrant was issued for $698.67, the amount of the original warrant with interest, and this last warrant was issued without any consideration, Wood simply agreeing that he would get possession of the original warrant and deliver it to the treasurer.

The warrant issued December 28, 1928, was registered on the same day it was issued, as warrant No. 4, and was paid to J. M. Whitlow, to whom Wood had transferred it.

On August 29, 1930, E. H. Stafford Trust and E. H. Stafford, Mrs. Florence Stafford and Russell Stafford, trustees of the E. H. Stafford Trust, filed suit in the Lawrence Chancery Court against School District No. 28 of Lawrence County, Arkansas, W. Phillips, Arthur Jones and Jess Blackshear, directors of School District No. 28; Charles A. Wood, doing business under the trade name of Wood School Supply Company; C. W. Webb, treasurer of Lawrence County, Arkansas, and the American Surety Company of New York.

Pleadings were filed by the parties, and the court found and decreed that the appellees were the owners and holders, in due course of business, for a valuable consideration of the school warrant issued on April 3, 1928, the warrant sued on here, and that the warrant was payable out of the general school fund of School District No. 28; that the warrant was issued to Wood School Supply Company, which was the trade name of Charles A. Wood, for school furniture, and for value and in due course transferred by Wood School Supply Company to E. H. Stafford Manufacturng Company, and by it for value, and in due course of business, transferred and delivered to E. H. Stafford Trust, the appellee.

The court further found that on May 8, 1928, said warrant was duly presented to C. W. Webb, county treasurer, and by him registered as warrant No. 1; that from the date of the registration of the warrant up until September 13, 1930, when suit was filed, payment of said school warrant was continuously demanded by appellees, and that, although there was sufficient funds on hand with the treasurer to pay said warrant, payment was by the treasurer refused, although payment was due as the first and prior claim out of the funds of said district, in the hands of the county treasurer, and should have been paid; that on or about December 28, 1928, Charles A. Wood,

having theretofore transferred, delivered and assigned said warrant and not being the owner thereof, fraudulently procured the school district through its directors, and Webb, the treasurer, to mark the warrant canceled of date April 3, 1928, and to mark "canceled" upon the register of school warrants, the record of the registration of said warrant, all of which was without the knowledge, authority or consent of appellees, who were then the owners and holders of said warrant; that this action and conduct on their part was fraudulent, unlawful, void and of no effect, and did not in any way affect the validity of the warrant or appellees' right to payment.

The court also held that the warrant should be reformed and corrected so as to show registration as warrant No. 1 under the date of May 8, 1928, and that all marks, erasures or cancellations and all notations relative to the cancellation should be in all respects canceled and held for naught, and entered judgment against Wood, Webb and American Surety Company of New York in the sum of $655, the amount of the warrant.

The court further held that O. T. Massey, the present treasurer, should pay the amount of said warrant out of any funds in his hands, or that hereafter come into his hands, belonging to said district, and issued mandamus directed to said treasurer, requiring him to make such payment.

The appellant contends for a reversal of the case, first, because he says the school warrant was not a negotiable instrument, and that there could therefore be no innocent holder.

The only case cited and relied on by appellants is the case of *First National Bank of Waldron* v. *Whisenhunt*, 94 Ark. 583, 127 S. W. 963. The court in that case held that the directors were without power to make a valid contract for the purchase of charts, and the warrant, having been given in payment of that, was void. In other words, when a school district gives a warrant or order in payment of a thing they had no power to purchase, the warrant is void, and also, if it is void as beyond scope of their

powers, it could not be ratified. The court further held that the warrants of school districts are not negotiable instruments in the sense of the law merchant, and that there could therefore be no innocent holder of a school warrant issued without power or contrary to law.

This question is not involved in the instant case. The school district had the power to purchase the school supplies, and to issue its warrant to pay for them.

The directors were expressly authorized by law to purchase supplies of the kind purchased by the appellant, for the district, and, since it had the authority to purchase the supplies, did purchase them, and gave the warrant signed by the directors in payment therefor, the warrant issued in payment for such supplies, is a valid obligation of the district.

This court, in discussing school warrants, said: "The school warrants were orders upon the county treasurer to pay out of the school funds in his hands the amounts specified; and, although the warrants are negotiable in form, and transferable by delivery, they are not negotiable instruments in the sense of the law merchant." *Dubard* v. *Nevin,* 178 Ark. 436, 10 S. W. (2d) 875.

In the above case it was insisted that the writ of mandamus should not be issued against the county treasurer because the officers of the bank did not present the warrants to the treasurer for payment during the first three days they were in the hands of the bank for collection, for the reason that the officers of the bank knew that the treasurer would pay the warrants, and that this might result in hastening the insolvency of the bank, but it was held that, if this were true, it would not defeat the action. The holders of the warrants had, in good faith, sent them to the bank for collection; they could not be held liable in any sense for misconduct of their collecting agent.

School warrants do not have to be presented for collection like a check drawn on a bank. They are orders drawn on the county treasurer to pay out of the school

funds, and the warrant in the instant case was registered according to law, and the undisputed proof shows that, after it had been issued and delivered to the present holders, there were ample funds in the treasury belonging to the district to pay it.

There is no dispute about the purchase of the school supplies and the issuance of the warrant, and it therefore is immaterial whether the warrant was negotiable or not. The school supplies were purchased, received by the district and have not been paid for. This being true, the fact that the warrant was payable on demand, and therefore past due when it was transferred, would not deprive the holders of the warrant of the right to collect same from funds in the treasury belonging to the district.

Long after the supplies had been purchased, and after the warrant involved in this suit had been acquired by the appellees, Wood went to the directors of the district and told them that the warrant had been misplaced and got them to issue another warrant for the amount and interest, although the evidence shows that the warrant was at the time in the possession of appellees, had been sold by Mr. Wood, and he knew it had not been misplaced.

The directors, without the return of warrant No. 1, issued another warrant to Wood, and secured the cancellation of the registration of the original warrant by the treasurer, and this was done by the treasurer without the original warrant being presented, and Wood transferred this warrant to Whitlow, and it was paid to him.

The court held that the cancellation of the original warrant and the cancellation of the registration of such warrant was all without the knowledge, authority or consent of the appellees, who were then the owners and holders of said warrant, and was fraudulent, unlawful and void, and did not affect the validity of the warrant held by appellees, and that they were entitled to receive payment therefor out of the funds of the district in order of its registration as warrant No. 1; that said warrant

should be reformed and corrected, and rendered judgment against Wood, Webb and the American Surety Company of New York, and ordered O. T. Massey, the present treasurer, to pay said warrant.

The question is purely one of fact, and the chancellor's finding of facts will be upheld unless clearly against the preponderance of the testimony. *Kelly Trust Co.* v. *Paving Imp. Dist. No. 47,* 185 Ark. 397, 47 S. W. (2d) 369, *Smith* v. *Thomas,* 185 Ark. 613, 48 S. W. (2d) 561 *Jolley* v. *Meek,* 185 Ark. 393, 47 (2d) 43, *Gravette Const. Co.* v. *Gregory* 184 Ark. 1193, 42 S. W. (2d) 987, *Greer* v. *Stilwell,* 184 Ark. 1102, 44 S. W. (2d) 1082.

We do not deem it necessary to set out the evidence in detail. The finding of the chancellor is sustained by the evidence, and the decree is therefore affirmed.

PAVING DISTRICT NO. 2 OF HARRISON *v.* JOHNSON.

4-2890

Opinion delivered February 27, 1933.

Woods & Jones, for appellant.

Cotton & Murray, for appellee.

MCHANEY, J. Appellant district was organized in 1925. The properties of appellees were located in the dis-

trict. The board of assessors assessed benefits against their respective properties as follows: Johnson, $2,430; Greenhaw, $1,215, and Shaffer at $2,265. In 1929, acting pursuant of an order of the board of commissioners, the board of assessors reassessed the benefits against the real property of the district, notice of which was duly published and said readjusted assessment approved by the city council. In such readjusted assessment the property of appellees was assessed as follows: Johnson, $4,430; Greenhaw, $1,500, and Shaffer, $2,365. No action was taken by appellees regarding the increased assessment of benefits against their properties. Again, in April, 1931, pursuant to another order of the board of commissioners, the board of assessors again readjusted the assessment of benefits against the real property in the district, but no change was made at this time in the assessment of the benefits on the properties of appellees. Each of the appellees took an appeal to the city council, in which they objected to the readjusted assessment of benefits against their respective properties, and prayed that such assessment be restored to the amount at which the properties had been originally assessed in 1925. The city council granted the prayer of appellees and restored such assessments of benefits against their respective properties to the amounts herein first above stated.

Thereupon, appellant filed this action against appellees in the chancery court, praying that the action of the city council, in reducing their assessments of benefits, be vacated, and that the readjusted assessment against their respective properties as made in 1929 and as approved in 1931 be reinstated against their respective properties, and have judgment for the taxes due on the readjusted basis. The court held that the city council was without authority to reduce said assessment of benefits, and that its action in attempting to do so is void and should be vacated. The court found, however, that no material improvements had been made on the respective properties of appellees subsequent to the original assessment of benefits, and that the action of the board of assessors in

attempting to increase said assessments was void, and entered a decree restoring the assessment of benefits against their respective properties to the amount of the original assessments made in 1925. Appellant's complaint against each of the appellees was dismissed for want of equity.

We think the trial court correctly held that the board of assessors was without authority to reassess the benefits against the properties of appellees, except there had been some material physical change in the condition of the property since the original assessment which would increase or diminish their value. Section 5664 of Crawford & Moses' Digest, authorizing a reassessment of benefits, was construed by this court in *Street Improvement District No. 74* v. *Goslee,* 183 Ark. 539, 36 S. W. (2d) 960, in which it was specifically so held, and we are of the opinion that this case is ruled by that.

No material physical change in the property since the original assessment was made. No improvements of such a nature as to increase the value of the property have been made, nor have any improvements been destroyed so as to decrease the value.

It is true that this is a collateral attack on the action of the board of assessors, but, since the board was without power to make the readjusted assessment in this instance, its action is wholly void and open to collateral attack.

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

FINE *v.* MCGOWAN.

4-2891

Opinion delivered February 27, 1933.

Rains & Rains, for appellant.

Starbird & Starbird, for appellee.

BUTLER, J. This case involves the construction of the will of Nannie C. Carter, who was the owner of a farm containing 82 acres of land, an additional 80-acre tract, and certain personal property and life insurance. Mrs. Carter died, leaving surviving her husband, John Carter, and four daughters, Mrs. Daisy M. Fine (then Malone), the appellant, Dora E. Patton, Leila Fine and Mary J. McGowan, the appellee. After providing for the payment of her debts and funeral expenses and directing that her executor convert into money all her personal property and collect the amount of her insurance, and devising to her granddaughter eighty acres of land not included in her farm, and certain other specific bequests, she devised to her husband, for his life or until his remarriage, the use, rents and profits of her farm, provided that on his death or remarriage the 82-acre farm be divided into four portions of 20½ acres each in a certain specific manner. Three of these parcels she devised in fee simple on the termination of the particular estate devised to her husband unto Mary McGowan, Leila Fine and Dora E. Patton. The particular estate of the husband was devised by item 5 of the will, which is as follows:

"I give and bequeath unto my beloved husband, John Carter, one bed, ten quilts, two pillows, 1 dresser, 1 commode, 2 rocking chairs, and such kitchen and dining furniture and ware as he may choose out of such articles as

I may leave at my death. I also give and devise unto my said husband, until his death or remarriage, the use, rents and profits of my farm in sections seven and eight in township nine of range twenty-nine west, in Crawford County, Arkansas, containing eighty-two acres, more or less."

The remaining 20½ acres was disposed of by item 8 of the will, which is as follows:

"I give, devise and bequeath unto my said daughter, Daisy M. Malone, the use, rents and profits of the residue and remainder in same after the death or remarriage of my said husband, John Carter, of the following described land in Crawford County, Arkansas, to-wit: The west twenty and one-half acres of the east forty-one acres of my farm in sections seven and eight, in township nine of range twenty-nine west, and I give and devise to my said executor, in trust for use of said Daisy M. Malone, and direct and empower him, my said executor, to invest one-fourth of all the rest, residue and remainder of my estate, after the specific legacies hereinbefore provided for, including therein the money arising from my insurance policies, in river-bottom land in this county as near as may be to said land above set apart for her use, and take title thereto of a life estate in said Daisy M. Malone, remainder over to the heirs of her body, if any there be, and, if not, then remainder over to her three sisters, Mary J. McGowan, Leila V. Fine and Dora E. Patton, in equal shares."

It was this item of the will that the trial court was called upon by the appellant to construe, it being appellant's contention there, and she here insists that item 5 of the will created a life estate in John Carter and at his death the fee would vest in the appellant who was at the time of the execution of the will, Daisy M. Malone. Before the beginning of this litigation, John Carter, the husband of the testatrix, had died.

In support of the contention of appellant, counsel cite and rely upon a great number of our cases and particularly stress the cases of *Hardage* v. *Stroope,* 58 Ark.

302, 24 S. W. 490; *Bell* v. *Gentry,* 141 Ark. 484, 218 S. W. 194; and *Pletner* v. *Southern Lbr. Co.,* 173 Ark. 277, 292 S. W. 370. We are of the opinion that the appellant misconceives the import of items 5 and 8 of the will and the effect of our decisions which correctly apply well-known principles of law to the construction of the particular language of the instruments under consideration. In *Hardage* v. *Stroope, supra,* which is a leading case, the instrument was a deed, and the particular part construed was the habendum clause, which is as follows: "To have and to hold the said lands unto the said Tennessee M. Carroll for and during her natural life, then to the heirs of her body in fee simple; and if, at her death there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this State."

In *Bell* v. *Gentry, supra,* there was the following devise: "I devise to my said executrix all the residue of my real estate as long as she shall remain unmarried and my widow, with remainder thereof on her decease or marriage to my said children and their bodily heirs in the following manner: (naming the children.)"

In *Pletner* v. *Southern Lbr. Co., supra,* the devise construed is as follows: "I wish my wife, Artemus F. Gillis, to have the benefit of the homestead, * * * with the remainder of my estate to the said Mary Elmira Godfrey and her bodily heirs, and should the said Mary Elmira Godfrey die leaving no bodily heirs, I wish that portion of my estate to be turned over to my nephew, John M. Gillis, and his children, of Perry County, Alabama, Marion, P. O."

In the first-named case the language of the habendum clause was held to convey to Mrs. Carroll an estate in fee by reason of the application of the rule in Shelley's case. The court there said: "The intention of the deed in question was to convey the land in controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The

intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's case. The estate of inheritance vested in Mrs. Carroll, and she became seized of the land in fee simple."

As a reason for this holding, the court said: "It is obvious that the deed to Mrs. Carroll created in her no estate *in tail.* Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children."

In *Bell* v. *Gentry, supra,* it was contended that the children of the testator at the termination of the widow's life estate took only a life estate with the remainder in fee to their children. In overruling this contention, the court properly held that the fee vested in the children, and said: "The will created a remainder and provided when it should vest, and that was on the decease or remarriage of the widow."

In *Pletner* v. *Southern Lbr. Co., supra,* the court, in disposing of the contention that Mrs. Godfrey held a life estate only under the devise, said: "This court has often ruled that, where land is conveyed or devised to a person and the heirs of the body, children, or issue of such person, such conveyance or devise creates an estate *tail* in the grantee or devisee, which, under our statute (§ 1499, Crawford & Moses' Digest) becomes an estate for life only in the grantee or devisee and a fee simple absolute in the person to whom the estate *tail* would first pass, according to the course of the common law, by virtue of such devise, grant or conveyance. But this familiar doctrine cannot have application here, for the reason that the estate is not devised to Mrs. Mary Elmira Godfrey and her bodily heirs, creating a life estate in her and a fee simple estate in her bodily heirs under the statute *supra.* The life estate, as we have seen, was previously devised to Mrs. Artemus F. Gillis, and the remainder of the estate, after such life estate, was devised to Mary Elmira Godfrey and her bodily heirs. If the

testator had intended to vest only a life estate in Mrs. Mary Elmira Godfrey, to take effect immediately upon the death of Mrs. Gillis, he doubtless would have designated the estate to be thus cast on Mrs. Godfrey as a 'life estate' instead of as a 'remainder.' After he had carved out of the fee a life estate, and then vested the 'remainder' in Mrs. Godfrey, he evidently meant to devise to her what remained of the estate in fee simple, which was all of it. The fee took it all, and there was nothing left to devise. To construe the will so as to vest the life estate in Mrs. Gillis and a life estate also in Mrs. Elmira Godfrey would be to make these clauses of the will repugnant and inconsistent. This could not have been the intention of the testator, and such construction must therefore be avoided in order to effectuate his purpose. Therefore, construing all the provisions of the will, it occurs to us that the testator intended to vest in Mrs. Gillis a life estate at his death, and at that time to vest in Mrs. Godfrey an estate in remainder (using the latter term in its technical sense) and, by so doing, to dispose of his entire estate."

Item 8 of the will under construction in the instant case, correctly interpreted, manifests a single intention, and the concluding language, "remainder over to the heirs of her body, if any there be, and if not, the remainder over to her three sisters, (naming them) in equal shares," is referable to the 20½ acres carved out of the farm as well as to the real estate purchased by the executor out of the proceeds of the personal property. Hence its effect, with the direction as to the investment of the proceeds of the personal property in land eliminated, would be as if it read as follows: "I give, devise and bequeath unto my said daughter, Daisy M. Malone, the use, rents and profits of the residue and remainder in same after the death or remarriage of my said husband, John C. Carter, of the following described lands in Crawford County, Arkansas, to-wit: The west twenty and one-half acres of the east 41 acres of my farm in sections 7 and 8, township 9 north, range 29 west, remainder over to

the heirs of her body, if any there be, and, if not, the remainder over to her three sisters, Mary J. McGowan, Leila V. Fine and Dora E. Patton, in equal shares."

Thus interpreted, the language of item 8 of the will is unlike to the language of the habendum clause in the case of *Hardage* v. *Stroope* and of the devises in the cases of *Bell* v. *Gentry* and *Pletner* v. *Southern Lumber Co., supra.*

After the determination of the particular estate in John Carter, if the will had devised the remainder to Daisy M. Malone and to the heirs of her body, etc., then the devise would have been similar in nature to the conveyance and devises above set out, the cases relied upon would be in point, and the principles upon which they were determined applicable here. But such is not the case. The testatrix here carved two particular estates out of the fee, one to John Carter, her husband, and at its termination, to Daisy M. Malone, her daughter, "with remainder over to the heirs of her body, etc." Under the holding in the cases cited, this would not create an estate in fee in Daisy M. Malone, but in the heirs of her body, if any, and if not, in her three sisters.

In construing wills the cardinal doctrine is that, when the intention of the testator has been ascertained by consideration and comparison of the will in its entirety, such intention must prevail and be enforced unless contrary to some well-recognized rule of law. Technical words used in a will are generally construed according to their technical meaning. It is apparent that for some reason, best known to the testatrix, she was unwilling to devise the fee in the parcel of land to the appellant. This is to be inferred by the express language used and by the fact that, with the same particularity and in no uncertain terms, she conveyed the fee in the other three parcels to her other three daughters. She did not convey to the appellant to hold during her lifetime and then to the heirs of her body in fee simple as was done in the Stroope case, but, in plain language, provided that at appellant's death the remainder should vest in her heirs, if any, and if not,

in her three sisters, the other daughters of the testatrix. The testatrix used the language to create a life estate in the appellant, as the court suggested the testator might have done in the Pletner case if a life estate had been intended. It must be assumed that the testatrix used the term "remainder" in its technical sense and to mean that, at the termination of the particular estate in Daisy M. Malone, it should vest in the remaindermen in fee. "Whether vested or contingent, it is essential to a remainder * * * and is an imperative rule of law, that it should take effect immediately on the termination of the prior estate, the particular estate and remainder together forming one continuous ownership. * * * From the doctrine above stated, that the particular estate and the remainder form together, when united, but one estate of the extent or duration of the two, it follows that, while ever so many remainders in succession may be carved out of a fee simple if each is less than a fee, no remainder can be limited after a fee; for, when a fee has once been created, there can be nothing left by way of remainder to give away." 2 Washburn on Real Property, p. 504.

The particular estate and the remainder were never united in the appellant, and therefore the fee did not vest in her, but remained dormant during her life tenancy to become vested at her death in the remaindermen. We are of the opinion that there is nothing in the cases cited by appellant in conflict with the conclusion we have reached, but, on the contrary, that they support our view. It follows that the decree of the chancellor is correct, and it is therefore affirmed.

McHaney, J., dissents.

Drake *v.* Kitchens.

4-2995

Opinion delivered March 6, 1933.

John C. Sheffield, Peter A. Deisch and *Moore, Daggett & Burke,* for appellant.

Jo M. Walker, Edwin Bevens and *W. G. Dinning,* for appellee.

HUMPHREYS, J. On petition of appellant, a writ of certiorari was issued out of this court to bring up the record in a habeas corpus proceeding by appellant against appellee in the chancery court of Phillips County, on the trial of which the writ of habeas corpus was denied.

It was alleged in appellant's petition for a writ of habeas corpus that he was held and confined by appellee, sheriff, in the county jail of said county under an invalid commitment issued by Leo J. Mundt, claiming to be the judge of the municipal court of Helena, Arkansas.

In the response filed to the petition by appellee, he admitted that he was holding appellant in said jail under a commitment for robbery issued by Leo J. Mundt, judge of the municipal court of Helena, but denied that the commitment was invalid.

The cause was submitted upon the petition, response, and an agreed statement of facts, which is as follows:

"It is hereby stipulated and agreed that the following facts shall be taken as true and shall be used as the testimony on which the court may base its findings.

"First, that a vacancy existed in the office of municipal judge of the city of Helena, Arkansas, on the 30th day of December, 1932.

"Second, a commission was issued by the Governor of the State of Arkansas to one Charles W. Straub purporting to appoint Charles W. Straub the municipal judge of the city of Helena, Arkansas. The said commission issued on the 31st day of December, 1932.

"Third, that the city council of the city of Helena, Arkansas, refused to be bound by such appointment, and on the 31st day of December, 1932, the said city council of the city of Helena, Arkansas, met in special session duly and legally called and held and on the said date and at such meeting duly and regularly appointed and elected Leo J. Mundt as municipal judge of the said city of Helena, Arkansas.

"Fourth, thereafter and immediately following the election and appointment of the said Leo J. Mundt as municipal judge by the said city council of the said city of Helena, Arkansas, the said Leo J. Mundt took, and has ever since that time held, physical possession of the said office. The said Leo J. Mundt has uninterruptedly, since his appointment, regularly held the said court at the time and place designated by law. He has complete and exclusive charge of all papers, records and dockets pertaining to the said court, all by order of the city council of the city of Helena, Arkansas. The regularly and duly elected city clerk of the city of Helena, Arkansas, has been acting as the clerk of said municipal court, obeying only the orders of the said Leo J. Mundt; this by the order of the said city council; that no docket entries, nor orders have ever been made by the said clerk of the municipal court except such as have been made by the said Leo J. Mundt.

"That the said C. W. Straub undertook on five occasions to hold the said court. On such occasions he acted without the records of the said court, except warrants that had been issued by himself in county cases, having no dockets nor any papers nor other records pertaining to the said court. No judgments or other docket entries have been made on the order of C. W. Straub by the clerk of the municipal court. This was by order of the mayor and city council of the city of Helena, Arkansas.

"That on the 2d day of January the county court ordered and directed R. G. Howard, clerk of the municipal court to deliver over to C. W. Straub all dockets and

records in civil, county and State cases, and the said order was duly served on R. G. Howard, and he refused to obey said order of the county court and refused to deliver possession of said court records to C. W. Straub as therein directed."

It was not alleged, and the agreed statement of facts does not reflect, that the process of commitment was issued out of a court that had no jurisdiction over the crime charged or that the process was void for any other reason than that the judge who presided over the court and signed the commitment was not entitled to hold the office.

The general rule announced in 29 C. J. page 40, § 32, is as follows:

"If the court or office is of recognized legal existence and the officer is at least a *de facto* officer and not a mere trespasser, his legal title to that office cannot be questioned in a habeas corpus proceeding."

