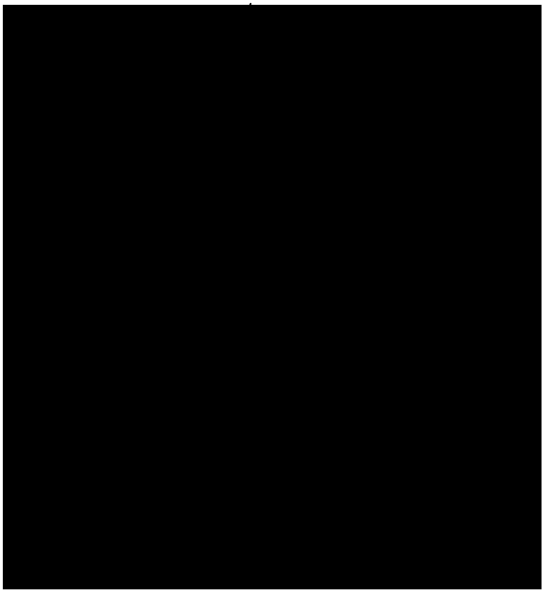

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WHITE *v.* TAYLOR.

4-2820

Opinion delivered February 27, 1933.

[redacted]

[redacted]

[redacted]

Jeff Bratton, for appellant.

Partlow & Rhine, for appellee.

KIRBY, J., (after stating the facts). It is insisted first that the court erred in refusing to transfer the cause to the chancery court that appellant might have an opportunity to show that the old bank was not really insolvent when it was declared to be so and taken over by the Bank Commissioner for liquidation. He insists that, if certain of the old bank's property wrongfully transferred to others could be recovered, it was sufficient to pay all its liability without any stock assessment. But, however this may be, this action is not the proper one to try the question of fraud or insolvency. Necessity for the levy and call of the stockholder's assessment by the Bank Commissioner was discussed at length in *Davis* v. *Moore,* 130 Ark. 128, 197 S. W. 295, where the court held that the action of the Bank Commissioner in making the assessment of liability of individual stockholders is conclusive in an action to enforce that liability. It was also said in *Poch* v. *Taylor,* 186 Ark. 618: "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 language of the section of the statute relating to assessments was copied from the National Banking Act, which had been construed by the United States Supreme Court prior to the enactment of our statute, and such construction was necessarily adopted with it. The Supreme Court of the United States said in *Casey* v. *Galli,* 94 U. S. 673, 24 L. Ed. 307, that the Comptroller's order that each stockholder should pay to the receiver the par of his stock cannot be controverted in a suit against the stockholder, saying: "It is conclusive

upon him and makes it his duty to pay. What may be done or intended with respect to other stockholders is immaterial in his case." The appellant could not question in the suit for the collection of the assessment either the necessity therefor or the right of the Bank Commissioner to levy same, and the chancery court could have no jurisdiction of this cause therefore.

It is next insisted that the stockholder's liability was not an asset and could not be assigned in the disposition of the assets for organization of the new bank. It was said in *Collman* v. *State*, 161 Ark. 362, 256 S. W. 357: "This stockholder's liability was not an asset available in the usual and ordinary course of business." See also 7 C. J. 507. Under our statute providing for liquidation of insolvent banks by the Bank Commissioner, he is authorized to maintain all necessary suits, make collections, conserve the assets and business, and, on the order of the chancery court, may sell or compound all bad or doubtful debts, and enforce, if necessary in the State or elsewhere the liability of the failed bank's stockholders. We see no reason why the Bank Commissioner, after the assessment of the stockholder's liability had been made, could not transfer and assign the claims therefor the same as he could any of the other assets of the bank in final settlement of its affairs, and certainly the purchaser of such assets of the bank, including the stockholders' assessments already made, would have the right to use the name of the Bank Commissioner in enforcing the liability, if necessary. *Waldron* v. *Alling*, 76 N. Y. Supp. 251.

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

STATE EX REL. ATTORNEY GENERAL *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND.

4-2979

Opinion delivered March 6, 1933.

Hal L. Norwood, Attorney General and *Walter L. Pope,* Assistant, for appellant.

Rose, Hemingway, Cantrell & Loughborough, Duty & Duty and *Daily & Woods,* for appellees.

SMITH, J. Separate suits were filed by the State, on the relation of the Attorney General, against C. S. Christian, W. W. Mitchell and Claude Duty. The members of the State Highway Commission and the surety upon the separate bonds of the commissioners were made parties to each of these suits. There is some confusion as to the record in the case, as the cases were consolidated for the purpose of trial. Answers were filed by all of the defendants, to which the State demurred, but the demurrers were overruled only as to the answers filed by the commissioners and their surety. The State elected to stand upon the demurrers which had been overruled, and the causes were dismissed as to the highway commissioners and their surety, and this appeal is from that judgment. The trial court does not appear to have disposed of the demurrers to the answers of Christian, Mitchell and Duty, and the causes of action against these defendants are still pending in the court below, although a brief was filed by Duty on the question of his liability, and we were

thus led to believe that the question of liability of all the defendants was before us for decision, and we proceeded to decide it. As the causes against Duty and Christian and Mitchell are not before us, we withdraw the opinion as originally handed down and limit our decision to the liability of the commissioners and their surety.

The complaints alleged that Christian, who was the State Highway Engineer, and Mitchell, who was a district highway engineer, and Duty who was an Assistant Attorney General of the State, had each been paid certain sums of money as "living expenses," in excess of their lawful salaries, and that these payments were made under the authority and direction of the members of the State Highway Commission, which action by the Commission was unauthorized by law and was in violation of the official duties of the Commissioners. Upon this allegation the Commissioners and the surety upon the official bond of each Commissioner were made party defendants in each suit.

The answers admit that certain sums of money were paid to Christian, Mitchell and Duty in excess of their fixed salaries, but alleged that this excess was paid by way of expenses, to retain their services, upon the assumption by the Commission that they possessed this authority.