This court said in the case of Ex parte *Andrew Jackson,* 45 Ark. 158 (quoting syllabus three) that:

"Where one is held in custody for crime upon void process of commitment or without any process, a chancellor may discharge him upon habeas corpus; but, if the process be valid, and the prisoner not entitled to bail, the chancellor cannot go behind the process to determine whether there was error in the proceedings."

This court also said in the case of *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880, that the right to office cannot be questioned collaterally.

Neither one of the claimants to the office of municipal judge are parties to the proceeding, and, in order to try the title to the office, both should be parties in a proper proceeding for that purpose.

This proceeding is clearly a collateral attack upon the judgment of a *de facto,* if not a *de jure,* official and cannot be maintained.

The decree denying the writ of habeas corpus is affirmed.

RALEY *v.* GRAYSON.

4-2759

Opinion delivered December 5, 1932.

F. G. Taylor, for appellant.

E. L. Holloway, for appellee.

McHANEY, J. On the 10th day of January, 1925, J. T. Grayson and his son, H. P. Grayson, executed and delivered their promissory note to C. Bauschlicher in the sum of $225 for money borrowed by H. P. Grayson from the latter, with interest at 10 per cent. from date, payable annually, and due one year after date. J. T. Grayson died before the maturity date of the note, and early in 1929 said note was placed in the hands of Mr. C. O. Raley for collection. After trying to collect the note from the heirs without success, he proceeded to take out letters of administration in his own name, probated the claim and allowed it, and took the necessary statutory steps in order to sell certain land owned by J. T. Grayson at the time of his death, there being no personal property out of which to pay same. Thereafter, on August 17, 1929, the land was sold by the administrator to the creditor. Thereafter the appellees filed exceptions to the procedure and sale, objected to the appointment of Raley as administrator, asked that his letters of administration be revoked, and that all of his proceedings in the premises be declared void. The probate court overruled his exceptions, and an appeal was prosecuted to the circuit court, with the result that the court held that the administration was void and that the sale of the land and all proceedings had and done by the administrator were likewise void. The administrator has appealed.

We think the court correctly so held. Mr. Bauschlicher testified as follows: "After Mr. Grayson's—J. T. Grayson's—death, I told them it was all right with me that they should take charge of the place and the personal property of Mr. Grayson. I didn't want no letters taken out. I tried to collect the money from Perry. I agreed to let the heirs take control and manage the property, without administrator." This clearly shows an agreement that the heirs might handle the estate of their father without administration. The proof conclusively shows that the heirs were all of age, and that Bauschlicher was the only creditor of the estate. In such cases § 1, Crawford & Moses' Digest, is controlling. It reads as follows: "When all the heirs of any deceased intestate and all persons interested as distributees in the estate of such intestate are of full age, it shall be lawful for them to sue for, recover and collect all demands and property left by the intestate, and to manage, control and dispose of such estate without any administration being had thereon in all cases where the creditors of such estate consent or agree for them to do so, * * *; and in every such case, after they have taken such control and management of the estate, no letter of administration shall be granted thereon, or, if granted, the same shall, on their application, be revoked."

Mr. Bauschlicher's own testimony shows that he agreed for the heirs "to manage, control and dispose of such estate without any administration being had thereon," and, he being the only creditor, had the right to make the binding agreement to this effect, and the statute is very clear that thereafter no letter of administration shall be granted, and, if granted, shall be revoked upon petition of the heirs.*

The circuit court correctly revoked the letters of administration, and canceled as void all proceedings of the administrator, and the judgment must accordingly be affirmed. It is so ordered.

KIRBY, J., dissents.

*See *Adamson* v. *Parker*, 74 Ark. 168 (Rep.).

JEFFERSON BANK OF ST. LOUIS, MISSOURI *v.* LITTLE RED RIVER LEVEE DISTRICT OF WHITE COUNTY.

4-2736

Opinion delivered January 9, 1933.

Culbert L. Pearce, for appellant.

Brundidge & Neelly, for appellee.

SMITH, J. Little Red River Levee District No. 1 of White County (hereinafter referred to as the district) was organized on April 7, 1913, by the order of the county court of White County, under the general law providing for the creation of levee improvement districts. Sections 6811 *et seq.*, Crawford & Moses' Digest. To expedite the construction work, bonds were issued and sold pursuant to the authority conferred by law, and a resolution was passed by the board of directors distributing the payment

of betterments over a period of twenty-five years from 1913 to 1938, inclusive.

The appellant bank brought this suit, and for its cause of action alleged that it was the owner of six of these bonds, each in the sum of $500; that two of the bonds had matured January 1, 1929, two on January 1, 1930, and the other two on January 1, 1931, and that neither these bonds nor the interest thereon had been paid. It was alleged that the district, to secure the payment of these and other bonds, had executed a pledge in writing of all revenues derived from taxes levied upon the real estate within the district, which pledge had been delivered to the Mercantile Trust Company, of St. Louis, Missouri, as trustee, and that it was the duty of the trustee under the pledge to take appropriate action to see that the betterment assessments were collected and the bonds paid from the proceeds of the collections, but that the said trustee had declined to act unless the plaintiff indemnified it against costs, expenses and attorney's fees in a sum designated by the trustee, which offer plaintiff declined and brought suit in its own name.

The right of the plaintiff to sue is questioned; but we think it had that right. The trustee was made a party defendant, and the plaintiff, as a creditor, had the right to demand the payment of its debt in the manner provided by law. As an incident to the enforcement of its demand for the payment of its debt, it had the right to require the officers of the district to apply the taxes of the district to the uses and purposes for which they had been collected. The complaint alleged there had been waste and mismanagement in the affairs of the district; that the taxes had not been collected with diligence, and that excessive and unauthorized fees had been paid to the officers of the district. It was prayed that a receiver be appointed to take over the affairs of the district; that its officers be required to account for its assets, and that an acceleration of the collection of betterments be ordered to the end that the maturing bonds and the interest thereon might be paid.

The act under which the district was created and the bonds issued contained no provision for the appointment of a receiver for the district upon its default in meeting its obligations, and the court properly refused to appoint a receiver for the district. The court can and will make such orders to the directors of the district as are necessary to require them to perform their duties under the law. *Paving Dist. No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795; *Martin* v. *Hargrove,* 149 Ark. 383, 232 S. W. 596; *South Miller County Highway Dist.* v. *Dorsey,* 174 Ark. 553, 297 S. W. 833; Sloan's Improvement Districts in Arkansas, § 477; *Guardian Savings & Trust Co.* v. *Road Imp. Dist. No. 7, Poinsett County,* 267 U. S 1, 45 S. Ct. 201.

It is definitely settled that an improvement district may be required to accelerate the collection of the betterments assessed in the district, and that this may be done by increasing the per cent. of the betterments to be collected in a particular year, provided the total assessments ordered to be collected shall never exceed the total amount of betterments assessed in the district, and the total assessments against any particular property shall never exceed the betterments assessed against that piece of property. There is, at all times and under all circumstances, a constitutional inhibition against collecting upon any property any sum in excess of the betterments assessed against it. *Griffin* v. *Little Red River Levee Dist.,* 157 Ark. 590, 249 S. W. 16; *Chicago Mill & Lbr. Co.* v. *Drainage Dist. No. 17,* 172 Ark. 1059, 291 S. W. 810; *Arkansas-Louisiana Highway Imp. Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355.

The court declined to order an acceleration of the collection of the betterment assessments, and it is earnestly insisted that this was error. But it does not appear to be so. The complaint alleged that the per cent. of the betterments ordered to be collected each year, made at the time of the bond issue, would suffice to pay the maturing bonds and the interest thereon if the collections were made and were not diverted to meet certain over-

head and operating expenses. The testimony shows that for some years the district had been operated as a one-man affair; this person being the secretary and treasurer of the district. Elections of directors were not held as required by law to fill vacancies in the office of directors as the terms of such officers expired. The secretary and treasurer of the district, who was also the collector of taxes for the district, made no report of his collections, and had given no bond as required by law.

A loss of the district's funds had been sustained through the closing of the bank in which they had been deposited, and the plaintiff sought to charge the amount thereof against the treasurer.

The secretary and treasurer was ordered to file a report of all moneys collected and disbursed during his incumbency, extending from May 15, 1916, to December 14, 1932. This report has not been filed and acted upon.

The records of the district show that at a meeting of its directors in 1921 it was ordered that the secretary and treasurer be allowed a salary of $40 per month "from June 15, 1916, until otherwise ordered," and that officer appears to have paid his salary from time to time as follows: Instead of drawing a warrant upon himself as treasurer, as he should have done, he marked the taxes paid on so much of his land lying in the district as equaled the amount of his salary.

Section 6845, Crawford & Moses' Digest, of the General Levee District Act, *supra,* provides that the board of directors shall, at their annual meeting on the first Monday in May, or as soon thereafter as practicable, elect a treasurer for the district, whose term of office shall continue until the first Monday in the following May, or until his successor is elected and qualified, and that such treasurer, upon giving bond, shall receive such compensation as from time to time may be fixed by the board of directors. This statute contemplates that the compensation of the treasurer shall be paid from time to time during each year of his election, and it should have been paid by warrants drawn upon the treasurer. It was a gross

irregularity for it to have been otherwise paid. But the secretary was also the treasurer, and, instead of drawing his salary warrant upon himself as treasurer, he marked his taxes paid to the extent of his salary. Having marked these taxes paid, he stands charged with the amount thereof, and thus he paid his salary, instead of drawing it in the manner contemplated by law, and with that money paying his taxes, as he had the right to do.

The procedure is subject to the severest criticism, but the directors of the district appear to have acquiesced in that action, and it does not appear equitable to require the officer to sustain this loss, as no profit resulted to him from the irregularity, nor did the district sustain any loss. A different method of bookkeeping should have been employed, but, had this been done, the same result would have been reached.

The court ordered the directors holding over as such to call an election for the purpose of electing three directors, to serve for one, two and three years, respectively, and that these directors elect a secretary and treasurer and require a statutory bond to be executed by him.

Under the facts stated, an acceleration of the collection of betterments may not be required; and we do not reverse the decree because of the failure of the court to order this done. The money to be derived under the audit now in progress may suffice to meet these obligations.

There appears, however, to be error in the decree in allowing the secretary and treasurer credit for the deposit which was lost upon the failure of the bank in which it had been made. It is insisted that the treasurer was "simply an officer of a *quasi* public corporation," and that he is liable for the loss of this money in the event only that his negligence had contributed to the loss; and it was not so contended.

We are of the opinion that the treasurer is responsible for this money, although he was not guilty of negligence or bad faith in depositing it in the bank which failed. He was a public officer and did not comply with

the provisions of § 1 of act 182 of the Acts of 1927, page 634, entitled, "An act requiring the commissioners and treasurers of all improvement districts in this State to require depositories of the funds of such improvement districts to give surety bond for the full amount deposited." *Epstein* v. *Kansas City Life Ins. Co., ante* p. 451; *Huffstuttler* v. *State use White County,* 183 Ark. 993, 39 S. W. (2d) 721.

The account of the treasurer will therefore be charged with the amount of this deposit, and, as his account is being audited in the court below, the cause will be remanded with directions to disallow this credit, but the court will allow a credit as was originally done on account of salary.

JAMES *v.* HELMICH.

4-2930

Opinion delivered February 20, 1933.

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Fred A. Snodgress, Guy Fulk, Jr., and *Shields M. Goodwin,* for appellant.

Ernest Briner, for appellee.

KIRBY, J., (after stating the facts). Appellants insist that they are entitled to recover in this cause under the provisions of the statute, § 10,507, Crawford & Moses' Digest, their names being omitted from the will, as though the testator had died intestate, and the contention must be sustained. *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395.

Under the statute and its construction, appellants are entitled to inherit as though the testator had died intestate, in which event each would be entitled to one-half of the estate, since one was the adopted child and the other sole and only heir at law and legal representative of the other adopted child, and both were living on April 23, 1924, when the will was executed, and neither was mentioned or referred to therein. The rights of legally adopted children are the same as the rights of those born in wedlock. 24 R. C. L. 84.

Neither is there any merit in the objection that the suit should have been instituted in the chancery court instead of the probate court as expressly provided in said statute, § 10,507, Crawford & Moses' Digest, as construed in *Rowe* v. *Allison, supra.* There is no contention that fraud had been perpetrated on appellants in the administration of the estate, it being conceded that the administration of the estate was free from fraud, and it is undisputed that the executor or the church had no knowledge of the adoption of the appellants by the testator until shortly before this suit was filed in 1931.

It is next contended that the claim of appellants to the estate is barred because no appeal was taken by them from the order approving the final settlement of the executor. It is stipulated that appellants had no knowledge of the death of the testator until more than two years after the settlement had been approved, when it was too late, of course, to take an appeal from the order of approval. The will was probated in common form without notice having been given, and there was no effort made during the administration of the estate of Troeger, which began on April 27, 1925, and was concluded on March 26, 1928, upon the approval of the final settlement and distribution of the executor, to obtain jurisdiction over appellants or any other persons who might have been interested in the probate of the will under the provisions of the statute, §§ 10,522 to 10,525, Crawford & Moses' Digest. The order of approval and confirmation of the final settlement of the executor were conclusive only of the matters embraced in the settlement, the court finding only that the assets of the estate had been reported and administered in the proceeding of which appellants had had no notice, either actual or constructive, and it did not operate to bar appellants from asserting their claim to the estate distributed to the trustees of the church upon their learning of the death of their foster parent and the improper distribution of the funds of the estate. *Beckett* v. *Williamson,* 92 Ark. 230, 122 S. W. 633. See also *Scott* v. *McNeal,* 154 U. S. 34, 30 L. ed. 896. The order of the probate court distributing that part of the estate to the church instead of the children surviving the testator, whose adoption was unknown at the time of the administration, was void as against them.

Since there is no special statute of limitations providing when or the period within which pretermitted children must bring suit to recover their share in the estate, they had 5 years in which to do so under the provisions of the statute, § 6960, Crawford & Moses' Digest. See also *Hill* v. *Wade,* 155 Ark. 490, 244 S. W. 743. The money was not paid by the executor to the church until March 2, 1928, and the rights of appellants could not

have arisen until the wrongful distribution of such money, and the statute began to run against them on the said date of its payment, and they were not barred by the 5-year statute of limitations, this suit having been instituted in 1931. Neither were they barred by laches, having brought the suit within the time allowed.

The court erred in not holding the appellants entitled to judgment for their claim, and the judgment must be reversed, and the cause remanded with directions to enter judgment in favor of the appellants, and for their costs. It is so ordered.

CASTELLAW *v.* TAYLOR.

4-2877

Opinion delivered February 27, 1933.

C. A. Holland, for appellant.

R. W. Robins, for appellee.

SMITH, J. There appears to be no substantial conflict in the testimony heard in the court below in the decision of this case in that court. The facts were as follows: Castellaw Brothers are merchants at Quitman, Arkansas, and are also engaged in buying cotton, which they sold at Conway, a city thirty-five miles distant from their place of business. The transaction out of which this litigation arose was similar to a number of others, and may be briefly related.

On November 20, 1930, Castellaw Brothers sent a truck, carrying six bales of cotton, from Quitman to be sold at Conway. An agent of Anderson Clayton Cotton Company at Conway bought the cotton, and gave the

truck driver a price ticket, which the latter carried, with the cotton, to the compress at Conway, where the cotton was delivered and weighed and a compress receipt issued therefor. The driver took the price ticket and the compress receipt to the Faulkner County Bank & Trust Company in Conway, and that bank paid for the cotton. The driver of the truck had the option to receive either money or a check from the bank, but, pursuant to the direction of his employers, he received a cashier's check for $319.96, the price of the cotton. Upon his return to Quitman, the truck driver delivered the check to his employers, who indorsed the check and deposited it for collection for their account with a bank at Quitman. When the bank at Conway had paid for enough cotton in this manner to load a railroad car, the cotton would be shipped to Anderson Clayton Cotton Company, with draft covering all the cotton in the car attached to the bill of lading. This draft was not for any particular cotton, but covered all the cotton in the car.

The owners of the cotton were not required to await the cashing of the draft accompanying the bill of lading, but had the option to receive cash or a cashier's check, and, as has been said, the six bales here involved were paid for with a cashier's check. The bank at Quitman forwarded the check to its Little Rock correspondent for collection, but before the collection had been completed in the usual manner the Conway bank closed its doors. The Little Rock bank returned the check to the bank at Quitman, and that bank charged the check back to the account of Castellaw Brothers. This check was filed with the Deputy Bank Commissioner, who was winding up the affairs of the bank at Conway, as a preferred claim. The chancellor denied the claim of preference, and allowed it as a general claim against the bank, from which order is this appeal.

The case of *Taylor* v. *Dermott Grocery & Commission Co.*, 185 Ark. 7, 45 S. W. (2d) 23, is decisive of this case. The headnote in that case reads as follows: "The payee of a depositor's check, indorsing it and accepting

a cashier's check from the drawee bank which was not paid on account of the failure of the bank, *held* not entitled to preference under Acts 1927, No. 107."

In the case cited, the bank honored the check of a depositor, but, instead of paying in money, payment was made with a cashier's check. Here the Conway bank honored the price ticket and the compress receipt just as it would have done a check pursuant to a prior understanding with Anderson Clayton Company to that effect. It did not pay in money, as it would have done if requested, but paid with a cashier's check. This check was not deposited with the Conway bank, but upon its acceptance the payee became a mere creditor of the bank, the amount of the indebtedness being evidenced by the check. As was said in the *Taylor* v. *Dermott Gro. & Com. Co.* case, *supra*: "No new funds were deposited in the bank, but the bank simply shifted the liability from one creditor, Townsend, to another creditor, appellee."

So here there was no accession to the funds of the bank, which charged the amount of the cashier's check, which it had issued to Castellaw Brothers, to the account of Anderson Clayton Cotton Company.

The decree of the court below, holding that Castellaw Brothers were creditors only, is correct, and it is therefore affirmed.

PINE WOODS LUMBER COMPANY, LTD., *v.* CHEATHAM.

4-2878

Opinion delivered February 27, 1933.

A. L. Burford and *B. E. Carter,* for appellant.
McKay & Smith, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of $1,250 obtained by appellee against appellant in the circuit court of Columbia County for an injury received through the negligence of a fellow-servant. A reversal of the judgment is sought upon the ground that the undisputed testimony reflects that both appellee and his fellow-servant were employees at the time of the injury of J. M. Deckard and not employees of appellant.

Appellant introduced three witnesses, J. M. Deckard, J. C. Donnegan, its foreman and logging superintendent, and D. G. Tyler, its bookkeeper, who testified concerning the kind of contract existing between appellant and J. M. Deckard at the time appellee received his injury. J. M. Deckard testified that appellant was the owner of certain timber, which he agreed to cut and haul for it from the land to its logging road for $4 per thousand, he to furnish the teams, equipment and men necessary to do the work; that he cut and sawed the trees into logs of lengths directed by appellant's woods foreman; that he employed and discharged his own men and paid them without instruction, direction or supervision of any of appellant's employees, and, at the time appellee was injured, both appellee and the driver who caused the injury were his employees and on his payroll; that his employees traded at appellant's commissary, and that what they bought was charged to him and paid for by him and deducted from the wages of said employees when he made up his payroll; that when he made up and presented his payroll, the company would issue him a check for the total amount, and that he would cash the check and take the money to Mr. Tyler, appellant's bookkeeper, and ask him to put each employee's wages in an envelope and hand it to him when he called for it; that Mr. Tyler used appellant's pay envelopes in doing this because he had no others; that appellant had no teams in Arkansas; that he requested Mr. Tyler to procure insurance for him on employees and deducted premiums from amounts due him on settlements; that, when appellee was injured, he made the proofs to the insurance company and directed him to go to Tyler and collect same, which he did.

Deckard was corroborated in all essential particulars by the testimony of J. C. Donnegan, the woods foreman and log superintendent of appellant, who made the contract with Mr. Deckard. The testimony of Deckard was also corroborated by that of D. G. Tyler, who was appellant's bookkeeper. Tyler stated that they settled with Deckard once or twice a month, and, in doing so, figured up what was coming to him on the basis of $4 per thousand on scale showing how many feet he put on the track, and deducted therefrom his feed bills, any advances he might have received, and his payroll check; that he handled two of the payrolls upon which appellee's name appeared and that he was paid at Deckard's request; that the payrolls showed that they were Deckard's payrolls.

It was admitted by appellee and one of his co-employees, who testified in his behalf, that Deckard employed and directed them in their work, and that no other employee of appellant gave them any directions or instructions in the performance of their work. They both claimed to be employees of appellant because they were handed their wages by appellant's bookkeeper in appellant's pay envelopes and because appellee received his insurance money from appellant's bookkeeper, and that on one occasion appellee asked Deckard to get his wages, and that Deckard asked him to give him an order for same.

We do not think these circumstances in themselves sufficient to warrant the court in submitting the question to the jury of whether appellee and the fellow-servant who caused his injury were in the employment of appellant, or in the employment of Deckard as an independent contractor. The first two circumstances were satisfactorily explained as matters of convenience, and the third circumstance was so slight and unimportant that it cannot be regarded as sufficient substantial testimony to support a verdict.

The testimony, in all essential parts, reflected, without substantial dispute, that Deckard was an independent contractor and that appellee and his fellow-servant, who

was responsible for his injury, were in the employment of Deckard and not appellant.

The court erred, under the evidence adduced, in not instructing a verdict for appellant, so the judgment is reversed, and the cause is remanded for a new trial.

KIRK *v.* BONNER.

4-2889

Opinion delivered February 27, 1933.

G. E. Pike, for appellant.

C. N. Carpenter, for appellee.

MEHAFFY, J. On December 30, 1930, the appellant filed suit in the circuit court of Arkansas County against the appellee, alleging that she and the appellee entered into an agreement on October 5, 1925, by which she rent-

ed to the appellee certain property in DeWitt, Arkansas, for rental of $20 per month; that appellee took possession of said property, but had paid nothing on the rent except $50. It was alleged that 10 days' notice was given, but that appellee refused to deliver possession, and refused to pay the rent due, and she asked judgment for rent in the sum of $350, and in the sum of $40 as damages for unlawfully detaining the property. The appellant filed affidavit and gave bond required in suits of unlawful detainer.

At the time of filing the suit, she filed a written stipulation signed by W. H. Bonner, appellee, wherein he agreed to waive issuance of summons, and entered his appearance in the court.

Thereafter judgment was entered for the sum of $350 with interest, and also for possession of the property.

On July 1, 1932, an execution was levied and notice of sale published by the sheriff, and proof of publication filed and report of sale made.

On July 25, 1932, the appellee filed a complaint and petition to vacate the judgment rendered at the January term, 1931. In this motion he alleged that there was no such person as Mrs. Fern Kirk, and denied that any process of any kind was ever served in the original suit. He also alleged grounds for defense to the original suit.

On October 10, 1932, Mrs. Fern Kirk filed motion to dismiss the complaint and petition filed by appellee, and alleged that appellee had not set out any of the statutory grounds necessary to vacate a judgment after the term at which it was rendered.

The court heard testimony and found that the entry of appearance of Bonner was not obtained by fraud, and that Carpenter was attorney but not employed by Bonner in this particular case, but held that the stipulation signed by Bonner and filed with the papers was not sufficient to constitute service as required by law,

and that the service should be quashed, and the judgment vacated. From this order, appellant prosecutes this appeal.

Appellee first contends that the appeal is not properly before this court because the motion for new trial was not filed in proper time. The record as to motion for new trial does not state the date on which it was filed. The indorsement, however, on the motion itself shows that it was filed on October 17. The case was tried on October 11, and appellant's attorney states that, at the time the judgment was entered on October 11, he was granted permission to file the motion for a new trial, and was given 60 days in which to file bill of exceptions. He discovered immediately that the judge had failed to note on his docket the filing of a motion for a new trial, overruling the same, and giving 60 days in which to file bill of exceptions. When appellant's attorney discovered that the record did not show the filing of the motion, he immediately asked the clerk to send the docket sheet to the circuit judge requesting him to make proper entries, and at the same time filed the motion for new trial, dating it on the same day that it should have been presented and overruled; that the circuit judge held the request until several days later when he again opened court at DeWitt, and at that time overruled the motion for new trial.

Whether all these things are true, it is impossible to tell from the record, but the record does show that the court acted on a motion for new trial and overruled the same without stating that it was not filed in time. From the record we are unable to say that it was not filed within the time fixed by statute, or allowed by the court. It is immaterial when it was overruled, so that it was overruled during the same term of court.

In addition to this, we think error appears on the face of the record, justifying a reversal of the case.

It is next contended by the appellee that there was no service, and that the stipulation entering appearance

of Bonner was not sufficient to give jurisdiction to the court.

The first case relied on by appellant as supporting this contention is *Clary* v. *Morehouse,* 3 Ark. 261. The court there, after stating how suits were instituted in the circuit courts, stated: "The requisitions of the statute do not appear to have been observed or complied with, for, as before remarked, no writ was ever issued, nor was there any voluntary appearance to the proceeding on the part of either of the defendants. * * *"

"The indorsement on the declaration purported to have been signed by Clary and Webb, being nothing more than a simple agreement by which they acknowledge service of the declaration and waive the necessity of any process issuing thereon, could not be regarded by the court for any purpose; nor could it in any manner subject them to the same legal consequences as if they had failed to appear in the action upon the service of a valid writ requiring such appearance; because the law does not regard such acts or agreements of the parties to a suit, not made in the presence of the court or entered on the records, as possessing in themselves such absolute verity as the official acts of the accredited officer of the court, etc."

In the next case cited by appellant, Ex parte *Gibson,* 10 Ark. 572, the court said: "We are aware that the former decisions of this court with regard to constructive notice, and in some other cases, have not given entire satisfaction to the bar. Without being understood as expressing any opinion as to whether in some instances the rule may not have been extended too far in cases of constructive notice, we think in the case before us the rule heretofore adopted by this court should not be changed."

The instrument relied on as giving the court jurisdiction in the above case was as follows: "I, Abraham Clark, do acknowledge due and legal service of the with-

in writ, and promise to enter my appearance at the next term of the Scott Circuit Court, this 17th October, 1839."

The above statement was indorsed on the back of summons and signed by Clark. It will be observed that there was merely a promise to enter his appearance, and not a signed statement entering his appearance.

The instrument relied on in the instant case, as entering the appearance of Bonner, gave the style of the court, the parties plaintiff and defendant, and the number of the case. The caption was, "Entry of Appearance and Waiver of Summons," and continued as follows:

"On this day the third day of December, 1930, comes the above-named defendant, W. H. Bonner, and hereby agrees to enter his appearance in the above-styled action, whether filed on this day or to be filed later, and the said W. H. Bonner, does hereby enter his appearance in the above-styled actions and waives the issuance of summons herein.

"(Signed) W. H. Bonner.

"Filed in my office Dec. 3, 1930, F. E. Stephenson, Clerk."

This was unlike the instruments signed in the cases cited by appellee. This was an actual entering of the appearance. This suit was prepared by Senator Rasco, before his death, who was a lawyer engaged in practice at DeWitt, Arkansas. Senator Rasco died before this suit was brought, but the stenographer who worked for him testified at length. She testified that Mr. Bonner came to the office several times; that he was advised about the suit, and was told what the amount of the rent was; he knew who was bringing the suit, and, according to the testimony of the stenographer, which is undisputed, he agreed to sign a stipulation waiving summons, and entering his appearance in order to save costs. She was asked if Mr. Bonner knew what the case was about and answered:

"Yes, sir, we explained it to him in the letter we wrote him; also in a conversation in our office. We took this waiver of service and filed it along with the complaint, same as we did the sheriff's summons."

She also testified that Mr. Rasco had prepared a waiver of service, and entry of appearance, and Mr. Bonner did not sign this instrument, but took it to Mr. Carpenter, and came back with the instrument above quoted, which had been prepared by Mr. Carpenter, and Mr. Bonner signed it in Mr. Rasco's office. It, according to the secretary's testimony, and the summons were filed with the complaint.

Another case cited by appellee is *Nunn* v. *Sturges*, 22 Ark. 389. In that case the court said:

"Everything upon the face of the transcript of the judgment shows that it was obtained in a different proceeding from any suit that is conducted according to the observances of our courts or the practice of the common law. And, as the court was evidently one of superior or general jurisdiction, one that must be taken, in the absence of proof to the contrary, to have had jurisdiction of the subject-matter of the suit, we must take it for granted that it would not have proceeded to render judgment without first obtaining jurisdiction of the person of the debtor, the action appearing to be a personal action. It also appears that the court considered the indorsement equivalent to personal service, and to a confession of judgment, in open court, and we must presume that the court acted according to law. Besides, to us the plain meaning of the indorsement is that Nunn thereby entered his appearance to the action begun by the petition, waiving the formality of citation, that is, waiving and in fact acknowledging the notice, the alleged want of which is the subject of Nunn's second plea."

The plain meaning of the instrument signed by Bonner is that he waived the service of the summons, and entered his appearance in the circuit court. He did this, evidently, for the purpose of saving costs. If the instru-

ment does not mean this, it is meaningless, and he had a right to enter his appearance, and, when he did so, the court had jurisdiction to render a judgment against him.

There is some conflict in authorities as to whether one may enter his appearance before process has been issued, but we know of no reason why one may not sign and permit to be filed, an instrument entering his appearance in the suit. He knew who the plaintiff was, he knew what court the suit was in, and he knew he was defendant, and knew he was being sued for rent, because the instrument prepared by Mr. Carpenter, who represents him, gave the style of the court and the names of the plaintiff and defendant, and was prepared by Mr. Carpenter, his attorney, at his request.

"Although no process has issued against a party, it seems that, if such party has a right to save or an interest to protect, he may enter an appearance." 4 C. J. 1324.

"On the foregoing statement it is evident that the Alabama court accepted and treated the aforesaid agreement as an appearance in said cause then pending, and based its subsequent decree against the defendants personally thereon; and the question for decision by this court is whether its judgment is and was valid and jurisdictional. We think it was manifestly so. The meaning of the phrase, 'We hereby enter our appearance to said cause,' means just what it says, and an appearance in a pending cause signifies an appearance for every purpose in said cause. Otherwise it would be meaningless. It was prepared, as its language and terms fully import, for use in that suit, and the defendant is conclusively bound thereby." *Mutual National Bank of New Orleans* v. *Moore,* 50 La. Ann. 1332, 24 So. 304.

Any action of a defendant which amounts to an intention to enter his appearance and be in court is a voluntary appearance. A voluntary appearance may be by formal writing as in this case, or it may be by informal parol action, but in either case, if it is manifestly

the intention by the formal writing to enter his appearance, he will be held bound by his act. *Stephens* v. *Ringling,* 102 S. C. 333, 86 So. 683.

Having entered his appearance, it was appellee's duty in that suit to interpose all the defenses he had. The court found in its judgment that W. H. Bonner had entered his appearance in form and manner as prescribed by statute. See *Chapman & Dewey Lbr. Co.* v. *Bryan,* 183 Ark. 119, 35 S. W. (2d) 80; *Galloway* v. *LeCroy,* 169 Ark. 833, 277 S. W. 45; *Purse Bros.* v. *Watkins,* 171 Ark. 464, 284 S. W. 533; *Soloman* v. *Carroll,* 175 Ark. 86, 298 S. W. 483; *Purnell* v. *Nichol,* 173 Ark. 496, 292 S. W. 686.

The statement signed by the defendant in the instant case did not purport to be an agreement to enter his appearance sometime thereafter, but it was an actual entry of appearance, just as much so as if he had filed an answer.

It is next contended by the appellee that Bonner did not have knowledge that a suit had been filed against him. Mr. Bonner testified that when he signed the entry of appearance the plaintiff's name in the instrument was Mrs. Fern Kirkpatrick. The evidence, without dispute, shows that she was known both as Mrs. Kirkpatrick and Mrs. Kirk. He admitted that he signed it in Mr. Rasco's office. He admits that he was told in Mr. Rasco's office that the suit was for about two years' rent, $290, and that he, Bonner, told them that it should be a little more than that. The appellee also admitted that he went to Mr. Rasco's office several times to see about the matter, and knew that suit was going to be filed, and knew the party plaintiff.

The purpose of a name is to designate a person, and this purpose is accomplished when the name is that by which she is known or called. *Nat. Life & Acc. Ins. Co.* v. *Scaffold,* (Ala.) 144 So. 816.

Mr. Carpenter, according to Bonner, fixed up the papers for him to take to Mr. Rasco, and he did take them, and signed them in Mr. Rasco's office.

The court found that the entry of appearance was drawn by Mr. Carpenter; that it was signed by Mr. Bonner at Mr. Rasco's office, and left at Mr. Rasco's office with knowledge that it was an entry of appearance to the suit in the circuit court; that no fraud was perpetrated by Mr. Rasco in securing the entry of appearance.

Our conclusion is that the appellee had entered his appearance, and that the court had jurisdiction, not only of the subject-matter, but of the person.

The case is therefore reversed, and remanded with directions to dismiss appellee's motion and petition.

UNITED STATES VETERANS' BUREAU *v.* RIDDLE.

4-2821

Opinion delivered February 27, 1933.

Cleveland Cabler and *Partlow & Rhine,* for appellant.

Barber & Henry, for appellee.

McHANEY, J. Appellees, Mrs. Esther Riddle and A. E. Randol, were the lawful guardians respectively of Eddie Becknell and Carroll Lee Gould, minor children of World War veterans, and each had on deposit, at 4 per

cent. interest, in the First National Bank of Rector, Arkansas, sums belonging to their respective wards in excess of the amount necessary for their support and education, Mrs. Riddle having $1,167.67 and Randol $1,925.02, when the bank became insolvent. These funds had come from the Federal Government by reason of the fact that they were dependent minor children of deceased World War veterans. Just when these guardians were appointed and qualified as such is not shown, except Mr. Randol testified he was appointed guardian in succession in January, 1926, and perhaps Mrs. Riddle was appointed prior thereto. Nor is it shown definitely just how long this money had been on deposit in said bank when it closed—date of closing not being shown, but probably in 1931. As early as June 15, 1928, appellant, through its attorney, began writing appellees, advising that it was their duty to invest said surplus funds in the manner provided by law, and not to permit them to remain in a bank on deposit. A number of letters passed between the parties, and, although appellee Randol had experienced a bank failure and consequent loss of funds in the Bank of Marmaduke, he continued to keep the money on hand in the First National at Rector. In a letter to appellant's attorney of August 27, 1929, in answer to one from it of the 15th, he said: "Now, as to loaning the money I have on hand, I can say if I have the money, you cannot hurt me. And as to the *if* of the bank failing why we can *if* on many things." The last letter of appellant to Randol was dated November 13, 1930. Although appellees consulted with the probate judge, no order was ever made authorizing these deposits to be made in said bank, nor was any other investment approved or rejected by order of the probate court.

After the failure of said bank, appellants filed separate petitions against each guardian, in the nature of exceptions to their annual settlements, in which it was sought to hold each personally liable for the loss sustained in said bank failure, to which responses were filed. The court denied the relief prayed, and, on appeal to the

circuit court, the cases were consolidated and tried by consent before the court sitting as a jury. Its findings and judgment were also adverse to appellant, and the case is here by appeal.

The court found, among other things, "that the said guardian did not make an investment as suggested by the said attorney for the reason that he was unable to find a safe and suitable investment for such funds. The court finds that he, as such guardian, acted in good faith and with due diligence with reference to investing the funds of said ward. That he consulted with and advised with the county and probate judge with reference to investing of such funds, and with the knowledge and consent and advice of the county judge loans were not made, Liberty bonds were not purchased, but that such funds were placed in the First National Bank of Rector on time deposit at 4 per cent. interest; that at such time said funds were so placed in said bank the bank was considered and thought to be a safe and solvent institution, and had such a reputation for safety and solvency up until the time that the same closed. That the said guardian was not negligent in the handling of said funds, and that he acted in good faith in an effort to safeguard the funds of the said ward."

Like findings were made in both cases, and were made upon testimony, admitted over objections by appellant, that the guardians had used due diligence to obtain investments, had consulted with the judge regarding certain proposed investments and had been advised by him not to make them. Conceding without deciding the competency of this testimony, we are of the opinion that it does not excuse the guardians from personal responsibility for loss of said funds. The records of the probate court fail to show any application of either guardian for authority to deposit said funds on time deposits or otherwise in said bank, or to make any other investment of said funds, and no order of court was ever made touching same. The statutes of this State are very plain regarding the duties of guardians to make investments of

the surplus funds of their wards and the kind or character of security to be taken. Section 5059, Crawford & Moses' Digest, provides 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." Section 5061 provides that the loan shall be "at the highest rate of interest prevailing in the community that can be obtained on unincumbered real estate security," not to exceed one-half the value. Section 5067 provides: "No guardian shall be personally responsible for any money belonging to his ward and loaned out by him, under the direction of the court, and no security which may have been approved by the court, in case of the inability of the person to whom such money may have been loaned or his security to pay the same."

Under the latter section of the statute, this court held in *Parker* v. *Wilson,* 98 Ark. 553, 136 Ark. 981: "that where a guardian loans the ward's money without first obtaining an order of court authorizing him to make the loan, he assumes the responsibility, and no subsequent order of the probate court confirming his action will relieve him from liability if loss occurs." 7th syllabus. In the case cited the guardian testified that, sometime before making the loan he presented a petition to the judge for authority to make the loan, and that the judge indorsed thereon: "Examined and allowed," which was placed among the guardianship papers, but not delivered to the clerk, and no order was entered. This court held that a finding of the chancellor that no order was obtained would not be disturbed. In holding these provisions of the statute mandatory, including those above mentioned and others related thereto, the court in this case said: "While the language of the provisions under consideration is not as strong and positive as that in the section last referred to, we think that it should be construed to be mandatory. The money belongs to the ward, but he is not consulted, and has no voice in regard to the loaning out of his own money. 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 out 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."

The deposits made in this case appear to be time deposits at 4 per cent. interest. Whether a certificate of deposit was issued in either case is not shown, but apparently they were made for a definite time, and not subject to withdrawal, except upon some notice, but, whether so or not, they were time deposits and had been there for perhaps three years or more. They cannot be regarded other than as investments made by the guardians without security and without an order of the probate court, for which they are personally liable in case of loss. 28 C. J. 1145, § 244.

Nor does the decision of this court in *Harper* v. *Betts*, 177 Ark. 977, 8 S. W. (2d) 464, militate against this holding. There the executor had deposited the money in a bank only 18 days before it closed, and the holding in that case was bottomed on the shortness of time in which the money had been on deposit and the reputation of the bank.

Section 5065, Crawford & Moses' Digest, makes it the duty of the probate court to require guardians to make reports at every annual settlement of the disposition made by him of his ward's money, and § 5066 reads as follows: "It shall be the duty of said court to carefully examine into such report as soon as made, and, if in its opinion the security is insufficient, it shall be the duty of the court to require additional security to be given to protect the interest of said ward, and, if such additional security be not given within such time as the court shall order, not exceeding ten days, it shall be the duty of the guardian or curator to institute suit forthwith on such security to recover the amount due thereon; and he and

his security shall be liable on the bond for any omission so to do; and, if such money has not been loaned out, the court shall order the money to be forthwith invested in United States bonds, for the use and benefit of such ward, and which shall remain so invested until said court shall order otherwise; and a report of the action of such guardian or curator shall be made of his proceedings."

If the guardian fails to lend his ward's money after being ordered by the court to do so, he is liable not only for the money but the interest thereon at the legal rate. *Merritt* v. *Wallace,* 76 Ark. 217, 88 S. W. 876. In *Lee* v. *Beauchamp,* 175 Ark. 716, 300 S. W. 401, the guardian deposited the money in bank at 4 per cent. It was sought to charge him, not with the deposit, but a higher rate of interest than 4 per cent. This court declined to do so because the rate received was as high or higher than that on Government bonds.

Here, however, these guardians did not invest in real estate securities and did not purchase Government bonds. We think the evidence sufficiently establishes the fact that they could have done either with safety, at least with the protection of an order of the probate court. They permitted these funds to remain on deposit over the strenuous objections of appellant for about three years, at least from June, 1928, until the bank closed. This they had the right to do by making themselves and their bondsmen liable for the loss sustained, just as they could by making any other investment without the approving order of the probate court.

The judgment will be reversed, and the cause remanded with directions to enter a judgment against appellees for whatever loss has been sustained by reason of the failure of said First National Bank, with interest at 6 per cent. from the date of failure, and to certify same to the probate court for its guidance in the premises. Costs will be awarded against appellees.

SMITH and HUMPHREYS, JJ., dissent.

LEAVITT *v.* MARATHON OIL COMPANY.

4-2899

Opinion delivered March 6, 1933.

W. L. Curtis, for appellant.

Henry E. Spitzberg, for appellee.

BUTLER, J. This is a suit by the appellee for judgment for debt evidenced by promissory notes and for foreclosure of a mortgage on personal property, being certain filling stations and equipment executed by the makers, appellants.

The defense relied upon is alleged in paragraphs 12, 13 and 14 of the answer. A general demurrer was filed to the answer and a specific demurrer to paragraphs 12 and 13, and the court, treating the general demurrer as a specific demurrer to paragraph 14, sustained the demurrers as to each of these paragraphs, the defense of the alteration of the mortgage set forth in the first section of paragraph 12 of the answer being waived. The defendant saved proper exceptions to this action of the court, and, refusing to plead further, judgment was rendered against them for the debt and accrued interest and

for foreclosure of the mortgages, and from that the defendants (appellants) have appealed.

The nature of the transaction whereby the debt was incurred sufficiently appears in the following paragraph of the answer:

"11. Further answering, these defendants state that on or about the 5th day of January, 1931, the defendant, W. Q. Leavitt, was the owner of a certain filling station, bulk sales station and the equipment incident to and necessary for the operation of said station, located and being in the city of Booneville, and county of Logan and State of Arkansas; that said equipment was, at the time, of the reasonable value of $7,500.

"12. That on said date the said defendant, W. Q. Leavitt, being in need of funds, negotiated a loan on said plants and equipment for the sum of $3,500, which was evidenced by five promissory notes of $700 each with 6 per cent. interest thereon, said notes to become due and payable in one, two, three, four and five years from date, and that, to secure the payment of said loan, and as a part and parcel of same transaction, made out and executed and delivered to said plaintiff a chattel mortgage on said retail and wholesale oil and gas stations and the equipment connected therewith, and that said chattel mortgage, together with the notes referred to above, are null and void, first, for the reason that said chattel mortgage was materially changed after its execution and delivery to plaintiff by the insertion therein of the paragraph thereof which reads:

"Party of the second part may at its option purchase fire, tornado and theft insurance upon the property herein mortgaged, charging same to the account of the party of the first part, to be secured by the mortgage as an advancement; that said notes and mortgage are further void, for the reason that at the time of making said loan and the execution of the notes and mortgage referred to, and as a part of the same transaction, the said defendant made out and executed a lease agreement with the plaintiff upon the property described in said

lease and in said chattel mortgage, which said lease, among other things, provides for an annual rental for said property of $1 per month or $12 per year, with a further provision that said property was to be maintained and kept in good operating condition by this defendant, lessor, at his own necessary expense for five years, and it is this part of the entire contract which the paintiff is seeking to have enforced in this suit, since it is and constitutes, as hereinabove alleged, a part and parcel of the entire transaction with the exceptions hereinafter stated.

"13. That said lease contract, together with the notes and mortgage referred to herein are fraudulent and void,

"(a) Because they are unconscionable and are not such contracts as will be enforced by a court of equity.

"(b) Because the same, when construed together with the entire transaction, discloses that the value of said lease or rental upon said property, when added to the interest provided for in the notes and mortgage, produces a rate of interest for the life of the contract, or for any one year embraced therein, of a charge in favor of the plaintiff far in excess of ten per cent. on the amount of money loaned by plaintiff to the defendant, and therefore and for that reason is attainted with usury, and that by reason of said usury said note and mortgage as well as said lease contract are absolutely void.

"14. That, as an inducement to secure the execution of said notes and mortgage and said lease at the time and in the manner hereinabove stated, the said plaintiff, through its agents and representatives who negotiated said contracts with the defendant, W. Q. Leavitt, M. R. Springer falsely and fraudulently represented to the said W. Q. Leavitt that the $12 rental specified in said lease and the difference between 6 per cent. interest on the loan and of possibly 10 per cent. thereon to the plaintiff was not a sufficient sum to constitute a valid rental on the use of the property which plaintiff was securing under the terms of said lease, but that in addition thereto the plaintiff would allow the defendant the sum of one-

fourth of a cent per gallon on all gasoline handled or sold during the life of the lease by either the bulk sale or retail station covered by said lease, but for certain trade reasons he did not want to include said provision in said contract, but would subsequently have the plaintiff confirm said arrangement by letter, and that the defendant relying upon said representations of said plaintiff and its agents, was thereby fraudulently induced to sign said notes and said mortgage and said lease contract, and that, notwithstanding said understanding and agreement and inducement, thereafter said plaintiff wholly repudiated same and refused to confirm the same or to recognize the same in any way, thereby rendered all of said transaction null and void and of no force and effect."

The first question to be determined is whether the allegations of paragraph 12 are sufficient to constitute the defense of usury. It is alleged that the lease contract set out was a part and parcel of the same transaction by which the loan was secured. This appellant contends is a sufficient plea upon which to found the defense of usury when there are other averments that the rentals on the property demised, when added to the six per cent. interest the notes carried, made a sum in excess of 10 per cent. per annum on the debt for the entire period before the due date of loan or any one year thereof. *Cammack* v. *Runyan Creamery Co.*, 175 Ark. 601, 299 S. W. 1023, is cited as supporting this contention. We do not so view that case, which was a suit on an alleged contract of employment, and which was successfully defended on the ground that no employment of the plaintiff was contemplated or any service rendered, but that the arrangement was merely a device to cover a usurious rate of interest on a loan of money made by the plaintiff, either as the principal lender or as his agent. In upholding the finding of the chancellor as not against the weight of the evidence, the court recited the settled principle that, to constitute usury, "there must be an agreement between the parties by which the borrower promises

to pay and the lender knowingly receives a higher rate of interest than the statute allows for the loan or forbearance of money, or such greater rate of interest must be knowingly reserved, taken or secured for such loan or forbearance. And the wrongful act of usury will not be presumed or imputed to the parties, and it will not be inferred where the opposite conclusion can be reasonably and fairly reached."

In the answer in the instant case there was no allegation from which the reasonable intendment could be drawn that a corrupt agreement existed between the parties that would bring its averments within the principle recognized in *Cammack* v. *Runyan, supra,* and which was necessary to a plea of usury. *Citizens' Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697; *Bauer* v. *Wade,* 170 Ark. 1020, 282 S. W. 359.

It is the general rule, approved by this court, that an agreement for a loan is not usurious, even though the lender refused to make it unless the borrower would enter into another contract from which the lender might gain advantage, if the collateral agreement was fair and legal (*Simpson* v. *Smith Savings Society,* 178 Ark. 921, 12 S. W. (2d) 890), the reason for which is stated in the recent case of *Hogan* v. *Thompson, ante* p. 497, as follows: "This is based on the principle that, since the law forfeits the entire loan and interest thereon for an exaction of usurious interest, however small, the intent to exact a usurious interest must be clearly shown and will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached."

Therefore, the allegation that the lease contract was a part of the transaction of the borrowing of the money does not constitute a defense, in the absence of an allegation that the contract of lease was a device or cloak for usury which the lender intended to exact and the borrower to pay.

2. In determining the correctness of the court's ruling on the demurrer to paragraphs 13 and 14, the contention of the appellant raised in the second and third

part of counsel's brief may be considered under one head. The first is that the "lease contract as a matter of equity was either without consideration or was for such a gross inadequacy as to render the same void," and, next, that the lease contract was secured by the false representation that appellant would be paid one-fourth of a cent per gallon on all the gasoline sold on and through the demised premises. The answer to these contentions is that the suit of appellees does not involve the lease, but a recovery on notes evidencing money it loaned appellant and foreclosure of a mortgage given to secure the same. The fact that a lease was fraudulently procured would be no defense to a suit to recover appellee's debt or for foreclosure on the security, and, as pointed out by counsel for appellee, appellant did not allege any damage for the alleged failure to pay them one-fourth of a cent per gallon on gasoline handled through the filling stations leased or seek to offset the debt or any portion thereof on account of any damage sustained.

We are of the opinion that no defense was stated in the answer, and the chancellor correctly sustained the demurrer.