The essential allegations of the pleadings are to the following effect: Christian resided in Texarkana, Mitchell in Fort Smith, and Duty in Rogers. These men were first employed—all of them—at salaries authorized by law, but they represented to the Commission that they could not continue the discharge of their respective duties unless they were allowed their living expenses in Little Rock. It was the unanimous opinion of the Highway Commission that the increased compensation demanded did not exceed the value of the services being rendered and thereafter to be rendered, but the question of the power of the Commission under the law to make the allowance arose, and a written request was submitted to H. W. Applegate, then the Attorney General of the State, for an opinion on the subject. A written opinion was rendered by the Attorney General's office in response

to this request, which was signed "H. W. Applegate, Attorney General, By Claude Duty, Assistant Attorney General." After a short review of the question, the opinion concluded with the statement that: "It is clearly my opinion that such action as mentioned in your letter is within the powers and within the legal rights of the Highway Commission to do, and you are so advised."

Thereafter the Highway Commission directed the payment monthly, to each of the three employees, of a sum equal to the estimated living expenses of such employees, while resident in Little Rock. This was in addition to their traveling expenses while engaged in the discharge of their respective duties. The right and power to pay the actual and necessary traveling expenses in the discharge of official duties is not questioned. The question for decision is the right to pay "living expenses in Little Rock," and the liability of the respective parties for an unauthorized payment on that account.

The payments of money complained of covered the period of time from July 1, 1927, when the first payment was made to Mr. Christian, to September 30, 1932, when the last payment was made to Mr. Duty, and the power of the Highway Commission during this period of time in the respect indicated is limited and defined by the following acts of the General Assembly: act 11 of the Acts of 1927, page 17; act 18 of the Acts of 1929, page 26; act 28 of the Acts of 1931, page 78.

Section 10 of act 11 of 1927, which was in effect before any of the payments here questioned were made, makes an appropriation of $280,000 to pay, among other things, "the salaries and other pay of the highway engineers employed by the Commission, the salaries and other pay of such other employees of the Commission as the Commission may deem necessary."

This act must however be read in connection with such portions of act 5 of the Acts of the Special Session of 1923 (Acts Special Session 1923, page 11) as were not repealed by the later act.

Two sections of the act of 1923 which must be considered in this connection are §§ 7 and 12. By § 7 it is provided that the Attorney General shall be the attorney

for the State Highway Commission, and that, to assist that officer in the performance of his duties, he is authorized to employ an additional assistant, to be approved by the Highway Commission, at a salary of $2,400 per year. The defendant Duty served as Assistant Attorney General during the time covered by this litigation, and was acting in that capacity when he wrote the letter to the Highway Commission above referred to.

Section 12 of act 5 of 1923 authorizes the employment of a State Highway Engineer at a salary of $5,000 per year, and that: "The salaries of the other engineers and employees shall be fixed by the State Highway Commission, but no salaries shall exceed $4,000 a year." By subsequent legislation the salary of the Assistant Attorney General was increased to $3,600.

By § 5 of act 18 of the Acts of 1929, the sum of $300,000 was appropriated to pay "all expenses of the office of the State Highway Department, expenses of the members of the Highway Commission, the salaries and expenses of the highway engineers employed by the Commission, and the salaries and expenses of such other employees of the Highway Commission as the Commission may deem necessary."

By act 28 of the Acts of 1931 (Acts 1931, page 78), there was appropriated the sum of $275,000 to pay, among other items, "the salaries and expenses of highway engineers employed by the Commission, and the salaries and expenses of such other employees of the Highway Commission as the Commission may deem necessary."

Christian, Mitchell and Duty were each paid the full amount of the salaries allowed by law, and these salaries are not questioned. The question is what expenses may be paid in addition to the salaries.

It is our opinion that the answer to this question is that the expenses contemplated by the statutes quoted are those only which were necessary and were actually incurred in the discharge of the duties of the respective employees, and that there was no authority to pay "living expenses" of any employee, as distinguished from the necessary and actual expenses incurred in the discharge of their duties. We therefore conclude that the Attorney

General was in error in the opinion furnished the Highway Commission to the effect that the salaries might be supplemented by the payment of "living expenses," in addition to the salaries, and we are of this opinion notwithstanding the allegation of the answers, which the demurrers admit, that the services of these employees, or of others equally efficient, could not otherwise have been obtained.

The law conferred no authority to pay anything more than the salaries provided by law and the expenses necessarily incident to the discharge of the duties of the defendants, Christian, Mitchell and Duty.

It does not follow however that the Commissioners are liable for the erroneous payments. As to them the question of their liability may be stated as follows: Shall a member of a public commission be held liable for a mere mistake or error of judgment in voting to pay certain expenses of employees, whom the Commission was authorized to employ, when the member in so voting acted not only honestly and in perfect good faith, but, indeed, under the written advice of the very attorney selected by the State to advise him?

The answers alleged, and the demurrers admitted, the good faith of the Commissioners. The law did not require that the members of the Highway Commission be learned in the law, and the answers alleged that none of them were lawyers. They were all called from other walks of life, and, in order that they might be advised as to their duties and as to the limitations upon their authority and powers, a law officer was designated to act as their adviser. They did not act until they had sought this advice, and the action taken accorded with the advice given. It is not contended that the Highway Commissioners acted wilfully, maliciously or corruptly; nor is it contended that they derived any profit or benefit personally from the advice asked and given.

It is not contended, on behalf of the Commissioners, that the erroneous opinion of the Attorney General changed the law or increased their power. It is contended however that the opinion of the Attorney General, through his deputy should be considered in connection

with the undenied allegations of the answers, that the Commissioners acted in good faith, and that they personally derived no profit or advantage from their action.

Counsel cite many cases defining the conditions under which members of official boards and commissions are responsible for misappropriation of public funds. We do not review these cases, as the rule already adopted in this State conforms to the rule in force in most, if not all, other jurisdictions.

The case of *Hendrix* v. *Morris,* 134 Ark. 358, 203 S. W. 1008, is typical of many other cases cited. In that case the facts were that a board of school directors, without authority of law, had purchased and operated an automobile truck for the purpose of carrying children to and from school. It was held in *Hendrix* v. *Morris,* 127 Ark. 222, 191 S. W. 949, the opinion being delivered January 29, 1917, that the directors had no authority to expend school money for this purpose. After the rendition of this opinion, suit was brought against the directors to recover the money thus expended, but it was held, to quote a headnote in *Hendrix* v. *Morris,* 134 Ark. 358, 202 S. W. 1008, that: "Where school directors act in good faith, believing at the time that they have authority under the statutes to expend money for the purposes for which they issue warrants, they will not be liable to the district individually for money so expended, even though they have no such authority."

In that case we quoted from *Sanborn* v. *Neal,* 4 Minn. 140, the following statement of the law: "As is said by the Supreme Court of Minnesota, 'Were the rule otherwise, few persons of responsibility would be found willing to serve the public in that large capacity of offices, which requires a sacrifice of time and perhaps money, but affords neither honor nor profit to the incumbent'."

We also said in this case of *Hendrix* v. *Morris,* 134 Ark. 358, 203 S. W. 1008, *supra,* that, "while it is alleged and admitted that the directors had no authority to issue the warrants for the purpose mentioned, there is no allegation that they acted wilfully or maliciously. This is essential in order to make the directors personally liable."

The case of *National Surety Co.* v. *Miller,* 155 Miss. 115, 124 Sou. 251, is a well-considered one, which reviews the legal principles here involved. The facts there were that the board of commissioners of a levee district let a contract to construct a levee, and later amended the contract to provide for increased compensation to the contractor. It was there held that this action was, not only not allowed by law, but was prohibited by the Constitution of the State, yet it was also held that, as the members of the board had acted within the scope of their general jurisdiction and in good faith, without fraud or corruption, they were not individually liable for the increased compensation which they had unlawfully paid. It was there said: "Equally is it to be said that when we create boards and commissions and invest them with high duties and powers towards the accomplishment of great public objects, if we are to subject them to actionable liability for errors of decision and judgment and cast their estates in ruin, although they acted within their jurisdiction and in good faith, we will have only insolvents in office, or else those who will be so fearful of disaster to their private fortunes and the safety of their families that the rule of their conduct will be that of nonaction or of action so feeble and halting and cautious, their performances so paralytic of the vigor of decision, that they would become little more than objects of commiseration and at last of contempt."

The case of *Russell* v. *Tate,* 52 Ark. 541, 13 S. W. 130, is cited as sustaining the opposite view. The facts there were that the mayor and council of the then town of Russellville appropriated a thousand dollars of the town's funds to build a county courthouse, and certain taxpayers of the town brought suit to enjoin the payment of this money, and to recover the part thereof already paid out. The relief prayed was granted, but, in granting the relief the court said: "As against the liability of these defendants, it is contended that a city council being in some sort a legislative body, its members are not liable for the erroneous exercise of their discretion in voting upon measures before them. This is true. [Citing cases.] But where, after exercising their discretion in voting

$1,000 of the money of the town, to pay an obligation which they and a few others had bound themselves to discharge, they or their building committee *took the money*, it was a conversion of trust funds, for which each of them, as also the mayor who ordered, and the treasurer who made, the payment, are liable.'' [Citing cases.]

It will be observed that the principle upon which the liability was sustained was not for the authorization of the appropriation, but for the subsequent conversion of the money appropriated. In the instant case there is no contention that the Commissioners converted or received any of the money which they had ordered paid without authority. Had this been done, the case of *Russell* v. *Tate* would apply.

As to the liability of the surety upon the bonds of the Commissioners, but little need be said. The execution of the bond added nothing to the liability of the Commissioners, as the purpose of the bond was to insure the faithful performance of the official duties of the Commissioners, and no official act of theirs would constitute a breach of the bond unless such act would, without a bond, amount to a breach of official duty. The principal not being liable, the surety cannot be held.

It follows, therefore, that the demurrers to the answers of the Commissioners and their surety were properly overruled, and the judgment dismissing the suits against them is affirmed.

DUGAN *v.* BROWNE.

4-2870

Opinion delivered March 13, 1933.

[redacted]

[redacted]

[redacted]

George P. Whittington and *Cooper B. Land,* for appellant.

Walter J. Hebert and *C. Floyd Huff,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists first that the court erred in not giving her requested instruction No. 1, which would have submitted the only question in the case to the jury. The undisputed testimony shows that appellee leased the premises that they had been occupying for some time before the leases were executed; that they executed the leases, and, after some time occupancy of the premises thereunder, under conditions about as theretofore under their monthly occupancy, they and each of them, without giving notice of any complaint or claim of forfeiture because of failure to furnish service that they regarded themselves entitled to under the terms of the leases, abandoned and vacated the premises and took offices in the new building upon its completion which they had contracted for before the execution of the leases to appellant. If there was such a failure upon the part of the lessor to furnish the service as agreed to be furnished in the leases as would have warranted forfeiture, appellant would have had the right to notice of such claim and a reasonable opportunity to remedy or repair the condition before appellees would have been justified in abandoning and vacating the building. The failure, if any, to furnish the service agreed to be furnished was not shown to have been complete at any time, nor sufficient to prevent the continued occupancy of the offices, but at most to render some of them occasionally uncomfortable for only a short time; most of the tenants who complained on account of it being able to supply the service needed at a very small outlay of expense—a negligible amount as compared with the rent reserved and to be paid. Under such circumstances, according to the undisputed proof, the tenants should have furnished or procured the service and taken credit therefor on the rent account, and were not warranted in abandoning the premises because of any such claim of failure. In other words, the testimony does not show any substantial failure upon the lessor's part to furnish the services agreed to be furnished in the leases as would have warranted the abandonment of the premises by the tenants under a claim of forfeiture. *Ashmore* v. *Hays,* 159 Ark. 234, 252 S. W.

11. See also *Tedstrom* v. *Puddephatt,* 99 Ark. 193, 137 S. W. 816; *Williams* v. *Shaver,* 100 Ark. 565, 140 S. W. 740.

The said requested instruction No. 1 not only should have been given, but No. 9 as well. In fact, the appellees admitted the execution of the leases and occupancy of the premises and their vacation thereof before the expiration of the time stipulated without payment of the rent, attempting to justify their conduct by a claim of forfeiture of said leases because of the default of the landlord in supplying the service agreed to be furnished under their terms. The testimony introduced in support of the claim of forfeiture and justification of the tenants' vacation of the premises was insufficient to establish the right thereto, and the court would have been warranted in directing a verdict in favor of appellant.

The judgment herein will be reversed, and the cause remanded for a new trial. It is so ordered.

BELOATE *v.* STATE EX REL. ATTORNEY GENERAL.

4-2824

Opinion delivered March 13, 1933.

W. E. Beloate, for appellant.

R. C. Waldron and *E. H. Tharp,* for appellee.

SMITH, J. The Attorney General commenced this suit under act 296 of the Acts of the General Assembly of 1929 (page 1235), to confirm the State's title to certain lands which had forfeited to it for the nonpayment of the taxes due thereon. The complaint described a certain forty-acre tract of land, which was alleged to have been sold in 1928 for the 1927 taxes.