The decree is therefore affirmed.

FAULKNER *v.* FAULKNER.

4-2910

Opinion delivered March 6, 1933.

T. H. Humphreys, Jr., Fred A. Isgrig and *Harry Robinson,* for appellant.

Tom W. Campbell, for appellee.

BUTLER, J. Nelson Faulkner, a locomotive engineer in the employ of the Missouri Pacific Railway Company, suffered an injury while in the discharge of his duties, from which injury he died.

He left surviving him Lillian Faulkner, his widow, aged 38 years, and two children, a son born to him and his wife, Lillian Faulkner, who was at the time of his father's death 20 years, 3 months and 24 days old. The other child was an adopted son, William August Faulkner, aged 22 months when the father died.

The deceased had made a will, which was filed for and admitted to probate, in which the said Lillian Faulkner was named executrix. Thereafter she, as such executrix, filed suit against the Missouri Pacific Railway for the benefit of the estate and for herself as widow and the next of kin. On December 24, 1929, judgment was rendered in the sum of $1,000 for the benefit of the estate and $4,000 for benefit of the widow and next of kin.

In January, 1932, Nelson Edward Faulkner brought suit alleging the death of his father, the recovery of the aforesaid judgment, and that at the time of his father's death he was a minor residing with, and dependent upon the earnings of, his said father for support. He further alleged that the defendant, Lillian Faulkner, had collected the sums adjudged; that he was entitled to one-third of the sum recovered for benefit of the widow and next of kin, but which had been kept or appropriated by the defendant for her own use. Judgment was prayed for $1,333.33 with interest at 6 per cent. from December 24, 1929, the date the defendant was alleged to have received the money on the judgment. To this complaint the defendant made answer denying that the plaintiff had been supported by or was dependent upon the earnings of his father or that he was entitled to share in the said recovery, and, by way of cross-complaint, alleged that the plaintiff was indebted to her in the sum of $1,306.25, for which she prayed judgment.

On these issues the case proceeded to trial, at which testimony was introduced tending to sustain the allegation that plaintiff lived with and was supported by, and was dependent upon, the earnings of his father, and to refute the allegation of the cross-complaint. The testimony on the part of the defendant sharply controverted that of the plaintiff and tended to sustain the allegation of her answer and the averments of her cross-complaint. On that state of testimony the court instructed the jury to find for the plaintiff the sum sued for, less whatever, if any, the jury might find to be due defendant on her cross-complaint, and refused the request of the defendant to instruct the jury as follows:

1. "You are instructed that, if you find from the evidence in this case that Nelson Edward Faulkner was not dependent upon his father, the deceased, for support, and that he sustained no pecuniary injury by the negligent killing of his father, then Nelson Edward Faulkner would not be entitled to recover, and your verdict will be for the defendant on his cause of action."

2. "If you find from the evidence in this case that Nelson Edward Faulkner was dependent upon his father for support, then his proportionate part of the recovery would be for the remaining time of his minority as compared with the expectancy of his mother, the defendant, and William August Faulkner, his foster brother."

There was a verdict and judgment for the plaintiff in the sum of $500 from which defendant has appealed and argues error of the trial court in its instruction given for the plaintiff and in its refusal to instruct the jury as requested by her.

The court evidently adopted the theory which appellee here maintained, *viz.*, that the suit of Mrs. Lillian Faulkner was instituted under § 1074 of Crawford & Moses' Digest, and that the sum recovered should be distributed as provided by § 1075 of the Digest which provides that the amount recovered for the benefit of the widow and next of kin be distributed to such widow and kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and by § 3535, *Id.*, which provides for an allotment of one-third of the personal estate to the widow as her dower; and by § 3471, *Id.*, which provides for the distribution of the estate of a deceased person.

The act of the General Assembly, approved March 6, 1883, of which §§ 1074 and 1075, *Id.*, is a part, embodied certain provisions of an English statute known as Lord Campbell's Act, and applies in cases where a recovery may be had for an actionable injury resulting in death, regardless of the agency by which the injury was inflicted and gives the right of action to the personal representative of any person whose death has been caused by the

wrongful act of any other. *Davis* v. *Railway,* 53 Ark. 117, 13 S. W. 801.

The act did not limit a recovery for the death of one of a certain class by another of a certain other class, but applied equally to all persons alike, both as to those for whose death a recovery was sought and to those through whose fault the death was occasioned. Under its provisions suit might be brought for the death of a railway employee against the railway company responsible therefor and thus remained the law until the General Assembly, by an act passed at its 1911 session, now § 7138 *et seq.* of Crawford & Moses' Digest, provided for liability of common carriers by railroad for damages for the death of its employees resulting from its negligence. It is the contention of the appellant that this suit was authorized and prosecuted under the latter act, and that it is to be, and is, determined by the allegations of the complaint.

The Federal Employers' Liability Act of April 22, 1908, applies only to railroad carriers and to those suffering injury resulting from the negligence of such carrier while in their employ and engaged in the prosecution of their work. The act of March 6, 1911 (§ 7138 *et seq.*) was modeled upon the Federal statute and was construed in the case of *K. C. & M. Ry. Co.* v. *Huff,* 116 Ark. 461, 173 S. W. 419, as not applicable to the case of every servant of a railroad company injured when he was performing his duty as such, and in *St. L., I. M. & S. R. Co.* v. *Ingram,* 118 Ark. 377, 176 S. W. 692, following the decisions of other states construing similar acts, it was held that our statute was designed for the exclusive benefit of those who, in the course of their employment, are exposed to dangers peculiar and incident to the use and operation of engines and trains and to injuries occasioned by these instrumentalities.

In *St. L., I. M. & S. R. Co.* v. *Wiseman,* 119 Ark. 477, 177 S. W. 1139, following and approving the doctrine announced in the two cases above mentioned, the dangers enumerated therein were designated as "railroad hazards" which the court said "are those peculiar dan-

gers to which employees are exposed while they are engaged in work connected with, and necessary to, the operation and running of trains." The facts in that case, in the opinion of the trial court, brought it within the statute (§ 7138 *et seq*). In overruling the trial court, this court said: "It would be a difficult task to determine in advance and to define specifically what cases may fall within the purview of the statute. Each case will depend upon its own peculiar facts as developed. But the undisputed facts of the present record show that Wiseman at the time of his injury was engaged in the work of repairing a car in the shops at McGehee. This work in no manner exposed him to those peculiar hazards which are incident to, and connected with, the physical use and operation of a line of railroad, and the work in which he was engaged did not bring him within the protection of act No. 88 of the Acts of 1911, as construed by us in *Ry. Co.* v. *Ingram, supra.*"

The doctrine of those cases was applied by the court in the case of *Murphy* v. *Province,* 153 Ark. 240, 240 S. W. 421, relied upon by appellant. In that case a recovery was obtained on a suit by the executrix against the railroad company for the death of her testator, one of its employees, by reason of the negligence of the railroad company. A married daughter brought suit against the executrix to recover a share of the amount recovered on the ground that the "recovery of the funds in controversy was secured in an action under the statute of this State which is generally referred to as having been patterned after Lord Campbell's Act (Crawford & Moses' Digest, §§ 1074, 1075), which provides that the recovery secured thereunder 'shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate'."

That suit was resisted by the executrix, her contention being that the judgment for the death of her testator was had either under the Federal Employers' Liability

Act or under the statute, § 7138 *et seq., supra,* which act she claimed provided a different method of distribution from that contended for by the plaintiff. This is precisely the issue presented in the instant case.

The court, in that case, found it unnecessary to determine whether the original recovery should be treated as one under the Federal statute or under § 7138 *et seq.,* of the Digest, holding that it might be under either according to the fact whether or not the employee was engaged in interstate commerce and noted that the complaint in the original action was silent on that subject. The court held against the contention of the plaintiff (appellee) and that, under the allegations of the complaint in the original case as "denoting the character of the accident," the case stated was not based on §§ 1074 and 1075, *supra,* as claimed by the plaintiff, but on the latter statute, § 7138 *et seq.,* as contended for by the executrix. In that connection the court said: "It was alleged in the original complaint that Murphy, at the time of his injury, was in the employ of the defendant, 'not operating any engine, but on said date was assisting engineer Schultz to disconnect engine 2395 at Cotter, and, on account of defects in said engine, the radiator rod was blown out of said engine, striking said Murphy in the back of the head, breaking his skull,' etc. This allegation brings the cause of action within the last statute referred to as interpreted by the cases cited above. It is clear therefore that the other statute of this State (the one patterned after Lord Campbell's Act) has no application, and we need not determine what the distribution would be under that statute."

The court, continuing, observes that our statute with unimportant variations is the same as the Federal statute, and that it is clear that it was intended to cover the same subjects included in that, so far as it affects causes of actions of the kind described other than those while the employee was engaged in interstate commerce. The court notes the construction placed by Federal courts on the Federal statute and says: "Our statute is, of course,

subject to the same interpretation. That statute (§ 7138 *et seq.*) does not contain any express provision or direction with reference to the distribution of the fund, as is the case with respect to our statute patterned after Lord Campbell's Act. But it does clearly appear from the statute that the recovery is for the benefit of the person or class of persons who suffer injury on account of the death caused by the wrongful act, and, in the absence of an express provision to the contrary in the statute itself, the only reasonable interpretation is that the participation in the distribution of the fund must be limited to those who are to be compensated for the injury."

We have seen that the contention of the appellant and the appellee in the instant case as to the statute under which the original suit was brought are the same as those of the parties in *Murphy* v. *Province, supra.*

In this case the complaint alleged that "the deceased was in the employ of the defendant as a locomotive engineer, and on said date, while he was in the exercise of due care for his own safety, he was attempting to alight from his engine at Hoxie, Arkansas, and, on account of the negligent and careless handling of the engine by the fireman who was running the engine at the time, and on account of the defective condition of the steps and handholds on the cab of said engine, said deceased was caused to fall to the ground, suffering severe injuries * * * and finally died."

A comparison of the complaint last quoted with that in the case of *Murphy* v. *Province, supra,* discloses that in each the person for whose death suit was brought was an employee of a railroad company engaged at the time of his injury in work for his employer "directly connected with, and incident to, the operation of a railroad," and neither complaint contains any allegation indicating whether or not the employees were engaged in interstate commerce. This comparison shows beyond question that the complaints are identical in legal effect, and that the conclusion reached in *Murphy* v. *Province, supra,* controls in this case.

We do not overlook the argument of learned counsel for the appellee (1) that when § 1075 is considered as a whole there is no conflict between that section and § 7138, as that section has been construed by this court, or (2) that by the express provision of that statute § 1075 has not been repealed; nor (3) do we disregard the contention that, as § 1075 contains the only directions for distribution of the amount recovered for wrongful death, therefore "when, in any case for wrongful death in this State, it has been determined which of the children are entitled to share in the damages recovered for the wrongful death, the provisions of said § 1075 furnish the only legal guide for the division of such damages among the widow and those of the children who are entitled to any share in such damages"; or (4) that this contention is sustained by the recent case of *Adams* v. *Shell,* 182 Ark. 959, 33 S. W. (2d) 1107, in which it was decided that the amount of recovery should be distributed, after the widow's interest was deducted, among the next of kin, share and share alike, as provided for in § 1075, *supra.*

The first three propositions advanced are answered by the court in *Murphy* v. *Province, supra,* where it is held that there are inconsistencies in the two statutes, and, where there are such, the later statute repeals the former, and that, while there is not any express direction for the distribution of the fund as in the statute patterned after Lord Campbell's Act, that act has no application in cases such as this. This last statement is made by the court in a paragraph quoted *supra.* With reference to the proposition that the statutes are inconsistent in certain particulars and when inconsistent the former is to that extent repealed by the latter, the court said:

"The act of 1911, *supra,* contains a provision in the last section to the effect that the act shall not be held 'to limit the duty of common carriers by railroad, or impair the rights of their employees in the existing laws of the State.' This provision may be conceded to show an intention on the part of the Legislature not to repeal any statute then in existence except those repugnant to the

terms of the later statute, but that statute necessarily operated as a repeal of any other statute conferring a right of action under the facts set forth in this statute. The two statutes are inconsistent to that extent, and the last one repeals the first to that extent. This is necessarily so, for the remedies of the two statutes are entirely different and for the benefit of different persons."

The last point raised by the appellee noted above (4) that their position is sustained by the opinion in *Adams* v. *Shell, supra,* because of the claim that the applicable law in that case was § 7144, a statute which, with the exception of the word 'corporation' being substituted for the words 'common carriers by railroad' found in § 7138, is the same, and in that case (as it is claimed) this court held that a fund derived from a judgment for wrongful death should be distributed, one-third to the widow and one-third each to the two children, and that therefore in the case at bar a similar order should be made and that the trial court correctly so held.

An examination of *Adams* v. *Shell, supra,* will disclose that the propositions advanced find no support in that case. In the first place, that was not a suit against a common carrier by railroad for the wrongful death of one of its employees, but an action for damages against the International Paper Company, and, in discussing the question of the distribution of the fund arising from moneys obtained in satisfaction of the judgment, the court assumed, whether correctly or not, that the suit for the wrongful death was under §§ 1074 and 1075, and not under § 7144, as counsel suggests. This is apparent because in the reference in the opinion to the manner of the distribution of the fund the court said: "Under § 1075 of the Digest, the personal representative of a deceased person may bring an action for the wrongful death of said decedent, and the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by

persons dying intestate. Thus, it will be seen that it is the duty of the administrator to bring the suit as provided by the statute, and, in the event of a recovery, to distribute the amount recovered according to the provisions of the statute which covers the distribution of personal property. The damages are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund when recovered is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin; and the suit is wholly for their benefit."

Further than holding that the distribution of the fund obtained by a cause of action, prescribed by § 7138, was not to be distributed as prescribed by § 1075, the court, in *Murphy* v. *Province, supra,* did not indicate how distribution should be made, as that was unnecessary because the plaintiff, having sustained no pecuniary injury, was not entitled to any part of the fund.

The statute as interpreted makes the pecuniary injury the basis of damage and of the participation in any judgment recovery therefor. The dependence of the plaintiff and whether or not the deceased had contributed to his support are merely evidentiary facts from which, with the other circumstances in the case, the question of the pecuniary injury and its extent is to be ascertained. The distribution not having been prescribed by the governing statute (§ 7138) and the mode named in § 1075 not being applicable, it becomes the duty of the court to formulate a rule of distribution consonant with reason and the principles of sound justice.

It is not difficult to perceive how the rule provided for in § 1075 or how any other fixed and arbitrary rule might be the occasion of an unfair division by which one in no sense in need and in every sense unworthy and who had received and had no right to expect any contribution would share equally with those entirely dependent and most worthy and who had, in the lifetime of the deceased, been the principal beneficiaries of his bounty and

had the right to expect that this would continue. Many cases might be imagined illustrative of how that rule might work, but the mere statement of the rule suggests to the mind circumstances which might, and frequently do, arise where an equal distribution among the next of kin would be most unreasonable and unjust. Therefore the rule to be adopted should be flexible to fit the circumstances of each case, which should determine who should participate in the distribution and to what extent.

The statute itself, as construed by this court, indicates the proper method to be adopted. It is clear that simply because one is among the number of next of kin does not entitle him to recover damages or to share with the others, but it must appear that some pecuniary injury to him must have been suffered. If then the injury suffered is the basis of the recovery, the extent of that injury as compared with others of the next of kin ought to be the measure by which his proportionate share in the damages recovered should be ascertained. In many cases that could not be determined by any single fact but only from a consideration of all the attendant circumstances.

The rule evoked by appellant's requested instruction No. 2 is unsound because it leaves out of consideration the pecuniary injury suffered and makes the ages of the respective parties the only measure of the extent of the injury. It might be, and it sometimes is, the case that an adult child may be more dependent than a minor and have received and may have reason to expect much greater contribution than the minor child. The fairest rule, it appears to us, is that it should be for the jury to say from a consideration of all the facts and circumstances whether the plaintiff in a given case had suffered pecuniary injury, and, if so, what was its extent as compared with the others entitled to share in the fund—that, also, to be determined from a consideration of all the circumstances in the case, and from this his proportionate share will be fixed.

In the instant case counsel for the appellee call attention to the allegation in the complaint of the executrix filed in the original suit, to-wit: "That at the time of his death the said Nelson Faulkner was in good health, aged about forty-seven, and earning large sums of money, practically all of which he was contributing to the support of his, your executrix, and two children, Nelson Edward, aged twenty-one, and William August, aged three, the latter named being his survivors."

Counsel for appellee then calls attention to the judgment based upon this allegation, which was "for the benefit of the widow and next of kin of said deceased." We are inclined to the view of counsel that this allegation precludes the appellant in the instant case from denying the right of appellee to share in the fund and that the cases cited by him support his contention. *Less* v. *Less,* 158 Ark. 255, 249 S. W. 583; 15 R. C. L., p. 1012, § 485; *Westfield Gas Co.* v. *Noblesville Gravel Road Co.,* 41 N. E. 955; *Parkhurst* v. *Berdell,* 18 N. E. 123. Therefore the only question which would be before the court would be the proportionate part of the fund due the appellee to be ascertained in the manner we have pointed out, that to be diminished by whatever it might appear was due appellant on her cross-complaint.

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

HOT SPRINGS STREET RAILWAY COMPANY *v.* HENRY.

4-2924

Opinion delivered February 13, 1933.

C. T. Cotham and *Sidney S. Taylor,* for petitioner.

J. R. Wilson, for respondent.

SMITH, J. The Hot Springs Street Railway Company prays a writ of prohibition to restrain the presiding judge of the judicial circuit, of which Cleveland County is a part, from proceeding with the trial of certain causes now pending in Cleveland County, in each of which it was made a party defendant.

A motion was filed in the court below to quash the summonses which had been issued and served in these cases, upon which motion testimony was heard. The undisputed testimony appears to be as follows: Louis Cone, a resident of Pulaski County, while driving an automobile in the city of Hot Springs, had a collision with a street car in that city, and he and two young ladies, who were riding with him, were injured. The young ladies, as well as Cone himself, resided in Pulaski County. Complaints were prepared to be filed in the Cleveland Circuit Court by the attorney for each of these young ladies against both Cone and the street car company, and during the day upon which they were filed service was had upon Cone under the following circumstances: The complaints were filed with the clerk of the Cleveland Circuit Court in the morning, and the plaintiffs' attorney advised a deputy sheriff that the defendant, Cone, would be at the court house that afternoon. The defendant, Cone, drove up to the courthouse gate that afternoon, accompanied by another man whom the officers thought was Cone's brother. This man came to a deputy sheriff, and told the officer that the defendant, Cone, was in his car. The officer did not know either party, but the man in the car was introduced to him as Louis Cone, and he served the summonses on him as he had been directed by the plaintiffs' attorney in the morning. The complaints upon

which these summonses had issued alleged that the young lady plaintiffs had been injured through the concurring negligence of the street car company and Cone, and prayed judgment against each of them.

Cone filed an answer, in which he denied that he had been guilty of any negligence which had caused or contributed to the injury. In connection with this answer, he filed a cross-complaint against the street car company, in which he alleged that he had been injured himself through the negligence of the company, and he prayed judgment against the company for $10,000 to compensate the injury.

The court declined to quash the summonses in the cases of the two young ladies, but did dismiss the cross-complaint of Cone against the street car company.

Thereupon, pleadings were filed in this court to prohibit the circuit court of Cleveland County from proceeding with the trial of the two original suits.

It was and is insisted that, as the street railway company is located only in the city of Hot Springs, in Garland County, and does not run through or into Cleveland County, any suit against it was local under § 1172, Crawford & Moses' Digest, and can be maintained only in Garland County, although the street car company was sued in conjunction with a defendant who was served with process in Cleveland County. We do not decide this question, as the writ of prohibition will be awarded upon another ground.

The respondents defend the action of the court in refusing to quash the service and seek to sustain the right of the circuit court to proceed with the trial of the causes under the authority of § 1178, Crawford & Moses' Digest, which reads as follows: "Where any action embraced in § 1176 is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them

resided or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him."

It is insisted that, as Cone was found in Cleveland County and served with summonses there, the plaintiffs have the right to compel his codefendant, the street car company, to answer in the same county, inasmuch as the plaintiffs alleged their injuries were occasioned by the concurring negligence of Cone and that of the street car company.

We do not concur in the view that § 1178, Crawford & Moses' Digest, above quoted, conferred jurisdiction upon the Cleveland County Circuit Court under the circumstances stated. This section does permit a defendant to be sued, not only in the county of his residence, but in another county in which he is found and is served with process. But this means, of course, where one is found and served with process in the usual and ordinary course of circumstances, and not where service was had collusively, as was done in the instant case.

The law of the subject was declared in the case of *Wernimont* v. *State,* 101 Ark. 210, 142 S. W. 194. The opinion in that case discussed the manner of obtaining service by summons, and, after referring to § 6074, Kirby's Digest, which is identical with § 1178, Crawford & Moses' Digest, above quoted, says: "If the transaction is colorable and collusive, and the resident person not a defendant in fact and in good faith, then service of process of summons upon him would be incapable of laying the foundation for jurisdiction of the court over nonresident defendants served with summons in other counties. Upon such facts being made known to the court, it would be its duty to quash the service of summons upon such nonresident defendants. Such defendants cannot be dragged from the forum of their residence by any sham or contrivance to evade suit against them in a court

in the county where they reside. Such a perversion of the court's process is a fraud practiced upon the court, which should receive its condemnation upon being made aware of it."

We think the conclusion is inescapable; in fact, it does not appear to be seriously denied that Cone was "found" and summoned in Cleveland County in accordance with a prior arrangement, to which he was a party, to that effect. It was the intention of all parties concerned to confer jurisdiction upon the Cleveland Circuit Court, although no person connected with the lawsuit in any capacity resided there, and to confer jurisdiction, not only of the suits of the young ladies plaintiff against the street car company, but to confer jurisdiction also of Cone's own suit. It is true the court dismissed Cone's cross-complaint, but it is true also that the filing of this cross-complaint shows the collusive character of the proceeding. The courts should not lend their aid to such practices, and no statute requires them to do so.

The writ of prohibition will therefore be granted as prayed, restraining the Cleveland Circuit Court from proceeding further in the causes.

CRAWFORD *v.* HOPPER.

4-2874

Opinion delivered February 20, 1933.

M. A. Hathcoat, for appellant.

Shinn & Henley, for appellee.

BUTLER, J. In 1921 Mrs. Grant Crawford died, leaving surviving her husband, the appellant, and three children, a son about four years old, a little girl just younger and a baby boy about seven weeks old. Immediately after Mrs. Crawford's death, Mr. and Mrs. Hopper, at the request of the appellant, moved into his home with the understanding that Mrs. Hopper was to take care of his small children, and she and her husband were to have a home. They lived together under this arrangement for a short time when Mrs. Hopper took the baby and went to Missouri. The appellant had Mr. Hopper arrested charged with kidnapping the baby, but after a time he was released upon the promise that he would secure the return of the child. Hopper then also went to Missouri, but did not bring the child back. The appellant attempted to locate the Hoppers without success until August, 1929, when they returned to Boone County, Arkansas.

Appellant filed a proceeding in the chancery court to obtain the custody of the child, who was then about eight years old. After hearing the evidence, the chancellor made certain findings of fact, in which he recited the testimony tending to show that the mother had before her death given her baby to her sister to be kept by her and reared as her own. He recited other facts which the evidence tended to establish, and concluded that the attempted gift of the child was void, but that under the circumstances the father was not entitled to the exclusive custody of the child. He divided the custody of the child between the Hoppers and the appellant, awarding the care and custody of the child during the time he attended school,—*i. e.,* from September 1st to June 1st, to Mr. and Mrs. Hopper, and for that period from June 1st to September 1st to the father and requiring the expenses of transportation from the home of the

Hoppers to that of the appellant to be borne equally by the appellant and the Hoppers; that Mr. and Mrs. Hopper should execute a bond in the sum of $2,000 obligating themselves to return the infant to the jurisdiction of the court and to perform the judgment of the court at that time or which might thereafter be made.

The order of the court made at its proceedings in August, 1929, was acquiesced in by both parties. The child remained with Mr. and Mrs. Hopper at their home in Muncie, Indiana, where he attended school from September to June, and was then sent each year to his father for the summer vacation. This arrangement continued until some time in August, 1932, when the appellant filed a petition in the Boone Chancery Court asking that the order made in 1929, be modified, and that he be given the exclusive and permanent care and custody of his child. At the hearing, a letter was introduced written by the child to his foster parents in which letter he expressed apprehension that his father was planning not to allow him to return to them in Indiana. The child also stated to the chancellor that he preferred to live with his foster parents. It was shown that Mr. Crawford was a good man, and that there was a good school in his vicinity; that he had remarried, and that he was able to properly care for the child. It was also shown that Mr. and Mrs. Hopper were good people, and that they were not only willing and able to care for the child, but that they had done so all his life and had sent him regularly to a good school, and that at the time of the examination he had advanced to the 6th grade in school; that during all this time, according to the testimony of Mrs. Hopper, which was not disputed, the father had contributed nothing to the support or education of the child.

The conditions had not materially changed since the order of the court in August, 1929, and the chancellor refused to modify that order. On appeal it is insisted that, as a father at common law is the natural guardian of his minor child, he is entitled to its sole care and custody unless it is shown that he is incompetent or unfit

for such duties. A number of our cases are cited in support of this contention, but this rule is not absolute and may be interpreted and inforced by the court placing the interest of the minor as of paramount importance. It is argued by the appellee that, in consideration of all the facts before the court in the *habeas corpus* proceeding first instituted and on the hearing from which comes this appeal, the father had practically abandoned the child and forfeited his right to its custody. We deem it unnecessary to review the facts in detail, for the reason that the chancellor had all the parties and witnesses before him in the two proceedings, which occurred in the county of his residence, and we are not disposed to differ from the conclusions he has reached unless it appears that this action was arbitrary and against the preponderance of the testimony. This we do not find to be the case, and, as he still has jurisdiction in the future to make such orders as equity in the case warrants, his order will be upheld and affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* MARTIN.

4-2883

Opinion delivered February 27, 1933.

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

Brid & Coffelt, for appellee.

McHaney, J. Appellee was employed by appellant to work in its yards connected with its North Little Rock shops. At the time of his injury, hereinafter mentioned, he was engaged in stenciling coal cars. It was usual and customary to do this work out in the yards in the open in good weather, but on the morning of October 23, 1930, the date of the injury complained of, it was raining to such extent that such work could not proceed in the open, and about 1 p. m. of said date, the rain continuing, the foreman caused ten coal cars to be moved under the sheds, and directed appellee to stencil the cars. There were a number of tracks under the sheds about eight or ten feet apart. There had been stacked a pile of grain strips between the track on which the coal cars were placed and another, same being about two feet wide and one and one-half or two feet high and held together by stakes driven in the ground. These grain strips were three-cornered pieces of wood of about two-inch faces, about thirty feet long, and were used in coal cars to prevent wastage of bulk grain when shipped therein. Some three or four of these strips had fallen off the pile. In moving from one place to another in doing his work, and while carrying his ladder, appellee stepped on said grain strips, which gave way and caused him to fall, injuring his back.

A suit by appellee against appellant resulted in a verdict and judgment against appellant.

The only error urged for a reversal of the judgment by appellant is that the court erred in refusing to direct a verdict in its favor on its request, on the ground that the undisputed evidence shows appellee assumed the risk. We must agree with appellant in this contention.

While it is true that appellee was performing his work under the sheds, a place in which he was not accustomed to work, and that he was in a hurry because he was directed to get the ten cars out, a whole day's work in half a day, still this pile of strips was perfectly open and

obvious, and whatever danger there was in stepping on them was likewise open and obvious; as much so to appellee as to appellant. He testified himself that he saw the strips, knew some three or four of them had fallen off the pile, and that the pile was higher than the stakes that held them. It is not clear whether he stepped on the pile and slipped, or whether on one of those that had fallen off, but in either event he must have known that to do so might cause him to fall. It was not incumbent therefore upon appellant to warn him of such danger, as whatever danger there might be was apparent. As said by this court in *Crawfordsville Trust Co.,* v. *Nichols,* 121 Ark. 556, 181 S. W. 904: "Where the elements of danger are obvious to a person of average intelligence, using due care, an employer is not required to warn his employees to avoid the danger, which ordinary prudence would make him avoid without warning. * * * Something may properly be left to the instinct of self-preservation and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved."

In the recent case of *Missouri Pacific Rd. Co.* v. *Lane, ante* p. 807, we said: "He was unloading this car in broad open daylight, and the only excuse he gives for not seeing the oil and thereby avoiding it is that he did not look. Had he looked he would have seen the oil, as it was plainly visible on the top of the car. The law, under such circumstances, is well settled. In the recent case of *Mississippi Valley Power Co.* v. *Hubbard,* 181 Ark. 487, 26 S. W. (2d) 118, we said: 'It is true employees do not ordinarily assume risks created by the negligent act of the master, and that he has a right to require of the master to provide suitable appliances and a safe place in which to do his work, and to do such is the clear duty of the master. *St. L., I. M. & S. R. Co.* v. *Touhey,* 67 Ark. 209, 54 S. W. 577, 77 Am. St. Rep. 109; *Pettus & Buford* v. *Kerr,* 87 Ark. 396, 112 S. W. 886; *St. L., I. M. & S. R. Co.* v. *Holmes,* 88 Ark. 181, 114 S. W. 221. But it is equally true that, where the danger arising from the negligent conduct of the master is so apparent and

obvious in its nature as to be at once discoverable to one of ordinary intelligence, an employee, by voluntarily undertaking to perform his work in such a situation, assumes the hazards which exempts the employer from liability on account of injury to the employee. *Wisconsin & Ark. Lbr. Co.* v. *McCloud,* 168 Ark. 352, 270 S. W. 599; *C. R. I. & P. Ry. Co.* v. *Allison,* 171 Ark. 983, 287 S. W. 197; *Ward Furniture Co.* v. *Weigand,* 173 Ark. 762, 293 S. W. 1002.' Other recent cases on the subject are: *Howell* v. *Harvill,* 185 Ark. 977, 50 S. W. (2d) 597, and *Koss Construction Co.* v. *Vanderberg,* 185 Ark. 316, 47 S. W. (2d) 41."

So here, appellee was working in a place which was open and light. He not only could see, but actually saw the strips, and deliberately or otherwise stepped upon them. It would be placing too high a duty upon the master to require him to keep the employee's place of work clear of every object upon which an employee might step and slip or fall. They are not insurers, but are only held to the exercise of ordinary care to furnish a safe place to work.

For the error in refusing to direct a verdict for appellant, the judgment will be reversed, and, as the case appears to have been fully developed, it will be dismissed.

J. H. HAMLEN & SON *v.* ALLEN.

4-2909

Opinion delivered March 13, 1933.

Rose, Hemingway, Cantrell & Loughborough, for petitioner.

Sam T. Poe and *Tom Poe,* for respondents.

HUMPHREYS, J. This is a petition filed in this court for a writ of prohibition against respondents to prevent them from proceeding in the trial of a suit in the circuit court of Grant County wherein respondent, T. H. Allen, is plaintiff, and petitioner is defendant, on the allegation that the warning order and summons issued in said cause were invalid and for that reason the writ of attachment issued on the complaint had nothing to support it.

The record tendered and undisputed is, in substance, as follows:

Respondent, T. H. Allen, brought suit against petitioner, J. H. Hamlen & Son, for $3,000 based upon contract in the circuit court of Grant County on July 15, 1932, by filing his complaint and an affidavit for attachment, alleging that petitioner was a foreign corporation and a nonresident and also an affidavit for a warning order containing the same allegation, but failed to allege that it had designated an agent in the State upon whom process could be served. At the same time, respondent caused the summons to be issued and delivered to his attorney. A writ of attachment was issued and levied upon the real estate belonging to said petitioner in said county. A warning order was issued and published as required by law. On August 15, 1932, the first day said court was in session after the complaint was filed, petitioner appeared specially and filed and presented its motion to quash the warning order on the ground that it did not contain an allegation that petitioner had not designated an agent in this State for service of process upon it. During the argument of the motion, petitioner was

advised that a summons had been issued upon the complaint, and was in the hands of the attorney for respondent, T. H. Allen. The summons had not then been served upon the agent appointed to receive service. At the conclusion of the argument, the presiding judge, T. E. Toler, who is the regular judge and who is the other respondent herein, passed the matter until October 16, 1932, for disposition. On August 16, 1932, the summons was served by the sheriff of Pulaski County within the confines of said county upon the duly appointed agent to receive service. Petitioner appeared specially and filed its motion to quash the summons because it was served after the return day thereof. The motion was presented to the court on October 10, 1932, whereupon the court made an order quashing the warning order, to which respondent T. H. Allen excepted, but overruled the motion to quash the service of the summons, to which petitioner saved its exception and requested a stay of thirty days in the proceeding in order that it might apply to this court for a writ of prohibition, which it has done.

The trial court correctly ruled that the attempted constructive service was void because the affidavit failed to state that petitioner had no agent in this State upon whom process might be served, when, as a matter of fact, it had appointed an agent in this State for that purpose. Section 1159 of Crawford & Moses' Digest makes such a requirement when an agent has been appointed as provided in § 1151 of Crawford & Moses' Digest. After the appointment of an agent in accordance with said § 1151, a foreign corporation can be proceeded against only by personal service upon the agent and not by constructive service upon it.

The trial court, however, was in error in ruling that the attempted personal service was valid, as the summons was not served before the return day thereof. It is true, as suggested by respondent, that according to the language of the summons, same was not returnable for 20 days after service, but § 1140 of Crawford & Moses' Digest requires that the summons shall be returnable to

the first day that the court shall be in session after twenty days after the date of the issuance thereof. The law, and not the language of the summons, must control. The first day the court was in session after the summons was issued was August 15, 1932, and the summons was not delivered to the officer and served until August 16, 1932, or one day after the summons was *functus officio*. The return of the officer shows that it was served August 15, 1932, but this was necessarily a clerical error, as the officer filed an affidavit that it was not received until August 16, 1932. Under § 4199 of Crawford & Moses' Digest, proof of the service of a summons may be made by affidavit.

Respondents also argue that, by requesting and obtaining time in which to apply to this court for a writ of prohibition, petitioner thereby entered a general appearance in the suit the same as if it had been properly served in the beginning. We think not. It could not appeal without entering its general appearance; hence a request for it to apply to this court for a writ of prohibition was its only remedy by which to test the jurisdiction of the trial court over its person. It was forced to request the time, else the suit would have proceeded, and, being forced to do this, it cannot be said that by doing so it entered its general appearance in the cause.

On account of the error indicated, a writ of prohibition is granted.

MOTION PICTURE ADVERTISING SERVICE COMPANY *v.* CANNON.

4-2914

Opinion delivered March 13, 1933.

Silas W. Rogers, for appellant.

McHaney, J. Appellant entered into a written contract with appellee, dated February 7, 1929, to render to him moving picture advertising service for fifty-two weeks at $18 per week. The contract provided for cancellation thereof by appellee in the following language: "This contract subject to cancellation after thirteen weeks' actual service, at option of advertiser, written notice of such intentions having been given M. P. A. Service Co. on or before 7-30-29."

Appellee decided to cancel the contract and thought he might do so at any time prior to the expiration of thirteen weeks' actual service, which he construed to be August 31, 1929. He gave written notice of cancellation August 10, 1929, which appellant refused to accept as a timely notice, performed the service, and brought this action to recover the balance due in the sum of $720. At the close of the testimony appellant requested a directed verdict, which the court refused, and the case was submitted to the jury to determine when the notice of cancellation was required to be given. If they found the contract required notice to be given on or before July 30, 1929, they were to find for appellant. If, however, they found notice could be given up to August 31, 1929, the verdict should be for appellee, except for $36, for which appellee offered to confess judgment.

The court erred in not directing a verdict for appellant. The clause above quoted relating to cancellation and when notice should be given is not ambiguous. It clearly provides that he shall have the right of cancellation after thirteen weeks' actual service had been rendered, but that he must give notice of his intention to cancel "on or before July 30, 1929." The right to cancel depended on the notice required. The parties might have agreed on any other date, but they saw proper to agree that notice should be given on or before July 30. It made no difference whether the thirteen weeks' actual service was then completed or not.

Since the contract fixed the date on or before which notice should be given in order to have the right to can-

cel the remainder of the service, notice after that date was ineffectual. The judgment will be reversed, and judgment be rendered here for the amount sued for with interest at 6 per cent. from February 7, 1930.

TAYLOR v. BANKERS' TRUST COMPANY.

4-2706

Opinion delivered October 31, 1932.

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

Cleveland Cabler and *Frauenthal, Sherrill & Johnson,* for appellee.

KIRBY, J., (after stating the facts.) Appellant insists that the United States Government has no lien and is not entitled to priority of payment of the funds paid to the guardian of the incompetent world war veteran by the Government under its laws and by him deposited in the failed bank. No claim was first made for priority of payment under the provisions of § 3466 of the Revised

Statutes of the United States (31 U. S. Code, § 191), nor could any valid claim have been made thereunder. The facts are undisputed: the payments were made to the guardian of the veteran under the provisions of the statute, the funds were received for the ward by the guardian and by him deposited as such guardian in the failed bank, and such funds were on deposit in the amount of $2,078.68 on November 15, 1930, when the depository bank became insolvent.

Priority of payment of this fund is claimed under subdivision 3, § 1, act 107 of 1927, which reads:

"A prior creditor shall be: * * * (3) a prior creditor who is such by virtue of an act of Congress applicable to the said bank and as to the extent as provided by said act * * *."

The Federal statutes granting bonuses and veterans' relief (U. S. Code, title 38, § 450) does not grant priority of payment to any such funds, and § 3466 of the Revised Statutes (31 U. S. Code, § 191) cannot apply in this case, because the American Exchange Trust Company, the failed bank, was not indebted to the United States on account of the deposit of the compensation money paid by the Government to the guardian of the incompetent world war veteran and by him deposited in the failed bank.

Section 3466 of the Revised Statutes reads as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law as to cases in which an act of bankruptcy is committed."

In *Wilson* v. *Sawyer,* 177 Ark. 495, 6 S. W. (2d) 834, this court held that money paid to a disabled soldier

under guardianship by virtue of the World War Veteran's Act (38 USCA § 421 *et seq.*) was not subject to garnishment whether in the hands of the soldier or his guardian; § 22 of the act providing that the compensation paid shall not be subject to the claims of creditors. 38 USCA, § 454.

Commenting on the declaration of the law made by the trial court therein, this court said:

"The court was correct in the declaration of law made except that the funds were not subject to seizure, even after they had come into the hands of the ward."

It was further held therein that the funds involved were exempt from garnishment by the statute under which they were allowed and paid to the veteran. After stating the terms of the act and citing cases from other jurisdictions construing it, the court said: "The World War Veterans' Act of 1924 contains substantially the same exemption from seizure as is found in the War Risk Insurance Act, and the cases cited which construe the latter act are applicable here." And further: "we think the manifest purpose of the legislation making provision for World War Veterans was to devote the benefactions there provided to the sole use of the beneficiaries, and that the same should not be subject to the demands of creditors, even after the money came into their hands or was held by another for their benefit."

These funds were paid over by the agency of the Government and had come into his hands, being delivered to his duly appointed guardian by whom they were held for his benefit. The guardian deposited said funds in the bank, and had drawn against the account along with the trust officer, who was required by the guardian's bond to also sign the checks, and the title to the fund was in the ward, the guardian's possession being the possession of the ward. 28 C. J. page 1128, and 12 R. C. L. page 1123.

The government may attach restrictions on its bounty to disabled veterans, has the power to prescribe when, how and to whom such payment shall be made.

It can also punish embezzlement or conversion of funds by those in a fiduciary capacity, and it may even withhold or suspend payment thereof, but when it has made payment to the beneficiary or to a duly appointed guardian, or other person authorized to receive same, the funds so paid lose their character as government funds, and the bank in which they are deposited by the guardian does not become indebted to the United States within the meaning of said § 3466 of the Revised Statutes, entitling the United States to priority of payment thereunder, and, neither the government nor the recipient of its bounty being a prior creditor by virtue of any act of Congress applicable to the bank, no priority of payment of such funds is provided under subdivision 3, § 1, of act 107 of 1927.

It follows that the court erred in decreeing otherwise, and the decree is accordingly reversed, and the cause remanded with directions to allow the claim as a common claim.

PROVIDENT LIFE & ACCIDENT COMPANY OF CHATTANOOGA, TENN. v. GRABIEL.

4-2826

Opinion delivered February 13, 1933.

1114 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Buzbee, Pugh & Harrison, for appellant.

Louis M. Cohn, for appellee.

KIRBY, J., (after stating the facts). Appellant first contends that the testimony is not sufficient to support the verdict, and insufficient to prove that any notice was given of the disability under the policy that would warrant a recovery in the case. It is insisted that the presumption that the letter of July 12, 1930, properly mailed to the company, was delivered had been overcome by the rebuttal testimony, and that in any event it was not sufficient notice of loss as required by the terms of the policy.

The testimony showed that the letter was dictated by the insured, written by the stenographer at the hospital on the same day, and thereafter signed by the insured; was addressed accurately to the appellant company at Chattanooga, Tennessee, with the insured's return address on the corner of the envelope, the ward of the hospital in which he was confined being shown thereon; and the stenographer testified that the envelope was stamped properly, that she carried it to the postoffice station and mailed it herself, although she did not remember whether it was sent by registered or air mail, and that the letter was never returned. The insured also testified that it had never been returned.

The instructions on this point about the presumption of the letter having been delivered to and received by the appellant were correct. *Merchants' Exchange Co.* v. *Sanders,* 74 Ark. 16, 84 S. W. 786, 4 Ann. Cas. 955; *Burlington Ins. Co.* v. *Threlkeld,* 60 Ark. 539, 31 S.W. 265; *Southern Engine & Boiler Works* v. *Vaughan,* 98 Ark. 388, 135 S. W. 913, Ann. Cas. 1912 D, 1062; *Knight* v. *American Ins. Union,* 1772 Ark. 303, 288 S. W. 395; *Harper* v. *Thurlow,* 168 Ark. 491, 270 S. W. 607; *Bluthenthal* v.

Atkinson, 93 Ark. 252, 124 S. W. 510; *Keffer* v. *Stuart,* 127 Ark. 498, 193 S. W. 83; *Click* v. *Sample,* 73 Ark. 194, 83 S. W. 932; *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557; *United Assurance Ass'n* v. *Frederick,* 130 Ark. 12, 195 S. W. 691.

The jury found that the presumption was not overcome by appellant, "and we must draw the strongest inference in favor of that finding that the jury were warranted in deducing from the evidence," as said in *Merchants' Exchange Co.* v. *Sanders, supra.*

Four or five of the employees of the insurance company testified that, if the mail was received and distributed regularly, they would have received or known of such letter and given it to the claim department of the company; but not all the employees, whose duty it was to distribute the mail, who were working for the company during the month of July, when the letter was claimed to have been written, testified, some of them having been replaced by other employees, and the chief of the claim department did not testify at all. Neither was the letter addressed to any particular department of the company, but to the company generally, and it might have been received by the company without going through the hands of the particular employees whose duties it was to properly distribute the mail received. The testimony left the question as to the receipt of the letter for the determination of the jury under all the testimony adduced at the trial, and the jury found that the presumption as to its delivery was not overcome. *Burlington Ins. Co.* v. *Threlkeld, supra;* and *Southern Engine & Boiler Co.* v. *Vaughan, supra.*

This letter of July 12, 1930, informed the company that, as a result of the fall of last December, insured sustained certain injuries which necessitated two operations, giving the name and location of the two hospitals wherein they were performed. That he had not recovered and had been sent to the hospital in Denver three months before this letter was written, and his trouble had been diagnosed as tubercular; advised that its agent through whom the

policy had been taken out had been written to without reply received; that insured had been confined to his bed since April 10, and had been unable to work for several months, in fact, from the date of his second operation on February 4. He said he did not know the amount of the policy, but that it was one giving his wife an income of $100 per month in case of his death; and said that the number on the premium note recently paid was 34,310, and the amount of the premium was $508. This letter, if it could be regarded as insufficient proof of the disability under the terms of the policy, certainly furnished the company all the necessary facts for its ascertainment about the condition; and the company could have waived any additional proofs by not notifying insured that such were required. Exact and full proofs were later demanded and supplied by the insured; and there has been no question raised or intimation even that the disability suffered by the insured did not exist or continue as shown in the proofs.

The disability herein began with the injury that caused it and prevented the insured from the prosecution of any kind of work or business until his recovery, and not with the giving of the notice of such disability, and appellant cannot claim that, notwithstanding it was advised of the time of the beginning of the disability and the duration of its continuance, it could escape payment therefor, except for the last month thereof, because it claimed that it had not had proper notice and proof of such disability, and that it was only bound to the payment of one month's indemnity, notwithstanding the time of its existence, because of failure to give notice and furnish proof thereon. It cannot escape payment therefor under the terms of its policy because of any such claim, and limit payment of the indemnity to one month because of the alleged failure to give the notice about and furnish the proof of such disability under the circumstances of this case.

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

PARRISH v. NELSON.

4-2957

Opinion delivered February 20, 1933.

A. B. Caplinger, I. M. Greer and *June P. Wooten,* for appellant.

Roy Nelson, J. J. Mardis and *Harrison, Smith & Taylor,* for appellee.

MEHAFFY, J. This is a suit to contest the certificate of nomination for the office of senator of the twenty-ninth district, composed of the counties of Poinsett, Mississippi and Jackson. This is the second appeal.

When the case was here on appeal before, it was reversed because the trial court had held that Nelson was not entitled to amend his complaint because ten days had elapsed. But this court held that it was a contest

against the total vote of the entire district composed of three counties, and not against the total vote cast in one county, and that, since it was a contest of the vote in the district, the contestant had twenty days in which to file his complaint from the date of the certification, and that he therefore had twenty days in which to amend, instead of ten.

The opinion on former appeal is on p. 427 *ante*. The case was reversed and remanded, and on the second trial in the circuit court the appellee, Nelson, was declared the nominee.

It was contended on former appeal, and is contended now, that the complaint should be dismissed because it was not supported by the affidavit of ten reputable citizens. While this question was not discussed in the opinion when the case was here before, this contention must have been overruled, because, if we had not held against this contention, the complaint would have been dismissed.

At the second trial in the circuit court, evidence was taken, and the court, of its own motion, made the following declaration of law:

"Section 3777 of Crawford & Moses' Digest of the Statutes of Arkansas was complied with in no respect or in the case of no ballot; that the purported official list of qualified electors was not prepared, authenticated and filed in substantial compliance with § 3740, Crawford & Moses' Digest, of the statutes of the State of Arkansas, and that no legal votes were cast in Poinsett County in the election in question."

The court was correct in holding that § 3777 of Crawford & Moses' Digest was not complied with, and also in holding that the official list of qualified electors was not prepared, authenticated and filed in substantial compliance with § 3740 of Crawford & Moses' Digest. This section provides that the collector shall file with the county clerk a list of all persons who have paid their poll tax, etc.

The court was in error, however, in declaring as matter of law that no legal votes were cast in Poinsett County

in the election. The failure to comply with the law by election officers, whether the result of carelessness, ignorance or negligence, destroys the integrity of the returns, but it does not have the effect of disfranchising the voters of the district, and does not make the election void.

In such case the integrity of the list, and of other acts in connection with the election, which are not in substantial compliance with the law, is destroyed, but the legal votes cast at such election are not void, but may be proved by other evidence.

When it is shown that the law has not been substantially complied with, all confidence in the official acts is destroyed, and persons claiming anything under an election conducted in this manner must prove the votes cast for him by evidence other than the official acts, which, if performed in compliance with the law, would themselves be evidence. McCrary on Elections, 423 *et seq.;* Paine on Elections, 105 *et seq.*

It is contended by the appellee, however, that no voter in Poinsett County complied with § 3777 of Crawford & Moses' Digest.

The judges of election had a list of the voters prepared by the collector, although not prepared in compliance with the above section. The election officers used this list to determine who was entitled to vote. While this list was not prepared as it should have been, yet it was a list by the collector of persons who had paid their poll tax, and thereby became entitled to vote at the election. No question was raised at the time about the insufficiency of the list, and the voters themselves did not violate the law. Therefore they are entitled to have their votes counted for the candidate for whom they voted. Having been permitted to vote upon a showing that their names were on the list of poll taxpayers, they were *prima facie* entitled to vote. There is no contention that the ballots had been tampered with.