W. E. Beloate, Jr., filed an answer, alleging his ownership of the forty-acre tract referred to, and a cross-complaint, in which Arthur Friar was made a cross-defendant, which pleading alleged that Friar had taken possession of the land under a donation certificate from the State based upon said sale for taxes.

It was alleged that the tax sale was void for the following reasons: (1) That the county court clerk, upon delivering the tax books to the tax collector, failed to attach a warrant to collect the taxes as provided by § 10,016, Crawford & Moses' Digest; (2) that the collector failed to file a delinquent list as required by § 10,082, Crawford & Moses' Digest, on or prior to the second Monday in May, 1928; and (3) the clerk failed to post a delinquent list in his office as required by § 10,084, Crawford & Moses' Digest.

A demurrer and motion to dismiss was filed by Friar, upon the ground that Beloate, the cross-complainant, "had never, at any time, tendered him any sum whatever for the amount of taxes paid, nor any sum for any improvements made, and the complaint does not so state."

There was no amendment to the cross-complaint to meet the allegations of the demurrer and motion to dismiss, which was sustained by the court and the cross-complaint was dismissed.

For the reversal of the decree of the court below it is insisted that cross-complainant was not required to comply with the provisions of § 3708, Crawford & Moses' Digest, by making tendor of taxes paid and improvements made, and was not, therefore, required to make that showing. This section reads as follows: "No person shall maintain an action for the recovery of any

lands, or for the possession thereof, against any person who may hold such lands by virtue of a purchase thereof at a sale by the collector, or Commissioner of State Lands, for the nonpayment of taxes, or who may have purchased the same from the State by virtue of any act providing for the sale of lands forfeited to the State for the nonpayment of taxes, or who may hold such lands under a donation deed from the State, unless the person so claiming such lands shall, before the issuing of any writ, file in the office of the clerk of the court in which suit is brought an affidavit setting forth that such claimant hath tendered to the person holding such lands in the manner aforesaid, his agent or legal representative, the amount of taxes and costs first paid for such lands, with interest thereon from the date of payment thereof, and the amount of taxes paid thereon by the purchaser subsequent to such sale, with interest thereon, and the value of all improvements made on such lands by the purchaser, his heirs, assigns or tenants, after the expiration of the period allowed for the redemption of lands sold for taxes, and, that the same hath been refused."

This statute was construed in the case of *Anthony* v. *Manlove,* 53 Ark. 423, 14 S. W. 624, where it was referred to as § 2649, Mansfield's Digest, and Judge HEMINGWAY, there speaking for the court, said of it that, "being penal in its nature, it should be strictly construed." Being thus construed, the benefit of the statute may not be invoked by one in possession under a donation certificate merely, such as Friar held, but only by one, as applied to the facts of this case, "who may hold such lands under a donation deed from the State."

The Legislature has thus made a distinction between the holder of a certificate of donation and one who holds a donation deed. The reason for the distinction is, no doubt, that the holder of a donation certificate may never sufficiently comply with the requirements of the law to be entitled to a deed, by living upon the land in a house habitable at all seasons of the year, and by making proof of his improvements, etc. But, whatever may have been

the reason, the statute does not require a tender of the taxes and costs for which the land sold, nor of the value of the improvements made, to one in possession under a donation certificate. The original owner may therefore bring suit to cancel a void tax sale and the donation certificate based thereon without being required to make a tender of the taxes and the value of the improvements, and the court therefore was in error in dismissing the cross-complaint for failure to allege such tender.

If the cross-complainant shall establish the allegation that the tax sale was void, the court would, no doubt, ascertain the value of any improvements made upon the land by the donee by virtue of his certificate of donation under § 10,120, Crawford & Moses' Digest, and require the payment thereof as a condition upon which a writ of possession might issue. This section provides that for improvements made after two years from the date of the tax sale "the purchaser shall be allowed the full cash value of such improvements, and the same shall be a charge upon the land." This section has been construed to give the tax purchaser the right to make improvements without exacting the showing of belief in the integrity of his title which is required by the Betterment Act. *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. 180, 241.

The decree of the court below is therefore erroneous, and the cause will be remanded with directions to overrule the demurrer and motion to dismiss the cross-complaint.

GROSS *v.* HOBACK.

4-2901

Opinion delivered March 20, 1933.

W. O. Young, W. D. Mauck and *J. T. McGill,* for appellant.

Duty & Duty, for appellee.

SMITH, J. Mrs. Maude Hoback brought this suit in the Benton Chancery Court against the administrator and heirs at law of John R. Gross, deceased, for the purpose of having her title established and declared to certain personal property which she alleged Mr. Gross had given her. The property consisted of $10,100 in United States bonds, a time deposit in the Benton County National Bank of $6,090, and a checking account in the same bank of $129.65, and two promissory notes payable to the order of Mr. Gross, one for $1,510, the other for $100. The court found that this property had been given to Mrs. Hoback by Mr. Gross, and from a decree based on that finding is this appeal.

The testimony in the case is to the following effect: Mr. Gross removed to this State from Tennessee many years ago, and was followed later by J. T. Grimsley, a nephew. No other relative removed to this State.

Mrs. Hoback testified that her mother gave her to Mr. Gross three days before her mother died, and that she was one year old on the date of her mother's death. This little orphan grew up in the home of Mr. and Mrs. Gross, who called her "daughter," and she called them "papa" and "mamma," and lived with them as their

child until her marriage, although she was never legally adopted as a child.

Upon the death of Mrs. Gross, who died before her husband, Mrs. Hoback and her husband abandoned their own home and removed to the home of Mr. Gross, where they continued to reside until the death of the latter. Mr. Gross made out a list of the personal property above described, which he gave to Mrs. Hoback, in the presence of his wife, stating at the time that he and Mrs. Gross desired her to have their property after both were dead. This list was made out about two years or more before Mr. Gross died. After Mrs. Hoback moved to the Gross home, Mr. Gross told her where his money and valuable papers were, and gave her, at the time, the key to his dresser drawer and the key to his lock box at the bank, and she retained these keys thereafter continuously. The government bonds were kept at the bank, but were not kept in the lock box. The cashier of the bank explained that they were kept in the vault of the bank in order that they might be insured.

There was a bill folder in the dresser drawer which contained the promissory notes and the bank's receipt for the government bonds. There does not appear to have been any paper in the bill folder relating to the bank deposits.