It was said by this court in a recent case: "The record shows that the collector did not file with the county clerk a list of poll taxpayers duly authenticated

by his affidavit as required by § 3740 of Crawford & Moses' Digest, and this fact is conceded by the contestant. The record shows that thirty-six votes were cast in the manner provided in § 3777 of the Digest by persons who have attained the age of 21 years since the time of assessing taxes next preceding the election, and that of these votes, 26 were cast for Tucker, and 10 for Meroney. It is the contention of counsel for appellant that these were the only legal votes cast, and that, inasmuch as a majority of them were cast for Tucker, he should have been declared the nominee, and that the certificate of nomination should have been issued to him. We do not agree with contestant in this contention. The official returns of the election are *quasi* records, and are *prima facie* correct. The burden is upon the contestant to show by affirmative proof that they do not speak the truth." *Tucker* v. *Meroney,* 182 Ark. 681, 32 S. W. (2d) 631.

Here it is contended that no votes cast in Poinsett County are legal, and here, as in the case last cited, the collector did not file a list as required by law. But the official returns of the election, as said in the case last cited, are *quasi* records, and *prima facie* correct.

The proceeding to contest the nomination in a primary election is statutory, and the statutes must be substantially complied with. There is, however, a presumption that the election was conducted according to law, and this presumption cannot be overcome by mere charge of fraud and illegality. *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. (2d) 319.

The contest of the certificate of nomination is intended to determine or ascertain which candidate received a majority of the legal votes cast. The ballots themselves are *prima facie* correct, and the burden is upon one contesting an election to show that he received a majority of the legal votes.

The votes of a township or a county will not be thrown out, where the legal votes can be separated from the illegal votes, and in the instant case it appears that this can be done.

It is also contended that contestant was not a candidate, and therefore not entitled to contest the election. We do not agree with appellant in this contention. The contestant evidently reached the conclusion that he would not be a candidate, and so announced, but, after talking to friends, he concluded to continue in the race. He was a candidate, and entitled to contest the election.

The right to contest a primary election is statutory, and it was evidently the intention of the Legislature to provide a method by which it could be determined what candidate had received a majority of the legal votes, and it was also the intention of the Legislature that the candidate receiving a majority of the legal votes should be entitled to the nomination.

For the error indicated above, the judgment is reversed, and the cause remanded for a new trial.

CONTINENTAL CASUALTY COMPANY *v.* ERION.

4-2862

Opinion delivered February 27, 1933.

Donham & Fulk, for appellant.

Dillon & Robinson, for appellee.

BUTLER, J. Action on an alleged oral contract of insurance; trial and judgment in court below for the plaintiff.

Among the errors assigned and argued here by the appellant is that the trial court erred in refusing to grant its motion for a directed verdict in its favor. The reasons

assigned are: (1) The agent, who it is claimed made the oral contract, was merely a "soliciting agent" and there was no competent substantial evidence that he had apparent authority to bind the appellant by his alleged act; (2) there was no premium paid and no consideration for the contract; and (3) that by the express agreement of plaintiff, if any valid agreement had been made, it ceased to exist before the date of the injury for which liability is claimed.

The trial court submitted to the jury the question of the agent's apparent authority by instructions which are correct if based upon substantial evidence. We discover no essential conflict in the testimony, and as to all the material facts it may be said that the evidence is undisputed.

One Collins was the agent of the appellant to solicit and obtain applications from railway employees for insurance against accident and sickness and to transmit such to the appellant's home office for its acceptance or rejection. This was the extent of his authority, and in the face of the application he was designated as a "soliciting agent" in this way; at the head of the application was a statement that the blanks were to be filled in and signed by "the soliciting agent," and in the blank left for the signature appeared the name of Collins.

On September 8, 1931, Collins solicited and obtained the signature of the appellee, who at that time was a railroad employee, to an application for insurance and told him that the insurance would be effective and begin on that date. The application was received at the home office of the appellant on September 14, 1931, and after some investigation it declined to issue its policy, but wrote Collins on September 18, following that waiver of claim for a certain ailment which it knew appellee at one time suffered be obtained, and stated that, upon the receipt of the signed waiver, "the matter of the policy issue will have our further attention."

In the meantime (September 10th) appellee had been "laid off" by the railroad company and while working

at his home had suffered an injury (September 18th) to his leg which caused him to enter a hospital for treatment some days later, where he was when Collins got appellant's letter. This letter and the unsigned waiver he returned with the notation "applicant is now in the hospital with an injured leg." After receipt of the unsigned waiver and the information relating to appellee's condition no further action was taken and no premium was demanded or received. In this connection it may be stated that accompanying the application was a written instrument signed by the appellee to his employer directing it to pay out of appellee's wages the monthly premiums as they became due. The first premium payment was to be deducted out of his October wages. In this order the following stipulation was made: "I understand and agree as to the duration of my said insurance: (1) that after my policy takes effect the payment of each installment of premium shall continue it in force as stated in "Period Schedule" appearing below, all such periods to be computed successively from the date of the policy; (2) that the failure to pay any installment of premium for any reason whatsoever shall terminate my said policy as of the expiration of the period from the wages of which such installment was to have been paid, except as it may be continued in force by reason of premium previously paid; (3) that if I shall cease to be in the service of the employer to whom this order is directed, this insurance shall terminate at once without notice, except as it may be continued in force by reason of premium previously paid."

On September 29 appellee made proof of his disability and demand for the disability benefit. It appears that at a prior time appellee had a policy with appellant company under which he had received payment for disability benefits, but which afterwards he had allowed to forfeit for failure to pay the monthly premiums. Replying to appellee's demand, appellant called attention to this fact and advised him that there was no insurance outstanding. Appellee wrote in reply that he was not claim-

ing on that policy but on "a new contract" made by Collins, its agent, on September 8th.

In support of his contention, appellee argues (a) that in the correspondence last above mentioned there was an effort to deceive and an indication that Collins had authority to make the agreement that insurance should be in force on and after September 8, and as a further indication of this it is argued that a previous policy bore the same date as the application. These further proved facts are urged as evidence that in making the agreement Collins was acting within the apparent scope of his authority, namely, (b) that in settlement of a previous claim he had received from Collins a draft drawn on appellant for the amount of the claim less a due premium; (c) that he knew what authority Collins had from what he said, and that while in the hospital he had been told by Collins that the insurance was in effect; (d) that the order on the railway company for deduction from wages for insurance premiums had been retained by appellant; (e) that while in the hospital he had been given by Collins the form for his preliminary notice of disability; and (f) principally, that the form of the requisition of appellant to the Commissioner of Insurance of the State of Arkansas and the latter's license issued thereon was sufficient to submit to the jury the question of the apparent authority of Collins to contract for and bind the appellant by the act in question.

Giving to these facts their greatest weight and indulging in every legitimate inference reasonably deducible from them we cannot see anything which would fairly sustain appellee's view.

(A) For the sake of brevity we refrain from setting out the correspondence relative to the present demand of the appellee as we cannot see how any fair interpretation of this correspondence can be construed as an effort on the part of the appellant to deceive him, or how it could have deterred him from asserting whatever rights he might have had, as it has developed he was in possession of the knowledge of all the facts known by

the appellant and of others of which at the time appellant did not know, and could not be expected to have known.

(B) That in the consummation of a previous transaction Collins had drawn a draft upon the appellant for the sum due, as agreed upon by the insurer and the insured, appears to us to have in it no element which would lead a reasonable person to believe that he had authority to do any act which bore no relation to this transaction. Neither could the fact that a previous policy bore the same date as the previous application indicate that in a subsequent transaction Collins would have the authority to make an oral agreement that the insurance should be in force from the date of that application.

(C) What Collins might have said to the appellee regarding the extent of his agency and the binding force of his verbal agreement is unavailing to the appellee, and the evidence of it incompetent under the well-known rule that the extent and nature of an agent's authority to act for and bind the principal cannot be proved by his declaration made in the absence of the party to be affected by them. *Turner* v. *Huff*, 46 Ark. 222; *Dennis* v. *Young*, 85 Ark. 252, 107 S. W. 994.

(D) The order given on the railway company for deduction from wages for insurance premiums was valuable only if and when the policy was written, and, as the application was not accepted, it would be immaterial what became of it and its disposition would have no evidentiary value.

(E) While appellee was in the hospital, he requested Collins to procure for him the form for giving his "preliminary notice." This Collins did—how or where he obtained it was not shown, but however it was obtained there is no showing that, prior to the date of the oral contract or at the time of it, Collins had these forms in his possession, or, if so, that appellee knew of it. Whatever was done after the application could not have influenced the action and belief of the parties at or before the time.

(F) Appellee relies principally on the requisitions for and license issued to Collins as evidence warranting

the submission to the jury of the question of Collins' apparent authority. The requisition and the license are as follows: "This is to certify that the Continental Casualty Company of Hammond, Indiana, has appointed Paul Collins of Little Rock, Arkansas, agent for the transaction of its authorized business of insurance in the State of Arkansas for the term ending March 1, 1932."

"Whereas, the Continental Casualty Company of Hammond, Indiana, is authorized until March 1, 1932, to transact the business of insurance in this State in accordance with license issued to said company,

"Therefore, I, the undersigned, Commissioner of Insurance of the State of Arkansas, in pursuance of instructions received from said company, do hereby license Paul Collins of Little Rock, Arkansas, as the agent of said company in the conduct of its authorized business in this State, untl March 1, 1932, unless his appointment as such be sooner revoked or otherwise terminated."

These were on forms which were not the work of the appellant, but which were prepared in compliance with §§ 6060 and 6062 of subdivision 5 of chapter 98 of Crawford & Moses' Digest, under the title "Insurance," which the insurance companies were required to use. These statutes recognize that there are different classes of agents representing insurance companies, and require that they be regarded as agents of such and render ineffective any provision in the applications or policies to the contrary and are as follows:

"Section 6060. No person shall act as agent or solicitor in this State of any insurance company of another State or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the Insurance Commissioner, a certificate of authority showing that the company or association is authorized to transact business in this State."

"Section 6062: Companies to which certificates of authority are issued, as provided by § 6060, shall from

time to time certify to the Insurance Commissioner and State Fire Marshal the names of the agents appointed by them to solicit risks, issue policies or receive applications in this State; and no such agent shall transact business until he has procured from the Insurance Commissioner and State Fire Marshal a certificate showing that the company has complied with the requirements of this act, and that the person named in said certificate has been duly appointed its agent."

Since the requisition and license were not prepared by the appellant company but by the Insurance Commissioner and are based on the above statutes, they can have no greater or other effect than the statute itself. It seems settled that statutes such as those quoted *supra* are not intended to, and do not, have any effect upon the agent's powers to bind the principal, nor do they change the general laws of agency, the powers of an agent being and remaining those only which his principal has expressly or impliedly conferred upon him, to be determined by the applicable principles of the common law relating to principal and agent. *Mutual Life Ins. Co.* v. *Hilton-Green,* 241 U. S. 613, 36 S. Ct. 676; *Sun Ins. Co.* v. *Scott,* 284 U. S. 177, 52 S. Ct. 72; *Eikelberger* v. *Ins. Co. of N. A.,* (1920) 107 Kan. 9, 190 Pac. 611; *Md. Cas. Co.* v. *Seay,* 56 Fed. (2d) 322; *Wood* v. *Fireman's Fire Ins. Co.,* 126 Mass. 316.

Counsel for appellee appear to concede the correctness of the rule stated, but argue that the form and language of the requisition and license extend the real or apparent scope of authority so as to bind the principal for all of the agent's acts, or at least raise the question of fact to be determined by the jury from the language used. The case of *Mass. Bond & Ins. Co.* v. *Vance,* 74 Okla. 261, 180 Pac. 693, 15 A. L. R., page 981, is cited as sustaining this contention. In that case the requisition of the appellant company on the Insurance Commission for agent's license is the one point of similarity of it with the case at bar, and whether or not the applicant knew of it or was acquainted with its language before or at the time his application for insurance was made is not dis-

closed. There, the applicant, a traveling salesman, who habitually carried accident insurance, remembering that his policy was about to expire, was directed to one Evans as an insurance agent and had an interview with him in the office and in the presence of the company's district manager. He told Evans that, unless the insurance would take effect at once, he did not want it. Evans, in the presence of the district manager, assured him that the insurance would take effect immediately, and the application was accordingly signed and a part of the first premium then and there paid and the remainder taken the next morning to the office of the district manager where it was paid to a person in charge of the office who delivered to the applicant the agent's receipt prepared by him and left in the office the preceding evening. There was a delay in the acceptance by the company of the application and of the issuance of the policy and in the interval an injury occurred. Liability was denied, but the premium was retained, and no offer made to return it until after suit was filed and just before the trial. On this evidence a recovery was allowed, and in the course of the opinion upholding the judgment of the court below appears language which indicates that the submission to the jury of the case would have been warranted on said requisition alone. Were we disposed to follow all the implication contained in that opinion in a similar state of case, we do not in the case at bar, if for no other reason, because of the difference in the facts.

In order for any conduct of a principal with respect to the agent, or of the agent, known or which ought to have been known to the principal, to bind the former for the latter's act as done within the apparent scope of the agent's powers, such conduct must have been of that character as would justify the reasonable belief of the agent's authority, and that those dealing with the agent knew of the conduct of the principal or of the agent and relied upon it. The rule is thus stated at page 574, § 213, 2 C. J.: "It is essential to the application of the above general rule (as to apparent authority) that two

important facts be clearly established: (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority."

The application of this doctrine to the facts in the instant case makes the form of the requisition and license unavailing to the appellee, for according to his own admission he had no knowledge of the existence of either until after this controversy arose, and therefore could not have been influenced by them in judging what was the apparent scope of the agent's authority.

On an examination of *Gibson* v. *Continental Casualty Co.*, 178 Ark. 1091, 13 S. W. (2d) 621, the principal case from this court relied upon by the appellee, it will be seen that the act from which the agent's power was determined was performed in the course of the taking of the application. This was the filling in of blank forms furnished by the principal to the agent for that purpose, one of the blank lines being for the date the policy was to become effective. In *New Hampshire Fire Ins. Co.* v. *Walker,* 178 Ark. 319, 11 S. W. (2d) 772, it was held that the fact that an agent of a fire insurance company had authority to write insurance and issue policies at one place was not sufficient to warrant the submission of the apparent authority of that agent to write insurance in another territory and bind his company by an oral contract for insurance.

In *Gibson* v. *Continental Casualty Co., supra,* the court, in differentiating that case from the case of *New Hampshire Fire Ins. Co.* v. *Walker, supra,* said: "There is no testimony in the instant case that disputes the authority of the agent Henderson to fill the blank, thereby stating the date when the accident policy became effective. We have already said that this action on the part of the agent was within the apparent scope of his author-

ity. Of course, if he had no right to make this, and had not had the blanks for the purpose of filling them up, or if the undisputed proof showed that he had no authority to fill the blanks or to make the contract, then, of course, it would be controlled by the case of *New Hampshire Fire Ins. Co.* v. *Walker, supra.*"

In the case at bar, as already observed, the proof is uncontradicted that Collins had no actual authority to make the oral contract and performed no act before the application from which his authority might be inferred as was the fact in the Gibson case.

In addition it may be said, if a valid contract had been made with railroad employees, such as was the applicant, it could continue only so long as did the employment. This was the express agreement of the appellee which has already been quoted.

Appellee ceased to work for the railroad two days after the application was signed and before the injury was received, and drew all his wages before the insurance company could have collected any premiums. Hence, in any view of the case, there was no valid existing contract, and the court should have directed a verdict for the appellant as requested by it.

The judgment is therefore reversed, and, as the case appears to have been fully developed, it is hereby dismissed.

SMITH *v.* MCEACHIN.

4-2884

Opinion delivered February 27, 1933.

Patterson, Patterson & Patterson, for appellant.
Pryor & Pryor, for appellee.

BUTLER, J. The appellant, while engaged in the performance of his duties as an employee of the appellees, suffered an injury which caused the loss of an eye. He brought suit to recover damages alleging that his employers were negligent in failing to provide him reasonably safe instrumentalities with which to perform his labor.

Appellees answered denying negligence and pleading assumed risk and contributory negligence as a bar to recovery. At the conclusion of the testimony, on motion of the appellees, the jury returned a verdict at the direction of the court. Judgment was entered in accordance with the verdict, from which this appeal is prosecuted.

There is only one question presented for our determination—*i. e.,* was the trial court correct under the evidence adduced in directing a verdict for the appellees? It is a rule of universal application that, where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached; but, where there is any substantial evidence to support the verdict, the question must be submitted to the jury. In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in the light most favorable to the party against whom the verdict is directed, and, if there is any conflict in the evidence, or where the evidence is not in dispute but is in such a state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict.

The evidence tended to establish the following facts: Appellant is a "metal cooker," it being his duty to properly melt metal for use in connecting joints in a pipe line. At the time of the injury the appellees were engaged in constructing a water main, and the appellant was employed by them in his usual capacity. The water main consisted of iron pipe which was being laid in a ditch dug for that purpose, and, on the occasion of the appellant's injury, the workmen who were engaged in excavating the ditch had been sent to another place, leaving some rock in it. The foreman passed by the place where appellant was working and told him to get an iron or steel maul, which he pointed out, and to remove some rock which was lying in the ditch. In order to do this, it was necessary to shatter the rock. The foreman told the appellant to hurry, and, in obedience to the orders of the foreman, he picked up the maul which was lying about 150 feet from the rock to be broken, and, throwing it on his shoulder, hurriedly went to the place and struck the rock two or three blows. As he struck the last blow, something hit him in the eye, either a fragment of the rock or a sliver from the maul, resulting in the

loss of sight in that eye. The appellant had never used a maul of that kind or for that purpose before. At one time about ten or twelve years before the accident he had used a maul or sledge in breaking up rubble while working on a levee. An examination of the maul after the injury showed that it was in a worn condition. The handle was not straight, and the striking face of the maul had been worn, so that it did not have a flat surface, but "was broken all off around the edges of it, and had a little ball in the middle."

The appellant testified that he did not make any examination of the maul at the time he picked it up because he had been told to hurry, and he did not think the foreman would order him to take a tool that he could hurt himself with and so just did not look at it. There was testimony of a witness who had had sixteen years' experience in stone quarries to the effect that it was proper, when the striking face of a maul became battered, to have it redressed so as to make the face of it smooth, as there was a tendency of rock to fly outward to the side when struck by a maul with a smooth face, but that if struck by a battered maul with rounded surface the tendency of the broken rock was to fly upward, and that was considered one of the dangers of using a battered maul; that there was also danger of slivers of steel breaking from the maul if it had a battered or rounded surface; that, while any one could observe the condition, it would be only one having experience who would understand the danger from its use.

It is the theory of the appellee that the maul should be classed as a simple tool which the master was not required to inspect, and that the dangers attendant upon its use would be only those ordinary risks which the servant would assume, and also its condition was obvious and the danger of its use ought to have been as apparent to him as to the master. The duty resting upon the master in the selection and inspection of the instrumentalities which the servant used in his work in all cases is to use ordinary care that they are reasonably adapted and safe

for the purpose intended, and, in determining that question, the simplicity of the tool and the skill required in its use is one of the circumstances to be considered in determining whether or not the master has exercised ordinary care. There is no fixed rule by which the liability of the employer for a defect in a common tool can be ascertained. *Arnold* v. *Doniphan Lumber Co.,* 130 Ark. 486, 198 S. W. 117. Each case must necessarily depend on its own peculiar circumstances.

In *Arnold* v. *Doniphan Lumber Co., supra,* the court approved the following statement: "A master is not required to inspect common tools and appliances which are committed to the custody of a servant who has the capacity to understand their character and uses."

In *Williamson & Williams* v. *Cates,* 183 Ark. 579, 37 S. W. (2d) 88, it is said: "The axes were simple tools such as men engaged in appellee's occupation are accustomed to use from boyhood, and the fact that they were dull could in no wise contribute to the happening of the injury, for that was occasioned by the falling of a brush, and the mere fact that it was severed with a dull axe instead of a sharp one could make no difference. As we have seen, appellee must have had knowledge of the use and construction of the axes, as he appears to have been a man of ordinary intelligence. Therefore there was no duty resting upon the appellants to exercise ordinary care in the selection of the axes, for they were simple tools in ordinary use."

In the case of *Little Rock M. R. & T. Ry. Co.* v. *Leverett, Admr.,* 48 Ark. 333, 3 S. W. 50, quoted in the case of *C. R. I. & P. Ry. Co.* v. *Smith,* 107 Ark. 512 (156 S. W. 166), at page 522, it was held that a servant is not required to inspect the appliances of the business in which he is employed for latent defects, but only to take notice of such defects or hazards as are obvious to the senses. The fact that he might have known these or had the means and opportunity of knowing them will not preclude him from a recovery unless he did in fact know, or, in the exercise of ordinary care, ought to have known, of them.

After a careful consideration of the evidence adduced on behalf of the appellant, applying to it the principles of law above stated and giving to it its strongest probative value, we are of the opinion that it warranted a submission to the jury of the question of negligence on the part of the master, and whether or not the servant assumed the risk or was himself guilty of negligence contributing to his injury. The question involved in this case, like that of *C. R. I. & P. Ry. Co.* v. *Smith, supra,* "is an exceedingly close one." In that case the defective tool was one in common use and practically identical with the tool involved in the instant case. There the servant injured had been directed to get the particular tool for the use of his fellow-servant, which tool, while in such use, glanced from the object struck because of a worn and defective face. The court said: "The undisputed evidence shows that the hammer had an imperfect striking face and was in a defective condition, when considered with reference to the uses for which it was intended. * * * Hence the jury was justified in finding from the evidence that the face of the hammer was defective, and that its defective condition was the efficient cause of the injury to the plaintiff. Neither can we say, as a question of law, that, under all the facts and circumstances adduced in evidence, an unskilled laborer of ordinary intelligence should have known that the hammer was defective and should have known and appreciated the dangers that he was exposed to by reason thereof. There is no hard and fast rule that may be laid down as governing the liability of an employer for a defect in common tools. In view of this condition, we do not undertake to say what state of facts the rule of liability should embrace and what state of facts it should not. * * * There was no duty imposed upon either plaintiff or Blackman to search for defects in the hammer. It cannot be said, as a question of law, that the defect in the face of the hammer was so open and obvious that they could have seen the defect by a glance or by such casual observation as it would be natural for plaintiff to have made while

carrying the hammer to Blackman or by Blackman to have made after receiving it."

Since there must be another trial of this case, it is proper that we refrain from commenting upon the effect of the evidence or pointing out with particularity that which appears to us to warrant a submission of the case to the jury.

Reversed and remanded for a new trial.

ROYAL NEIGHBORS OF AMERICA *v.* TATE.

4-2887

Opinion delivered March 6, 1933.

Brewer & Cracraft, for appellant.

John C. Sheffield, for appellee.

KIRBY, J. Mrs. Alice Tate became a member of the appellant order at the solicitation of its agent and was duly initiated into the local lodge of the order, and a policy of insurance in the sum of $2,000 was issued on her life with Jesse T. Tate named as beneficiary. All premiums due on the policy had been paid, and on August 4, 1931, the insured was killed in an automobile accident, while the policy of insurance was apparently in full force and effect.

Demand for payment was made and liability denied, and, upon a suit filed by the beneficiary, the order defended on the ground that the insured had fraudulently misrepresented her medical history making untrue and false representations about such history as forfeited the policy under the terms of the contract.

After the introduction of the testimony, the court instructed the jury, two of appellee's instructions being objected to as abstract and misleading, and refused to direct a verdict in favor of appellant, and from the judgment on the verdict against it the appeal is prosecuted.

The policy provided that the application, medical examination, articles of incorporation and by-laws were a part of the contract. In the application and the policy the answers to the questions asked the insured were warranted to be literally true, and otherwise it was agreed that the policy was to be void *ab initio.*

Among the questions asked were, whether or not the applicant had ever had cancer, whether or not she had ever had abnormal vaginal flow, and whether or not she had ever had an operation or been an inmate of a hospital. All these questions were answered by the applicant in the negative.

The deputy, Mrs. Maude Fields, who took the application, had authority to solicit applications for membership, to instruct in ritualistic work, promote the growth and prosperity of local camps, and organize new camps. The by-laws provided that no benefit certificate should be issued to any applicant until examined by the camp physician. The application was divided into three parts, part one dealing with the family history, and at the top of the page it is provided that it may be filled in by the applicant or deputy, part two dealing with the health and medical history of the applicant must be filled out by the camp physician, and part three was the medical certificate, it being made by the examining physician, the camp physician, Dr. C. P. Burnett of Paducah, Ky.

Mr. Tate paid $1.25 for the medical examination, and when the benefit certificate came to be delivered she was notified but did not have the money and Mrs. Fields, the deputy who was the soliciting agent in this case, agreed to advance the sum for her, and so Mrs. Tate signed the acceptance of the certificate as of July 6, 1931, and left it in Mrs. Fields' possession until she could get the money to pay the assessments. On August 4, Mrs. Tate was killed in an automobile accident while riding with her husband near Monteagle, Tenn. Mrs. Fields thereupon sent Mr. Tate word about the certificate, which she had, and he reimbursed her to the extent of $6.50, which was paid after Mrs. Tate's death. The total amount of $7.75 was tendered to appellee in settlement of the policy before suit was brought.

Proof of death was sent in on October 3d, and Mrs. Ida Shelby, a member of another camp in Paducah, Ky., wrote the home office informing them that Mrs. Tate had had an operation for cancer of the uterus before she made application for the policy, and, upon investigation made, the information disclosed being proved to be true, the society declined to pay the claim.

It was stipulated that, after the death of the insured and prior to the filing of suit, the appellant tendered to the appellee all dues and examination fees paid by the insured, and the tender was refused; and that on December 11, 1930, the deceased was admitted to the Riverside Hospital of Paducah, Ky., and was operated on there on December 12, "for ulceration and cancer of the cervix, and the uterus was removed and a post operative diagnosis showed ulcer of the cervix and carcinoma; that the operation was performed by Drs. Shemwell, Goodloe and Fishman; that a copy of the hospital record is attached and may be admitted in evidence; that the history as given thereon was based on facts given by the deceased, Alice Tate, and on her examination by physicians; that the application for the insurance was made May 6, 1931, and may be admitted in evidence; that Dr.

C. P. Burnett was the camp physician and conducted the medical examination as shown on page 3, and prior to said examination he did not know of the operation, and that, if present, he would testify that he did not know that the operation had been performed on Mrs. Tate; that he asked her various questions appearing on the application, page 2, and the answers were put down as she gave them. 'She stated to me that she had not had an operation and had not been an inmate of a hospital. Had I known of the operation which she had on December 12, 1930, and had I been familiar with the hospital records which I have since examined, after the death of Mrs. Tate, showing carcinoma and that there had been a hysterecotomy and removal of the uterus, I would not have recommended her. I did not observe anything in the examination that caused me to believe that she had had an operation. I considered the statements she made as true'."

It was also shown that Mrs. Fields had written the answers for the medical examination, and she testified that they were correctly written, and the answers about the operation were all in the negative; and the doctor who read the questions again in making the examination was told that she had never had an operation and had never been an inmate of a hospital.

An attempt was made to show that Mrs. Fields, the deputy who solicited the insurance, might have known that Mrs. Tate had had such operation, but she denied having had such information, and stated that she read the questions in the application over and wrote Mrs. Tate's answers thereto correctly; and that she was then taken to the doctor's office where he took the application and read it, read to her each question and answer and "asked her if I, Mrs. Fields, had written them down correctly, and she replied, 'Yes,' and then the insured signed the application in the doctor's presence, and it was witnessed by him. She did not write down the doctor's examination; he made his own examination,

and had received no information from her or anybody else that she had had an operation."

Instruction No. 2, objected to as abstract, reads as follows:

"The jury are instructed that, even though you find that the answers contained in the application for insurance are false, still if you find that the applicant made correct answers to the representative of the defendant and such representative wrote false answers without the knowledge of the applicant, this would not void the policy."

It is insisted that the court erred in not directing a verdict in appellant's favor, and this contention must be sustained. The undisputed testimony discloses that the insured in her application made answers to several questions about never having been operated upon nor an inmate of a hospital, and, under the provisions of the application, the policy or contract of insurance and by-laws such untrue representations and warranties voided the policy according to its provisions. The fact that the untrue warranties had nothing to do with the accident or injury makes no difference, since the policy would not have been issued if the true disclosures had been made to the questions asked, and it was not done.

There is no testimony tending to show that the answers of the insured were not correctly written as given, nor any change made therein after they were written, and the said instruction No. 2 was not warranted and is erroneous and prejudicial under the circumstances.

The court should have directed a verdict as requested by appellant; and for its error in not doing so the judgment will be reversed, and, the cause appearing to have been fully developed, it will be dismissed. It is so ordered.

UNITED ORDER OF GOOD SAMARITANS *v.* REAVIS.

4-2906

Opinion delivered March 6, 1933.

Cooper Thweatt and *Jno. D. Thweatt,* for appellant.

W. A. Leach, for appellee.

MEHAFFY, J. The appellant is a fraternal insurance company, and on June 5, 1923, it issued a policy of insurance to James Rivers, and another to his wife, Zetta Rivers. Zetta Rivers was the beneficiary under the policy issued to James Rivers, and he was the beneficiary under the policy issued to her. The policies were identical except the differences in the insured and beneficiary.

The policies provided that the premiums or dues should be paid to the local financial secretary by the first of the month, and it provided that they must be forwarded to the home office of appellant by the tenth of the month, and, if not so forwarded by such date, the policies should be null and void.

It was also provided that, when an amount greater than the premium for one month became due, the insured became automatically suspended, and that, if such dues should be paid later, neither insured nor beneficiary should be entitled to any benefits, not only during the delinquent period, but for 30 days after payment was made.

There was also a provision in the policy that the financial secretary was the agent of the insured, and not the agent of the appellant, and failure of the home office to receive payments rendered the policy null and void.

James Rivers died January 25, 1930, and Zetta Rivers two days later. All premiums were paid by both parties, and they were both in good standing until December, 1929.

The appellant contends that neither the December, 1929, premium, nor the January, 1930, premium was paid as required by the terms of the policy. Appellant also contends that the payment to the local financial secretary was not a payment to appellant. There was a controversy as to whether the January payment had been made.

H. R. Reavis, administrator of the estates of Zetta Rivers and James Rivers, brought suit in the Prairie Circuit Court, and the appellant filed answer denying all the material allegations in the complaint, and alleged that the policies were void for failure to pay premiums. It also alleged that, under the rules of the company, each of the beneficiaries, being over 51 years of age at the time the policies were taken out, was entitled to only one-half of the face value of the policy.

The case was tried on August 15, 1932, and the jury returned a verdict for the appellee, as administrator, on the policy issued to Zetta Rivers in the sum of $300, and on the policy issued to James Rivers, in the sum of $150, and judgment was entered for the sum of $450 with

interest from May 1, 1930, at the rate of 6 per cent. per annum. The case is here on appeal.

Appellant contends first that there is no competent evidence tending to show that the premiums for the month of January, 1930, were paid.

H. R. Reavis, the administrator, testified that at the time of the deaths of James and Zetta Rivers, proof of the deaths and the two policies were turned over to him, and he mailed all of the papers to the home office of the insurance company at Little Rock. He did not know whether there were any receipts among the papers, but he sent all of the papers turned over to him to Little Rock, and demanded a receipt. The receipt showed that the company received the papers. Witness had not seen any of the papers nor the policies since he sent them in. The policies called for $300 each, and $50 burial expenses.

It was admitted by the appellant that proof of death was sent in, and that the policies were a printed form, a copy of which was exhibited in court.

The court thereupon told the jury that it was admitted that proof of death was filed and sent to the insurance company, and that Mr. Reavis was duly appointed administrator, and had a right to bring this lawsuit. The court told the jury that the only question involved now, was whether or not premiums were paid up according to the rules of the insurance company at the time of their deaths. This instruction was agreed to by both the parties.

Reavis further testified that James Rivers died first, and Zetta Rivers died two or three days later; that he paid the burial expenses himself, and that the insurance company had never paid him.

J. E. Humphreys testified that he was in the undertaking business in Stuttgart, knew James and Zetta Rivers in their lifetime, and furnished the burial supplies; that he examined the insurance papers, and had all the receipts from the insurance company before him.

The receipts were exhibited by witness, but the one for December was missing. He had the January receipt. These were receipts issued by appellant and showed that the January premium had been paid, but there was no receipt for the December payment. All the receipts from the company were there except the one for December.

Witness received the receipts from Zetta Rivers, and they were in a long envelope post-marked Little Rock, and it came from the headquarters of the lodge. A letter acknowledged the receipt of dues sent in for January; this receipt was on a printed form, signed by W. O. Hill.

H. R. Reavis was recalled, and testified that the dues for December were paid to the local secretary, but she failed to send them in. The money was handed to the local secretary, whose name was Zola Price. She was the local secretary of the United Order of Good Samaritans. Witness knew that the secretary, Zola Price, at times bought money orders and sent them to the company. The company had a local lodge at Brummit, and Zola Price was its local secretary.

Jim Curry testified that he paid Zola Price the December dues at a store down town. He also testified that he took the money to Mrs. Hoover, the postmistress at Brummit, and gave it to her to pay the January dues, and got a receipt for his money. After Jim Rivers died, the company sent a dun, stating that they had received the January dues, and to hurry with the December dues.

A letter was introduced, which was on the letterhead of appellant, acknowledging receipt of the December dues.

Appellant introduced some witnesses whose testimony was in conflict with the evidence offered by appellee, but as to whether the January and December dues were paid was a question of fact properly submitted to the jury. The appellant itself stated that the court gave proper instructions, and no objections were offered to any of the court's instructions.

The burden was upon the appellant to show a forfeiture. *Supreme Council American Legion of Honor* v. *Haas,* 116 Ill. App. 587; *Ry. Passenger & Freight Conductors Mutual Aid & Benefit Ass'n* v. *Thompson,* 91 Ill. App. 580; *United Brotherhood of Carpenters & Joiners of America* v. *Fortin,* 107 Ill. App. 306; *Sup. Tent of Knights of Maccabees* v. *Stensland,* 206 Ill. 124, 68 N. E. 1098; *Sleight* v. *Sup. Council of Mystic Toilers,* 133 Iowa 379, 107 N. W. 183; *Kidder* v. *Sup. Commandery United Order of Golden Cross,* 192 Mass. 326, 78 N. E. 469.

It is not disputed that the December dues or premiums were paid to the local secretary, but it is contended by appellant that, because the dues were not sent in to the home office by the local secretary, the policies were void.

The policy provides that the Supreme Colony shall in no event be responsible to individual members for the failure of the secretaries to send to the Supreme Recorder of Records and Seal their names and money. The policy also provides that in each or every case or condition that may arise, it is expressly understood and declared that the Colony is the agent of the member or insured, and not of the Supreme Colony.

Whenever an insurance company authorizes the clerk of the local lodge to collect dues from members, it thereby constitutes such person its agent, notwithstanding it may provide in its constitution, by-laws, or policy that such officer, in collecting and forwarding assessments, shall be the agent of the insured.

It is not disputed that the December dues were paid to the local secretary. The proof shows conclusively that they were so paid, and the local secretary did not testify, and this evidence that they were paid to the local secretary is not contradicted. In order that there should be a forfeiture of the policy, the burden was on the appellant to show a forfeiture of the policy, and, since the undisputed proof shows that the dues were

paid to the local secretary, who was the agent of the appellant in collecting and forwarding the dues, this was a payment to the company. *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132, 219 S. W. 759; *Eminent Household of Columbian Woodmen* v. *Simmons,* 150 Ark. 325, 234 S. W. 182; *Supreme Lodge K. of H.* v. *Davis,* 26 Colo. 252, 58 Pac. 595; *Sup. Tribe of Ben Hur* v. *Hall,* 24 Ind. App. 316, 56 N. E. 780, 79 Amer. State Rep. 262; *Sup. Lodge K. of P.* v. *Withers,* 177 U. S. 260, 20 Sup. Ct. 611.

One provision of the policy provides that the policy shall be void if the dues are not received at the home office as required by the constitution and laws of the society, and, if the dues are paid after the time, neither the insured nor the beneficiary shall be entitled to any benefits before the expiration of 30 days.

Another provision of the policy provides that when the dues exceed one month's dues, taxes and fines included, the insured shall be automatically suspended, etc.

There seems to be some conflict in these provisions of the policy. They, at all events, make the provision of the policy with reference to forfeiture ambiguous.

This policy, like all policies of insurance, should be construed most strongly against the insurance company that wrote it, and it is also a well-established rule of this court in the construction of contracts of this character that, if capable of two constructions, one of which will make the policy void, and the other will avoid a forfeiture, that construction must be adopted which avoids the forfeiture. *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *American Indemnity Co.* v. *Hood,* 183 Ark. 266, 35 S. W. (2d) 67; *Ætna Casualty & Surety Co.* v. *Sengel,* 183 Ark. 151, 35 S. W. (2d) 67; *Mech. Ins. Co.* v. *Inter-Southern Life Ins. Co.,* 184 Ark. 625, 43 S. W. (2d) 81; *Gilbert* v. *Life & Casualty Co.,* 185 Ark. 256, 46 S. W. (2d) 807; *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *McClain* v. *Reliance Life*

Ins. Co., 174 Ark. 478, 295 S. W. 730; *Mosaic Templars of America* v. *Crook,* 170 Ark. 474, 280 S. W. 3; *Fire Ins. Co.* v. *Boydston,* 173 Ark. 437, 293 S. W. 730; *Nat. Benevolent Society* v. *Harris,* 178 Ark. 24, 9 S. W. (2d) 773.

We find no error, and the judgment is affirmed.

COCA-COLA BOTTLING COMPANY *v.* SWILLING.

4-2900

Opinion delivered March 13, 1933.

S. Hubert Mayes and *Buzbee, Pugh & Harrison,* for appellant.

Robert Bailey and *Hays & Smallwood,* for appellee.

SMITH, J. Suit was brought by appellee to recover damages sustained by drinking a bottle of Coca-Cola in which there was a partly decomposed centipede. The suit was brought in the Pope Circuit Court against two defendants, who were residents of that county, and served with process therein. A third defendant was the Coca-

Cola Bottling Company of Arkansas, a domestic corporation having its place of business in Pulaski County. There was a verdict and judgment against all three defendants, from which is this appeal. It is stated in the brief of appellee, the plaintiff below, that the suit was not brought upon the theory of implied warranty, but upon the theory of negligence on the part of R. Kelch and C. C. Sanders, the resident defendants, and upon the negligence also of the Coca-Cola Bottling Company.

Kelch, as a dealer, sold bottled Coca-Cola to the ultimate consumers, who drank the contents of the bottles in his place of business, as did the plaintiff in the instant case, and it was alleged that one of these bottles which plaintiff bought and drank contained a decomposed centipede.

The allegations of the amended complaint, upon which the cause was tried, as to plaintiff's injuries, read as follows: "That said injuries to this plaintiff and the poisoning of the plaintiff's system were brought about solely, wholly and alone by the carelessness and negligence of the defendants, the Coca-Cola Bottling Company, Morrilton, Arkansas, and the Coca-Cola Bottling Company of Arkansas, in bottling said drink and holding out and representing said drink to be fit for human consumption, and permitting their agent, C. C. Sanders, to be upon the road and selling said bottled products to merchants, and not properly protecting said bottles and syrup itself from foreign substances, and through the carelessness and negligence upon the part of these defendants, and that R. Kelch was careless and negligent in his manner of selling said Coca-Cola to this plaintiff, and through the carelessness and negligence of the defendant, the Coca-Cola Bottling Company, Morrilton, Arkansas, and the Coca-Cola Bottling Company of Arkansas, their agents and employees, in their failure to make a proper investigation upon their part as to whether or not said Coca-Cola was fit for human consumption, before offering the same to the general public."

Although there were allegations as to two Coca-Cola companies, it appears that there was only one corporation by that name, this being the Coca-Cola Bottling Company of Arkansas, domiciled in Pulaski County, and service was had on that corporation in that county.

Before trial or verdict, the Coca-Cola Company filed objection to the jurisdiction of the Pope Circuit Court, and moved that the cause be dismissed for lack of jurisdiction, for the reason that it was not served in Pope County, and for the further reason that no joint cause of action was stated against it and the other defendants. The motion to dismiss alleged that, even though a joint cause of action were stated, the plaintiff would not be entitled to a judgment against it unless judgment was also obtained against one or both of the other defendants who were served in Pope County. This objection to the jurisdiction was based upon § 1178, Crawford & Moses' Digest.

It is conceded that the testimony was sufficient to support a finding that plaintiff bought from Kelch, the dealer, a bottle of Coca-Cola which contained a partially decomposed centipede which plaintiff drank, and that he sustained an actionable injury on that account.

The testimony as to the defendant, Sanders, was to the effect that he made delivery of bottled Coca-Cola to dealers in cases, each case containing 24 bottles. He made delivery to many dealers every day, and in no instance made inspection of any bottles. It appears very clear that no cause of action was established against Sanders.

As to the defendant, Kelch, the testimony of the plaintiff himself was to the following effect: Plaintiff drank bottled Coca-Cola daily, usually from three to six bottles each day, and made purchases from numerous dealers. It was not customary for the dealer, upon selling a bottle of Coca-Cola, to inspect the bottle, as the drink was supposed to be put up in sterilized bottles, and all the dealer was expected to do, and all any dealer did in that vicinity, was just to take a bottle out of the

receptacle in which it was contained, pull the cap off, and hand it to the customer to drink. Neither Kelch nor the plaintiff made any inspection of the bottle in question. Had either done so, the presence of the centipede in the bottle would probably have been discovered. A careful inspection would certainly have revealed its presence.

Upon this testimony we are of the opinion that no case was made against Kelch. There was no occasion, nor was it usual or ordinary, for the dealer to inspect the bottle, which was an original package ready for delivery to the consumer, to be drunk by him. Both dealer and the consumer had the right to assume, and both apparently did assume, that the drink was contained in sterilized bottles, containing no deleterious substance, as neither made any inspection. The presence of the centipede was as easily discernible by the one as the other. The dealer was not selling a portion of a bulk product, but a drink contained in an original package, which was known to be sealed with a metal cap to prevent the waste of the content and to protect it from contamination. The case of *Heinemann* v. *Barfield,* 136 Ark. 456, 207 S. W. 58, cited and relied upon by the plaintiff, does not therefore apply.

The duty of the dealer in selling a portion of a bulk commodity, as distinguished from his duty in selling an article canned or sealed, both being intended for human consumption, is pointed out in § 29 of the chapter on Food in 11 R. C. L., page 1124. In the early history of the law on this subject sales of food or drink in canned or sealed containers was not common, and, as is said in the section of the chapter cited, the early rules of law were formulated upon the theory that the provision dealer having the opportunity to inspect the article sold was charged with knowledge of its unfitness. But it was there said also that, the reason for the rule having ceased when manufacturers began to prepare their products for sale in canned or sealed containers, a new rule should be and is applied which more nearly harmonizes with what is rational and just, and that it "comports better with

justice to hold that, where a dealer sells to his customer an article in the original package in which it is put up by the manufacturer, and the customer knows as much about the article as the dealer, and buys it without any representation from the dealer or reliance upon his judgment, knowing that there has been no inspection of it by the dealer, there is no implied warranty, although the dealer knows that the customer buys it for food." It was there further said: "The situation of the retailer and consumer of packed products is properly governed by the rules of negligence law. The retailer owes to the consumer the duty to supply goods packed by reliable manufacturers, and such as are without imperfections that may be discovered by an exercise of the care, skill and experience of dealers in such products generally. This is the measure of the retailer's duty, and if he has discharged it he should not be mulcted in damages because injuries may be produced by unwholesomeness of the goods. As to hidden imperfections, the consumer must be deemed to have relied on the care of the packer or manufacturer or the warranty which is held to be implied by the latter." The annotated cases cited in the notes to the text quoted appear to sustain the text.

Now, as we have said, it is not questioned that the testimony supports a finding of liability on the part of the manufacturer of the Coca-Cola. The cases of *Coca-Cola Bottling Co.* v. *McBride,* 180 Ark. 193, 20 S. W. (2d) 862; *Coca-Cola Bottling Co.* v. *Bennett,* 184 Ark. 329, 42 S. W. (2d) 213, and *Coca-Cola Bottling Co.* v. *Jordan, ante* p. 1006, are to that effect. But, if it be true, as we have concluded, that there was no liability on the part of Kelch and Sanders, the question arises whether the Pope Circuit Court had the jurisdiction to ascertain whether the Coca-Cola Company was liable and to assess damages on that account.

Each defendant requested a separate instruction for a directed verdict declaring that there was no liability against the defendant asking the instruction, but each and all of these instructions were refused, and error was as-

signed in the motion for a new trial for refusing to give them.

The motion for a new trial did not specifically assign as error the action of the court in refusing to quash the service upon the Coca-Cola company and dismiss the cause for want of jurisdiction as to that defendant, but at the time the motion for a new trial was filed a verdict had been returned and a judgment rendered against all three defendants, and, if either of the other defendants was liable, the service upon the Coca-Cola Company was good under § 1178, Crawford & Moses' Digest. The motion for a new trial did, however, as we have said, assign as error the refusal of the court to direct a verdict for the Coca-Cola Company and each of the other defendants, and we think this was sufficient to raise the question of jurisdiction.

Upon this question, the case of *Howe* v. *Hatley, ante* p. 366, is very similar and controls here. In that case Belford, a resident of Randolph County, had been sued, in conjunction with Hatley, a nonresident of the county, upon allegations that their joint and concurrent negligence had caused the damages sued for, and it was upon these allegations that service was had upon the nonresident of Randolph County in the county of his residence. There was a verdict and judgment against both defendants. The opinion in that case recites that, after the introduction of all the evidence, the nonresident defendant filed his motion objecting to the jurisdiction of the court under § 1178, Crawford & Moses' Digest. This motion was overruled, and, we said, correctly so, for the reason that the court had jurisdiction of both the subject-matter and the parties at that stage of the proceeding, but it was said that, had there been a verdict against the nonresident defendant alone, he could have objected to the jurisdiction of the court at any time prior to the judgment. We there said there could be no judgment against the nonresident defendant served with process in another county unless judgment was also rendered against the local defendant where timely objection, as required by the statute, was made.

In that case instructions were given on the question of joint liability, to which no objections were made and the giving of which was not assigned as error in the motion for a new trial. But, as we were there constrained to reverse the judgment against the resident defendant, we also reversed the judgment against the nonresident defendant, for the reason there stated, that there could be no judgment against a nonresident defendant unless there was also a judgment against the resident defendant, where objection to the jurisdiction had been made as required by the statute.

Section 1178, Crawford & Moses' Digest, provides that, "Where any action embraced in § 1176 (which section provides that transitory actions may be brought in any county in which the defendant, or one of several defendants, resides or is summoned) is against several defendants, the plaintiff shall not be entitled to judgment against any of them on the service of summons in any other county than that in which the action is brought, where no one of the defendants is summoned in that county or resided therein at the commencement of the action, or where, if any of them resided, or were summoned in that county, the action is discontinued or dismissed as to them, or judgment therein is rendered in their favor, unless the defendant summoned in another county, having appeared in the action, failed to object before the judgment to its proceeding against him."

Here instructions were requested by each defendant for a directed verdict, and refusal to give them was assigned as error in the motion for a new trial, declaring the law to be that no case had been made for the jury, and we are of the opinion that no negligence was shown as against Kelch and Sanders, the resident defendants, it follows that a verdict should have been rendered in favor of the defendant served in another county, it having, before judgment and within the time prescribed by law, objected to the proceeding against it.

The entire judgment must therefore be reversed, and, as the Pope Circuit Court is without jurisdiction to pro-

ceed for lack of proper service against the only defendant shown to be liable, the case must be dismissed, but without prejudice to further proceedings against the Coca-Cola Company upon proper service. *Fidelity Mutual Life Insurance Co.* v. *Price,* 180 Ark. 214, 20 S. W. (2d) 874.

FIRST STATE BANK OF BENSENVILLE, ILLINOIS, *v.* TAGGART.

4-2916

Opinion delivered March 13, 1933.

Ingram & Moher, for appellant.

George C. Lewis, for appellee.