Mr. Gross had been in good health prior to the day of his death, and had worked that day at a factory, coming home at the usual time. He became violently ill that night, and Mr. and Mrs. Morris, his nearest neighbors, were called in, and he said to Mr. Morris: "I have sent for you to tell you about my business. I don't know what will happen to me before morning if this pain keeps on. I sent for you to tell who is to have my property." He then said: "Everything I have got is Maude's (Mrs. Hoback's), including land, personal property, notes and bonds, with the exception of $100, to go to Keith Grimsley," his nephew, who later administered on his estate. Nothing was said about a will, but the witnesses to the statements of the dying man later reduced the statements to writing in an effort to establish a nuncupative will. This attempt was abandoned because the value of the

property exceeded $500. Section 10,497, Crawford & Moses' Digest.

It is insisted, however, that this testimony shows there had been no prior gift, as Mr. Gross was then apparently attempting to make an original disposition of his property, which would not have been necessary had he previously disposed of it. But this is not, in our opinion, the only inference, nor the proper one, to be adduced from the testimony of Mr. and Mrs. Morris, who had no interest whatever in the litigation. Mr. Gross was a man of limited business experience, otherwise he would have made a will on the night of his death, if not before, to carry into effect his steadfast purpose to give his "Daughter" all his property, except $100. We think the testimony of Mr. and Mrs. Morris confirms, rather than questions, the fact that the personal property had been already given to Mrs. Hoback.

Another circumstance, which it is insisted refutes the theory that the personal property had been given to Mrs. Hoback, is that Mrs. Hoback allowed the bill folder to remain in the dresser drawer until the administrator took charge of the bill folder and made an inventory of its contents. We think, however, that this circumstance, when viewed in its proper light, shows only the simplicity and honesty of these people. Mr. Grimsley, the nephew, became the administrator. As a nephew, he was one of the heirs, and his testimony against his own interest as an heir carries conviction. Mrs. Hoback knew the nature and value of the contents of the bill folder, but she left it undisturbed, although she had the key to the drawer which contained it until it had been inspected by the administrator. Mr. Grimsley testified that his uncle told him frequently that he intended for Mrs. Hoback to have his property, and, while he made an inventory of the personal property as administrator, he stated his reasons for so doing as follows:

"Q. You knew at the time you took charge of it and inventoried it Maude Hoback was claiming it? A. Yes, sir; I knew she was the legal heir to it. Q. Why did you include it as a part of the assets of the estate? Why you inventoried it and took charge of it? A. In order that it

could go to its rightful owner. Q. She told you herself and claimed the property as her own at the time, didn't she? A. I disremember the exact words that were said; it was something to that effect; the lawyer advised us that it would have to go through court, be an administrator appointed, before I could turn it over to her. Q. You knew she was claiming the property? A. Yes, sir. Q. You know Mr. Gross had told you some time previous he had given it to her? A. Yes, sir."

Without further recitation of the testimony, it may be said that it appears certain that Mr. Gross intended that Mrs. Hoback should have all of his property, except the $100, and, if proof of this intention only were required, the case would be a very simple one, as Mr. Gross' intention is established beyond question. But something more is required to make this intention effective, as the mere intention to make a gift does not suffice to pass title. There must be a delivery, actual or constructive, of the gift, so that the donor parts with, and the donee acquires, possession and title.

It must be confessed that the record before us presents a close question as to whether there was such a delivery as to pass title to the personal property described, but we have concluded that the testimony sustains the chancellor's finding in this respect except as to the bank deposits. Mrs. Hoback testified, upon her cross-examination, that her father could have retaken this property had he wanted to, and that she would have made no question had he done so, but we understand from this testimony that she meant only to say that she would have permitted her father to retake the gift, but she did not concede that there had been no gift. It must be remembered that these were simple people, who evidently had no thought that the far-away heirs would question their actions. The only heir present or with whom they were in touch understood the transaction and does not question it. The bill folder contained the notes and the receipts for the bonds, and its possession was given to Mrs. Hoback when Mr. Gross delivered to her the key to the drawer in which it was contained, thus placing in her

hands the means of obtaining possession of the gift and of excluding others from it.

We do not review the numerous cases cited by opposing counsel, as the law of the subject has been definitely settled by our own decisions. It must be remembered also that this was a transaction, not between strangers, but between an old man and a woman who regarded each other as father and daughter. A headnote to the case of *Baker* v. *Applen,* 181 Ark. 454, 26 S. W. (2d) 109, reads as follows: "The rule as to delivery of gifts is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as delivery acts which would not be so regarded if the transactions were between strangers living in different places; it not being required that the thing given should be removed from the common residence."

The bill folder contained the notes and the receipt for the bonds, but it contained no muniment of title to the bank deposits. It does not appear whether Mr. Gross had a pass-book or deposit certificates covering his bank accounts, but, if so, they were not in the bill folder. We are therefore constrained to distinguish between the deposits and the other property. The distinction may appear somewhat artificial in view of our statement that the intention of Mr. Gross that Mrs. Hoback should have all his property was clearly established, but the distinction exists nevertheless. The intention to give is not sufficient; there must be a delivery to consummate the gift and to pass the title. There was such a delivery of all the personal property except the bank deposits, and, as to these, nothing passed from Mr. Gross to Mrs. Hoback evidencing the title thereto.

That part of the decree relating to the bank deposits must be reversed, and the cause will be remanded with directions to the administrator to account to the heirs at law for the amount of the deposits. In other respects, the decree is affirmed.

COBB *v.* FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA.

4-2886

Opinion delivered March 20, 1933.

[redacted]

Horace Chamberlin, for appellant.

Verne McMillen, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee in the circuit court of Pulaski County, Second Division, to recover $1,580 on account of damage caused by fire to a building owned by C. W. Greenwood and insured by appellee.

The gist of the complaint was to the effect that C. W. Greenwood and wife executed notes and a mortgage to secure same on the property for $3,500 to the Exchange Trust Company, agent, which notes and mortgage were assigned to appellant for a valuable consideration on June 9, 1931, at which time the property was insured against loss by fire in favor of C. W. Greenwood and his mortgagee, as his interest might appear, in the sum of $3,000. The policy was obtained through the agency of Rightsell-Pearson-Collins-Barry-Donham, Inc., in the Southern Fire Insurance Company. When the policy expired on January 18, 1932, said agency renewed the policy in appellee company, which it represented at the time, and charged the premium of $22.50 to C. W. Greenwood, who had a regular account with said agent. The renewal policy contained a mortgage clause providing that any loss thereunder should be paid to Rightsell-Pearson-Collins-Barry-Donham, Inc., agents, and that appellee and

said agency knew that appellant was the owner of the mortgage and placed the mortgage clause in the policy for appellant's benefit. The policy also contained a provision that, in the event the owner of the property failed to pay any premium due on the policy, the mortgagee, on demand, should pay same. Appellee reserved the right in the policy to cancel same as to the mortgagee (appellant) if he failed to pay the premium after ten days' notice of Greenwood's failure to pay same. C. W. Greenwood failed to pay the premium, and on February 6, 1932, said agency, without notice to appellant, the mortgagee, of Greenwood's default, credited Greenwood's account with the amount of the premium and canceled and returned the policy to appellee. On March 29, 1932, the property was damaged by fire to the amount of $1,580, and appellee refused to pay appellant the loss sustained, under the mortgage clause, and the prayer of the complaint is for judgment for said amount.

A demurrer was sustained to the complaint, and the complaint dismissed, from which is this appeal.

In sustaining the demurrer and dismissing the complaint, the trial court proceeded upon the theory that Rightsell-Pearson-Collins-Barry-Donham, Inc., was not only the agent of Greenwood and appellee for writing and canceling the policy, but was also the agent of appellant, mortgagee, for consenting to the cancellation.

This court ruled in *Fireman's Insurance Company* v. *Simmons,* 180 Ark. 500, 22 S. W. (2d) 45, that, if an insured authorizes a fire insurance agent to insure his property in any company the agent represents, the general authority thus conferred authorizes the agent to waive a cancellation notice and renew the insurance in another company for the insured. This rule, however, has no application to a mortgagee who conferred no such authority on the agent of the owner of the property. Without such an understanding, express or implied, between the mortgagee and the agent, the agent would have no authority to waive notice of cancellation of a policy to the insured and leave the mortgagee unprotected. Under the terms of the policy, the mortgagee was entitled to ten days' notice of cancellation, so that he might pay the pre-

mium himself and continue the policy or obtain insurance elsewhere. According to the allegations of the complaint, he was not notified of the cancellation at all, although both the insured and its agent had knowledge that he (appellant) was the mortgagee.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to overrule the demurrer and reinstate the complaint.

McHaney, J., dissents.

Western Union Telegraph Company *v.* Clark.

4-2925

Opinion delivered March 20, 1933.

Francis R. Stark and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

R. H. Peace and *T. D. Wynne,* for appellee.

Humphreys, J. This is an appeal from a judgment for $1,000 recovered by appellee from appellant in the circuit court of Calhoun County as damages for appellant's alleged negligence in failing to deliver a telegram

to her in time for her to have attended her mother's funeral. Appellee's brother, D. Anderson, sent a telegram from appellant's office in Pine Bluff between seven and eight o'clock on the morning of March 20, 1930, to appellee at Thornton, Arkansas, telling her that her mother was dead and would be buried the next morning at 11 o'clock at Mt. Carmel church. The message was directed to "Miss" Daisy Clark at Thornton, Arkansas, and signed D. Anderson. It was received by appellant's agent, O. E. McGoogan, at 8:15 o'clock A. M. on the morning it was sent, but was never delivered to appellee, for whom it was intended. The message was addressed to "Miss" Daisy Clark. Mrs. Daisy Clark was a widow, and the only Daisy Clark in Thornton, which town had a population of about 200 people. She lived 130 yards from appellant's office. When the message arrived, Walter Davidson and a boy by the name of James were in the office, and Davidson testified that the agent inquired of him about Miss Dixie Clark, and that he informed the agent that she had been visiting the James family but had returned to her home in Carthage, and that "Mrs." Daisy Clark lived about 130 steps from the station or office. The agent, McGoogan, testified that he inquired of Walter Davidson and the James boy if either knew Miss Daisy Clark and was informed that she had been visiting the James family and had returned to Carthage, her home. The girl who had been visiting the James family was "Dixie" and not "Daisy" Clark. The agent made no further inquiry, but repeated the message to the Carthage office and received an answer that Daisy Clark could not be found; and, after notifying the Pine Bluff office that Miss Daisy Clark could not be found, he filed the message. Two weeks thereafter, Mrs. Daisy Clark received a letter informing her of her mother's death and burial, together with the information that her brother had wired the day of her mother's death; whereupon she called on the agent at Thornton and received the message in a sealed envelope from him. The agent's excuse for not delivering the telegram was because it was addressed to "Miss" instead of "Mrs." Daisy Clark. With reference to the address, Anderson testified that he called

at the office of appellant in Pine Bluff and told Miss Scott, who was in charge of the office, that he wanted to send a telegram to Mrs. Daisy Clark at Thornton, stating that her mother had died and would be buried the next day at Mt. Carmel church, and that she wrote the message on a blank, which he signed without reading it or knowing that she had directed it to "Miss" Daisy Clark. Miss Scott testified that she wrote the telegram at the request and under the direction of Mr. Anderson, and that she read it to him as written before he signed it. Lionel Robinson testified that he had worked in the postoffice seven years and had the agent inquired of him where Miss Daisy Clark lived, he would have directed him to Mrs. Daisy Clark. Over the objection and exception of appellant, the following question was propounded to Lionel Robinson and answered by him:

"Q. If the Western Union agent had gone to you at the postoffice inquiring for Miss Daisy Clark, could you have directed him to Mrs. Clark here? A. I don't know whether I could have directed where she lived, but I knew her and knew her to be there."

Mrs. Clark testified that she would have understood that a telegram directed to Miss Daisy Clark was intended for her, and that she would have received the message if it had been offered to her, and would have gone to the funeral had she received it. The testimony tended to show that, when she received the information that her mother had died and been buried without getting to see her and attend her funeral, she was greatly shocked and grieved, so much so that her nerves were shattered, resulting in a loss of weight and a general breakdown. That, after the breakdown, she lost her appetite and suffered from insomnia until she could not perform her household duties, and was compelled to send for her daughter to take care of her and attend to her business.

Over the general and specific objection of appellant, the court gave appellee's requested instruction No. 1, and, over its general objection, gave appellee's requested instruction No. 2. The specific objection to instruction No. 1 was that the undisputed testimony showed that the tele-

gram was not addressed to appellee but was addressed to a "Miss" Daisy Clark, Thornton, Arkansas.