SMITH, J. On January 29, 1931, the First State Bank of Bensenville, Illinois, filed suit in the chancery court of Arkansas County, Northern District, against Thomas T. Taggart, to foreclose a mortgage securing certain notes of Taggart payable to its order. As ancillary to the foreclosure of the mortage, the plaintiff bank caused to be issued a garnishment requiring McGill Brothers to answer what funds they had in hand belonging to the defendant Taggart. The usual bond was given. McGill Brothers answered that they had in their hands the proceeds of a crop of rice belonging to Taggart, which they were ready to pay under the direction of the court, but that they were advised there were outstanding liens thereon.

At the beginning of the year in which the crop of rice was grown, Taggart borrowed money from his wife, to secure which he gave her a chattel mortgage on his crop of rice and certain personal property. The sum due Mrs. Taggart and thus secured was $416.07. The net proceeds of the sale of Taggart's rice sold to McGill Brothers amounted to $669.98. From the time the garnishment was issued until the following March, McGill Brothers were doing a large business as rice millers, met their obligations promptly, and were in good local credit. After that time they became somewhat dilatory, and on the 26th day of July, 1931, were adjudged bankrupt, with large liabilities and small assets.

A decree was rendered on December 9, 1931, foreclosing the mortgage, and pursuant thereto a sale was had of the land described in the mortgage, but the sale left a large deficiency against Taggart.

On September 17, 1932, Mrs. Taggart filed an intervention, in which she alleged that the rice had been sold to McGill Brothers subject to her mortgage, but that by reason of the garnishment the money had been impounded and lost through McGill Brothers' insolvency, whereas, but for the garnishment, the rice would have been paid for. She prayed judgment for the amount of her debt secured by her mortgage by way of damages against the plaintiff in the original foreclosure suit and garnishment proceeding and the surety upon the garnishment bond. Mr. Taggart filed a petition in which he prayed that, after his wife's claim had been ordered paid, the balance due on the rice be paid him under § 5549, Crawford & Moses' Digest. He alleged that he was a married man and insolvent, and filed a schedule of all his personal property, and claimed the balance due from McGill Brothers after his wife's debt had been paid as his personal exemptions from the demands of his creditors under the law. The court granted the relief prayed, and this appeal is from that decree.

Authorities are cited in support of the decree below to the effect that property exempted from execution gen-

erally is also exempt from garnishment, and that the debtor has the right to assert the exemption in a garnishment proceeding at any time before the impounded funds have been lawfully paid to the creditor, and also to the effect that a stranger to the garnishment proceeding may sue for the wrongful conversion of such impounded funds.

It is true that Mrs. Taggart was a stranger to the garnishment proceeding, but it is true also that McGill Brothers were required to answer only as to the money due her husband. No sum due her was impounded. She had the right to take such action as was advised for the recovery of any money due her. It is true also that the garnishment against her husband was not wrongfully sued out. McGill Brothers did have money in their hands belonging to Taggart. He alleges this to be a fact himself. It is no doubt true that Taggart had the right to claim his personal exemptions, but he might or might not have asserted this exemption, failing which his creditors had the right to subject the money to the payment of his debt. As a matter of fact, both Mr. and Mrs. Taggart delayed the assertion of the rights upon which they now insist for many months and until McGill Brothers became insolvent. Had they proceeded more expeditiously, their action might have been more profitable.

Under the circumstances, we think there is no liability against the plaintiff in the garnishment, and the decree of the court below must be reversed, and both the intervention and the petition will be dismissed.

BROADWAY-MAIN STREET BRIDGE DISTRICT *v.* TAYLOR.

4-2913

Opinion delivered March 13, 1933.

Trieber & Lasley, for appellant.

Sam Rorex, for appellee.

MEHAFFY, J. The appellant, Broadway-Main Street Bridge District of Pulaski County, had on deposit in the American Exchange Trust Company on November 22, 1930, when the Commissioner took charge, $62,685.45, and held improvement district and school district bonds pledged to it by the depository in the sum of $43,000, of which $6,500 now remains on hand unrealized upon. This was the sole security for the deposit.

The appellant filed an intervention in the Pulaski Chancery Court in the liquidation therein pending, involving the affairs of the American Exchange Trust Company, insolvent. The purpose of the intervention was to establish the basis of intervener's participation as a secured creditor in the dividends payable by the insolvent estate.

The rule adopted by this court is announced in the case of *Jamison* v. *Adler-Goldman Commission Co.,* 59 Ark. 548, 28 S. W. 35, and followed in *Merchants' Nat. Bank of Ft. Smith* v. *Taylor,* 181 Ark. 356, 25 S. W. (2d) 1048.

In the last case cited, we stated the rule as follows: "The rule is that when one files a claim he files it for the full amount due at that time. If his claim is secured by collateral, and he collects anything from the collateral before a dividend is paid, then his dividend is calculated on the amount reduced by the amount of the collateral collected. If there is still another collection from the collateral before another dividend, the creditor is entitled to a dividend on the amount reduced by the amount of

the collateral received. In other words, he is entitled to a dividend on the amount of his debt at the time the distribution is made, and not entitled to a dividend on the claim as originally filed, if anything has been realized from the collateral."

The above rule was followed by this court until the enactment of act 107 of the Acts of the Legislature of 1927. That part of the act of 1927 applicable is as follows: "All creditors of a bank of which the Commissioner has taken charge are classifiable either as secured creditors, prior creditors or general creditors. A secured creditor shall be a creditor (1) who has security for his debt upon the property of the said bank of a nature to be assignable under this act, or (2) who owns such a debt for which some indorser, surety or other person secondarily liable for said bank has such security upon the said bank's property, to the extent in both such instances of the value of such security. The value of the security of a secured creditor shall be determined by converting the same into money (1) according to the terms of the agreement pursuant to which such security was delivered to such creditor or in the absence of applicable terms of such agreement (2) by such creditor and the Commissioner, by agreement, arbitration, compromise or litigation, as the chancery court may direct. The expense of such conversions by such creditor and the Commissioner shall be borne as the said court may direct."

It will be observed that this act established a different rule as to the payment of dividends to secured creditors. The secured creditor files his claim, but the law provides that the value of the security of a secured creditor shall be determined by converting the same into money, according to the terms of the agreement pursuant to which security was delivered to such creditor. It will therefore be seen, if there is an agreement, that the value of the security is to be determined according to the terms of that agreement. If there are no applicable terms of such agreement, then the value of the security must be determined by the creditor and Commissioner, either by

agreement, arbitration, compromise, or litigation, as the chancery court may direct. This act establishes a new rule for the payment of dividends to secured creditors.

It was manifestly the intention of the Legislature to change the rule heretofore announced by this court as to the payments of dividends to secured creditors, but providing that the value of the security of the secured creditors should be determined in the manner named in the act.

Therefore, while the secured creditor must file his claim in the manner provided by law, he receives his dividends as provided in act 107, above referred to, and not according to the rule heretofore followed by this court.

It is the duty of the court, in interpreting a statute, to give effect to the intention of the Legislature in enacting the law; and the law enacted by the Legislature must be enforced according to such intention of the Legislature when ascertained.

When a statute is plain and unambiguous so that no doubt arises from its terms, it needs no interpretation, and courts must follow such act implicitly. Lewis' Sutherland Statutory Construction, vol. 2, 694.

This statute either means that dividends to secured creditors are to be paid according to the rule announced in the statute, or it would be meaningless.

It would serve no useful purpose to discuss the rules or authorities, because, if this statute is applicable, and we hold that it is, it must be implicitly followed.

The decree of the chancery court is affirmed.

STERNBERG *v.* SNOW KING BAKING POWDER COMPANY, INC.

4-2919

Opinion delivered March 13, 1933.

[redacted]

George W. Dodd, for appellant.

I. J. Friedman, for appellee.

MEHAFFY, J. This is a suit in replevin brought by the appellee against Browne-Brun Wholesale Grocery Company. The appellee alleged that it was the owner and entitled to the immediate possession of 259 cases of baking powder, and four nose trucks. It was alleged that the goods were placed with the appellant on consignment.

The following is the instrument under which the Browne-Brun Wholesale Grocery Company acquired possession of the goods:

"Ship. Date SNOW KING JOBBER AGENCY PLAN

"Browne-Brun Who. Gro. Co. Nov. 12, 1931.

"Ft. Smith, Ark. ADVERTISING PREMIUMS

"Cases	Size	Cans	Price	Chain-10
50	10c	48	3.70	Pana-5
250	20 25c	24	4.60	Truck-5

25 Introductory Free

12/15/31 1/3 Billed 30 days—less 2%
1/15/32 1/3 Billed 60 days—less 2%
2/15/32 1/3 Billed 30 days—less 2% Less 17% and 2%
(Stamped on face: Nov. 16, 1931. 22647)

"CONDITIONS AND AGREEMENT

"1. All orders on Snow King Baking Powder are to be shipped from jobber's stock, including all orders for advertising premiums taken by the Snow King salesman, or the jobber's salesman.

"2. The Snow King Baking Powder Company agrees to supply the jobber with advertising premiums free of charge. As these advertising premiums offers change from time to time, only a limited supply of these premiums are sent along with this order, but the premiums are sent to the jobber, without any cost to him, whenever new deals are put into effect and whenever new premiums are offered to the trade as long as this arrangement is in effect.

"3. Only jobbers operating under this plan are privileged to fill Snow King orders from their stocks. Jobbers' salesmen are notified of new deals and new premium offers from time to time when they are brought out by the Snow King Baking Powder Company.

"4. The Snow King Baking Powder Company reserves the right to withdraw this agreement, if it is impossible to effect savings by not shipping into this territory in either pool car shipments, or solid cars, because this extra profit to the jobber is only possible due to the savings in freight which the Snow King Baking Powder Company can make.

(In pencil as follows): "If any of the above payments become due before same being sold, payments to be deferred 30 or 60 days or longer if necessary or until this stock is sold by the jobber.

"Signed:

"Bowling
"The Snow King Baking Powder Co.
"Cincinnati, Ohio.

"Signed:
"Browne-Brun Gro. Co.
"Fred Browne."

The Browne-Brun Wholesale Grocery Company was adjudicated a bankrupt after suit was brought, and Henry Sternberg, trustee in bankruptcy, was substituted as defendant. The case was tried before the circuit judge sitting as a jury, and, after hearing the evidence, the court took the case under advisement, and afterwards rendered judgment in favor of the appellee. The case is here on appeal.

At the time of the hearing, appellee offered certain evidence which was excluded, some of which the court afterwards considered. The appellant requested the court to find as follows:

"(a) That the baking powder involved in the suit was sold to the grocery company, and title passed upon delivery;

"(b) That the contract in this case is evidenced by a written instrument in the form of an order signed by both parties, complete in its terms, not ambiguous and requires no explanation to enable one to understand its terms;

"(c) That the order does not establish a conditional sale, nor does the order, together with the invoice, show that same was on condition.

"Defendant requested the court to find as a conclusion of law that the title to the baking powder was vested in the grocery company, or its trustee in bankruptcy, and judgment should be for the defendant. These requests were denied."

The court at the request of appellee, found as follows:

"(a) That the sheriff has in his possession merchandise described in the writ;

"(b) That the merchandise was shipped and delivered to the grocery company under and by virtue of a jobber's agency plan, written order, duly signed by Fred Browne, president of the Browne-Brun Wholesale Grocery Company, an authorized agent of the defendant, which order provided that goods were not to be paid for until sold and were placed in storage, goods to be withdrawn by defendant as needed; an additional commis-

sion being allowed by saving expense of storage, and that title to said goods to be in plaintiff until sold; defendant being an agent for sale on account of plaintiff. The court announced its conclusion of law to be, "that, upon the facts introduced by plaintiff, title to the baking powder remained in plaintiff, * * * and that the written order designated 'jobber's agency plan, not to be paid for until sold,' in connection with the undisputed testimony of plaintiff constitutes an agency agreement, and the goods in question were consigned by the plaintiff to the defendant, * * * and that the plaintiff is entitled to judgment for possession of the baking powder."

It is first contended by the appellant that the evidence objected to and which the court afterwards considered was inadmissible, because he contends that the contract is plain and complete and contains no ambiguity.

The evidence was competent to explain certain provisions in the contract, and it was not prejudicial. The only purpose of it was to show the intention of the parties, and the trial court, believing that the contract was ambiguous, admitted the evidence for the purpose of showing the intention. Moreover, the evidence is practically undisputed.

The primary rule in the construction of contracts is that the court must, if possible, ascertain and give effect to the intention of the parties so far as this can be done consistent with legal principles. 13 C. J. 521; 6 R. C. L. 835.

And, in order to arrive at the intention of the parties, courts may acquaint themselves with the persons and circumstances that are the subjects of the statements in the written agreement, and are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they view them, and so as to judge the meaning of the words and the correct application of the language to the things described. *Inter-Southern Life Ins. Co.* v. *Shutt,* 175 Ark. 1161, 1 S. W. (2d) 801; *Coca-Cola Bottling Co. of Ark.* v. *Coca-Cola Bottling Co.,* 183 Ark. 288, 35 S. W. (2d) 579.

Evidence which tends to show the intention of the parties and does not contradict or vary the terms of the written instrument is admissible for the purpose of showing the real meaning of the words used in the instrument and the intention of the parties.

It is contended, however, by the appellant that the sale was not conditional, and that the title passed to the purchaser. The last paragraph in the contract clearly shows that the Browne-Brun Grocery Company was not to pay for any of the goods until they were sold, and the instrument does not purport to be a contract of sale. It further appears that this clause, indicating that there was to be no payment made until the goods were sold by the jobber, was written into the contract by Mr. Browne himself. We must look at the whole contract in order to determine its meaning, and ascertain what the parties themselves did under the contract, and how they construed the contract.

Unless the Browne-Brun Grocery Company sold the goods, it was not to pay for them. Moreover, the evidence on the part of the appellee shows that he talked with the representative of the Browne Company, and stated to him that the appellee was carrying insurance on the goods. This is not denied by Browne, but he simply says he does not remember.

It is not necessary that the term "conditional sale" be used in a contract, nor that there be a reservation of title to make it a conditional sale. Such reservation may be implied from the contract. 55 C. J. 1201. The facts that the appellee carried insurance on the goods, and that no payment was to be made to it until a sale by the jobber, together with the other competent evidence introduced, show clearly the intention of the parties.

The finding of facts by a judge sitting as a jury is as conclusive here as the verdict of a jury. We do not pass on the weight to be given to the evidence, nor the credibility of the witnesses.

There was substantial evidence to sustain the finding of the court, and the judgment is affirmed.

STERNBERG *v.* LIBBY, MCNEILL & LIBBY.

4-2920

Opinion delivered March 13, 1933.

George W. Dodd, for appellant.

Daily & Woods, for appellee.

MCHANEY, J. Sometime prior to the failure of Browne-Brun Wholesale Grocery Company, appellee sold it a quantity of merchandise. The order for the merchandise was signed by the grocery company's agent and contained a clause at the head of the order providing that the seller retained title and property in the goods until they were paid for in full. The goods were not paid for, and, the grocery company being in a failing condition, appellee brought replevin against it to recover the merchandise still on hand and unsold, a part of it having been sold. Shortly thereafter the grocery company was adjudicated a bankrupt, and appellant became the trustee. He was substituted as defendant in the action and filed an answer denying that appellee was the owner of the goods and entitled to the possession thereof and all other material allegations in the replevin action. A trial before the court sitting as a jury resulted in a finding and judgment for appellee.

For a reversal of the judgment against him, appellant contends (1) that the provision in the contract of sale for the retention of title in the goods was no part of the contract; and (2) that such retention of title is void as against creditors.

As to the first proposition, appellant contends that the purchaser did not notice the provision of the contract relating to the retention of title, and that it was not bound on that account. The testimony was in dispute as to whether the grocery company had notice of that provision of the contract. Appellee's agent stated that the buyer's agent knew that it was there; that it was in all their contracts. The buyer's agent said that the clause made no impression on him, and that he paid no attention to it. The court's finding against appellant is supported by substantial evidence. However, we think it would be immaterial whether the purchaser noticed that provision or not. The undisputed fact is that it was in the contract, plainly visible had the purchaser's agent desired to inform himself of the provisions of the contract. In the recent case of *Gray* v. *Brewer*, 177 Ark. 486, 9 S. W. (2d) 81, we held that "where a person signs a paper containing the terms of a proposed contract, and the paper is accepted, he is bound by its terms, whether he reads the paper or not." See also authorities cited in that case. We therefore hold that this provision is an essential part of the contract.

As to the second proposition that the reservation of title is void as against creditors, we are of the opinion that the appellant is again in error. One of the leading cases in this court holding against appellant's contention is *Triplett* v. *Mansur-Tebbetts Implement Co.*, 68 Ark. 230, 57 S. W. 261. It was there held that a contract of conditional sale is valid, regardless of the fact that it contains a provision that the purchaser may resell the property in the usual course of business, and the conditional vendor was allowed to replevin the goods from the conditional vendee's assignee in insolvency who had taken possession. See also *Swofford Bros. Dry Goods Co.* v. *Bryant*, 153 Fed. 841. This case was affirmed by the Supreme Court of the United States in *Bryant* v. *Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 29 S. Ct. 614, 53 Law. Ed. 997.

We find no error, and the judgment is affirmed.

BLAKELY & SON *v.* JONES.

4-2922

Opinion delivered March 13, 1933.

Buzbee, Pugh & Harrison, for appellant.

Wallace Townsend and *Owens & Ehrman,* for appellee.

BUTLER, J. Action for personal injury—verdict and judgment for plaintiff.

On appeal the defendant raises only two questions: (1) That the evidence fails to show any actionable negligence on the part of the defendant, and (2) That the court should have declared as a matter of law that appellee Jones was guilty of negligence which directly occasioned or contributed to the casualty causing his injury.

The injury involved in this suit was caused by appellee's Ford coupe striking the rear of appellant's truck. This happened about ten or ten-thirty P. M. about fifteen miles out from Little Rock while appellees were journeying from that city along the highway in the direction of Hot Springs. The highway is one of the principal thoroughfares of the State, and is paved with concrete. The truck belonged to the appellant, and was operated by two of its servants making daily trips between Little Rock and Hot Springs transporting freight. It had left Little

Rock on the night in question, and, at the time of the collision, was standing on the highway without any lights being displayed thereon. The claim is made by the appellant that the uncontroverted evidence establishes the fact that the stopping of the truck was unavoidable, and that the collision occurred under circumstances which made it impossible for appellants' servants, in the exercise of ordinary care, to prevent it, and therefore no actionable negligence was proved.

On the evening of the accident there were two of appellants' servants on the truck, the driver and his helper. The testimony of these two is relied upon to establish appellant's contention, and it is insisted that this evidence stands undisputed.

The driver testified that they were going to Hot Springs, the truck being loaded with furniture and other commodities, and the load weighing about 4,000 pounds; that, while driving at the rate of about thirty miles an hour, the lights on the truck suddenly went out, and because of this the truck was brought to an immediate stop. It was a dark misty night. There was no flash light or lantern or other means of making a light except matches. As soon as possible after stopping, witness got out of the truck from the left, or driver's side, on the highway and struck a match to locate the position of the truck thereon, and as he did so he saw two cars coming, one meeting him from the direction of Hot Springs and the other, which proved to be appellee's coupe, coming from the direction of Little Rock behind him; that at this time, and when first observed, the car approaching from the rear of the witness was about 200 yards distant and coming at a rapid speed. The car approaching from the front had stopped, and witness stepped upon the running board of the truck expecting the car coming from the rear to pass on his left, but, instead of doing so, it crashed into the back end of the truck. He was corroborated by his companion as to the interval of time between the stopping of the truck and the collision and that the truck was stopped because its lights had suddenly gone out. The

testimony of this witness was to the effect that, when the truck stopped and the driver got out on the left, witness got out on the right with one foot on the pavement and the other on the fender, and in this position raised the seat in order to look for a pair of pliers; that at this time the coupe struck the rear end of the truck, but that he had not seen it or any other car before the collision.

The inference to be drawn from the above testimony is that the stopping of the truck was necessary, and that the collision occurred practically simultaneously with the stopping of the truck. Under settled rules of law, this testimony could not arbitrarily be disregarded by the jury, and, if reasonable and not inconsistent with other testimony, must be accepted and would warrant the contention of the appellant. If however there were other circumstances in evidence from which a contrary inference might be drawn, then it could not be said to be undisputed, and a question would arise for the determination of the jury. In our opinion such is the state of the case raised by other testimony adduced. The evidence is clear that the truck was stopped and suffered to remain with its left wheels within one and a half or two feet of the center line of the highway. The truck was about eight feet wide and virtually blocked that part of the road intended for and used by those traveling in the same direction; also, that beyond the pavement and to the right was a space about four feet wide, a part of the highway called the shoulder, and within eighty feet of the point where the truck was stopped and on the same side of the road was an ample and convenient place where it might be parked. It is also certain that no lights were displayed or any other care taken to warn approaching cars of the presence of the unlighted truck. The appellants, in effect, say that their servants had no time to maneuver the truck to the side or to the open space nearby or to warn those approaching of danger. But on this question there was evidence warranting the conclusion that a greater interval of time elapsed between the stopping of the truck and the collision than is to be inferred

from the testimony of appellant's servants, and that they had time by the use of due care and circumspection to have taken the precautions suggested, but they negligently delayed with the intention of repairing the lighting system on the truck at the place where it was standing rather than to take the trouble to move it to a safer place or the precaution of signalling those who might approach.

These are the implications to be found in the testimony of the servants regarding the search for the pliers, a tool which then could have no use except to repair the wires of the lights, and from the testimony of a witness who was in bed but awake in an upper room not over one hundred feet distant and overlooking the highway where the collision occurred. This witness stated that, just after having gone to bed, he heard the truck approach and stop. He heard voices in conversation, and arising he went to the window and looked in the direction where he had heard the truck stop and the voices. Because of the darkness he was unable to see either the truck or the persons who were doing the talking, and retired to bed with his curiosity unsatisfied. Sometime after this—which he estimated at about three or four minutes—he heard what he judged to be a Ford car approaching and a crash, which he afterward learned was the noise of the Ford striking the rear of the truck standing where he had before heard a vehicle stop and from whence had come the voices he had heard.

On the question of the conduct of the appellee, Jones, who was the driver of the Ford coupe, and as to whether or not he was negligent in its operation, there was some evidence that the impact of the car moved the truck along the highway about ten feet and that at the time the truck was in low gear with its brakes set. Appellant argues that the proof of this physical fact and the estimates of witnesses as to the rate of speed at which Jones was driving is sufficient to show an excessive speed and a failure to keep a proper lookout ahead. We discover no evidence tending to establish the distance a truck of the

kind and situated as was this one would be moved by the impact of a Ford coupe traveling at any given rate of speed. That matter therefore must have been purely speculative with the jury as it is with us. Some of the witnesses estimated the speed of the coupe a quarter of a mile or further away from the scene of the collision at from fifty to sixty miles per hour. The estimate of another witness was thirty-five miles an hour and both of the appellees testified, one of whom was an experienced driver, that the rate at which they were traveling was from twenty-five to thirty miles per hour. Here was a direct and substantial conflict in the testimony of the witnesses of whose credibility the jury was the sole judge. On the question of keeping a lookout, it seems to us the evidence is such that different conclusions might reasonably be drawn. The witnesses all agree that the night was unusually dark, and the obscurity increased by a fine rain or mist; also that the truck had over it a dark covering and was stopped in a depression or valley, and that the appellees were on the proper side of the road. They testified that they were looking ahead and explained that the truck was stopped, as one expressed it, so as to show no "sky-line" and that, because of this and the peculiar contour of the terrain, their lights did not shine upon and disclose the presence of the truck until they were nearly to it, when, as they said, "it suddenly loomed up" before them, and then so close that they had neither opportunity nor time to avoid striking it.

In determining what is or is not negligence in any given case, the test is always what in the light of all the circumstances and in situations similar to that of the person under inquiry, one of ordinary prudence would or would not do, and where men of ordinary intelligence might differ in their honest judgment, the question of negligence is one for the jury. This is the state of case the record before us presents, and the trial court by correct instructions fairly presented the issues to the jury, which by its verdict, resolved the conflict in favor of the appellees. Its judgment is conclusive upon us.

The judgment of the trial court is therefore affirmed.