The general objection to instruction No. 2 was that it is inherently wrong.

Appellant contends for a reversal of the judgment on the ground that the undisputed testimony reflects that it was not guilty of any negligence. We cannot agree with learned counsel for appellant in their interpretation of the evidence. The mere fact that the telegram was directed to "Miss" instead of "Mrs." Daisy Clark is no excuse for not making diligent inquiry as to the whereabouts of the party for whom the message was intended. Had he made inquiry at the postoffice, he would have been directed to Mrs. Daisy Clark, who was well known in the small town of Thornton, and who was the only Daisy Clark residing there. Wallace Davidson told the agent that Mrs. Daisy Clark lived only 130 steps from the telegraph office. He knew the importance of the message and should have gone to see if the message was intended for Mrs. Clark. The slight inquiry and effort made by the agent to deliver the telegram to the sendee for whom it was intended showed an indifference on his part rather than diligence, and clearly warranted the submission to the jury of the issue whether appellant exercised reasonable diligence to deliver the telegram to the party for whom it was intended. This court ruled in the case of *Arkansas & La. Ry. Co.* v. *Stroud,* 82 Ark. 117, 100 S. W. 760, that: "A mistake in one of the initials of the person to whom a telegram was sent did not excuse the telegraph company for failure to deliver the telegram, unless the mistake caused or contributed to the failure." It cannot be said, as a matter of law under the evidence in the instant case, that the mistake in the use of "Miss" for "Mrs." caused or contributed to the failure to deliver the message, had the agent exercised reasonable diligence. Again, it is a disputed question of fact as to whether the sender of the message or appellant's agent at Pine Bluff made the mistake. We think the mistake wholly immaterial because delivery of the message could have been made, notwithstanding the mistake, had the agent exercised reasonable diligence in his search for the real sendee. 37 Cyc., p.

1673, and Arkansas cases cited therein in support of the rule.

Appellant also contends for a reversal of the judgment because the reverse side of the telegram required appellee to present a claim for her damages to appellant within sixty days after the message was received, which she failed to do. According to the record before us, this defense was not relied upon in the trial below and cannot be raised on appeal for the first time. *Western Union Telegraph Co.* v. *Freeman,* 121 Ark. 124, 180 S. W. 743.

Appellant also contends for a reversal of the judgment because the court allowed Lionel Robinson, an employee at the postoffice, to testify that, had the agent of appellant made inquiry of him, he would have directed him to go to Mrs. Daisy Clark. We think the testimony admissible because the law required that the agent, in the exercise of reasonable diligence, should make inquiry as to the identity of the sendee. The most likely place he could have obtained this information was at the postoffice.

Appellant also contends for a reversal of the judgment because the court gave appellee's requested instructions Nos. 1 and 2. Identical instructions were approved by this court in the case of *Arkansas-Louisiana Ry. Co.* v. *Stroud, supra,* the facts in the two cases being almost parallel.

Lastly, appellant contends for a reversal of the judgment because the verdict is excessive. According to the record, appellee was greatly shocked when she received information of the death and burial of her mother without an opportunity on her part to see her mother before she was buried and to attend the funeral. The shock was so intense that it shattered her nervous system to such an extent that she lost her appetite and her ability to sleep and to perform her household duties and attend to her business affairs. She was compelled, as a result of the shock, to send for her daughter to take care of her and attend to her business. Considering these results, we do not think $1,000 is an excessive verdict.

No error appearing, the judgment is affirmed.

Mr. Justices SMITH and McHANEY dissent from the affirmance of the amount of the verdict.

SMITH, J., (dissenting). The negligence of the telegraph company had nothing to do with the death of the plaintiff's mother; indeed, the purpose of the telegram was to apprise the plaintiff of that fact. It cannot be, and is not, contended that the telegraph company should make compensation, in whole or in part, for the grief which plaintiff sustained on account of her mother's death. The telegram, if promptly delivered, would have caused this anguish.

It may be assumed, and the jury no doubt found, that the plaintiff was not lacking in filial affection, and that her grief was augmented by the negligence of the telegraph company in failing to deliver the telegram promptly, as it should have done. But the plaintiff had not lived with her mother for many years, and had grown children of her own, and, as was said in the case of *Western Union Telegraph Company* v. *Wemiski,* 84 Ark. 457, 106 S. W. 486, where the failure to deliver a telegram had caused a sister not to attend the funeral of her brother, her only deprivation, on account of the failure to deliver the telegram, was the melancholy pleasure of attending the funeral and the satisfaction of having fully discharged her duty to the dead. In that case the plaintiff, who was a sister of the deceased, was awarded judgment for $1,354, which the court said was so grossly excessive as to call for the reversal of the judgment, regardless of any other error in the proceedings.

In the case of *Western Union Telegraph Co.* v. *Evans,* 108 Ark. 39, 156 S. W. 424, the youngest child of a mother was deprived of the sad satisfaction of attending his mother's funeral by the negligence of the telegraph company in failing to deliver a telegram which would have advised him of his mother's death. A judgment for $3,000 was said to be so grossly excessive that it would be reversed unless a remittitur was entered reducing the judgment to $500.

In *Western Union Telegraph Co.* v. *Rhine,* 90 Ark. 57, 117 S. W. 1069, the negligent failure to promptly deliver a telegram deprived a mother of the opportunity to

attend the funeral of her son, and a judgment for $750 was said to be so excessive that it would be reversed unless there was a remittitur of all sums in excess of $400.

After some diligence I have failed to find in our reports or in those of any other appellate court any case in which a judgment for a sum as large as the judgment here appealed from has been affirmed where the only element of damage was the deprivation of the opportunity to attend a funeral, and the majority cite no such case. It is impossible, of course, to measure with any degree of accuracy or certainty the suffering thus occasioned, but the damages awarded on that account should be fair and reasonable. There is absent any testimony upon which to base a verdict for punitive damages.

I think the verdict is excessive and that a remittitur should be ordered in some amount not less than $500.

Mr. Justice McHaney concurs in the views here expressed.

East St. Louis Cotton Oil Company *v.* Hutchins.

4-3011

Opinion delivered March 20, 1933.

C. W. Norton, for petitioner.

Jonas F. Dyson, for respondent.

KIRBY, J., (after stating the facts). Petitioner insists the court was without jurisdiction to appoint receivers or administer or liquidate the assets of the insolvent corporation of a class covered by the National Bankruptcy Act. Jurisdiction was invoked "by petition of creditors signed by respondent Dendy on behalf of himself and other creditors who might wish to join," etc. It was alleged the corporation was insolvent, with a prayer that it be adjudged so, and the court took charge of the

assets, administering same under the said insolvency statute of Arkansas.

"The insolvency laws of Arkansas were suspended by the Bankruptcy Act of Congress of July 1, 1898, * * * and since that date have remained and are now in abeyance, in so far as they relate to the same subject-matter and affect the same persons as the act of Congress, which is still in force." *Hickman* v. *Parlin-Orendorff Co.,* 88 Ark. 519, 115 S. W. 371. See also In re *Weedman Stave Co.,* 199 Fed. 948, and *Morgan* v. *State,* 154 Ark. 273, 242 S. W. 384.

In *International Shoe Co.* v. *Pinkus,* 278 U. S. 260, 73 L. ed. 318, it was said:

"The question is whether, in the absence of proceedings under the Bankruptcy Act, what was done in the chancery court protects the property in the hands of the receiver from seizure to pay the judgment held by plaintiff in error," and concluded: "State laws governing distribution of property of insolvents for the payment of their debts and providing for their discharge are superseded by the National Bankruptcy Act." See also Remington on Bankruptcy, §§ 2106-7.

It follows that the court was proceeding to act without authority, the State insolvency laws having been superseded and suspended, and its orders were void; and the writ of prohibition is granted prohibiting any further proceeding in the matter by the said court.

McDANIEL *v.* PRAIRIE COUNTY.

4-2918

Opinion delivered March 20, 1933.

Craig & Craig, for appellant.

Emmet Vaughan, for appellee.

KIRBY, J., (after stating the facts). The statute expressly allows restoration and reinstatement of a claim and order of the court thereon, §§ 8342-43, Crawford & Moses' Digest.

The petition was sufficient, and was not only verified by affidavit of the petitioner, but was supported by affidavits of the former county judge, who made the allowance, the county clerk, who filed it, and the road overseer, under whose supervision and direction the work for which the claim was presented was done.

There is no question about notice, since the county appeared and resisted the proceeding, which was one, as already said, to restore and reinstate a lost order and claim and not to procure the allowance of a claim against the county in the regular course.

The court erred in sustaining the demurrer to the complaint upon the two counts as alleged, since, if the order of allowance were reinstated in conformity with the allegations of the petition, it would have the same force and effect and relate back and take effect from the time when the original allowance, judgment or decree was rendered. *Id.,* § 8343.

Neither could the right to the reinstatement be defeated by any contention that the original claim was not itemized according to law, nor that the claim was barred under the provisions of the Constitution as set forth in Amendment No. 10 thereto, the claim as originally made having been duly allowed with no appeal therefrom.

As already said, this is not a proceeding to verify or collect the claim, in which such contention could have been made if the conditions warranted, but only to restore the record, the order of allowance of the claim long since properly made, the original claim as presented for such allowance, and their reinstatement upon the records of the court. *Chicago Title & Abstract Co.* v. *Hagler Special School District,* 178 Ark. 443, 12 S. W. (2d) 881; *Williams* v. *Dawson,* 185 Ark. 1190, 46 S. W. (2d) 634.

The court erred therefore in sustaining the demurrer and dismissing the complaint, and the judgment is reversed and the cause remanded with directions to overrule the demurrer and for further proceedings according to law.

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

4-2858

Opinion delivered March 20, 1933.

Rose, Hemingway, Cantrell & Loughborough, J. W. House, C. H. Moses and *W. H. Holmes,* for appellant.

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

MEHAFFY, J. The town of West Memphis was incorporated March 21, 1927, and on May 14, 1930, the town council of West Memphis passed an ordinance granting to Charles E. Sullenger, his heirs and assigns, the exclusive right and privilege to use the streets, alleys, avenues and public grounds of said town for the purpose of maintaining and operating a system of poles, wires, transformers and other appliances necessary for the distribution of electric current for lighting and furnishing power for manufacturing and other purposes for public and private use in said town for a term of thirty years, which franchise rights and privileges the said Sullenger, on that date, accepted.

Thereafter, on August 15, 1930, for a good and valuable consideration, Sullenger transferred and assigned

all the franchise rights and privileges granted to him under said ordinance to the West Memphis Power & Water Company.

The West Memphis Power & Water Company constructed its system for electrical distribution, and was ready for operation on November 9, 1930. It has had at all times since that time sufficient power and equipment, and has been ready and willing to supply all necessary electrical current for the use of the inhabitants of said town, according to the terms and provisions of said franchise.

The Arkansas Power & Light Company built its electrical lines prior to the granting of the ordinance above mentioned, and prior to the incorporation of the town of West Memphis.

The appellant claims the right to operate because of having constructed its poles and equipment under the authority of § 4043 of Crawford & Moses' Digest, which reads as follows: "Any corporation organized under the laws of this State for the purpose of generating, transmitting, and supplying electricity for public use may construct, operate and maintain such lines of wire, cables, poles, etc., necessary for the transmission of electricity along and over the public highways, and the streets of the cities and towns of the State or across or under the waters, and over any lands or public works belonging to the State, and on or over the lands of private individuals, and upon, along and parallel to any railroad or turnpike of this State, and on and over the bridges, trestles and structures of such railroads; and in constructing such dams as the corporation may be authorized to construct, for the purpose of generating electricity by water power, may flow the lands above such dams with backwater resulting from such construction. Provided, the ordinary use of such public highways, streets, works, railroads, bridges, trestles, or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes; and provided, further, that the permission of the proper municipal authorities shall be obtained for the use of such streets."

The appellant contends that its contract with the State was violated by granting the ordinance to the appellee, and that the former decision of this court in *Arkansas Power & Light Co.* v. *West Memphis Power & Water Co.,* 184 Ark. 206, 41 S. W. (2d) 755, recognizes the appellant's right to continue its service in West Memphis.

We do not agree with appellant in this contention. The court said in that case: "By act of the General Assembly, *supra,* any corporation organized for the purpose of generating, transmitting and supplying electricity for public use was permitted to construct its lines over the public highways. Therefore appellant's rights to the use of the highway running through the village stands upon a different footing to its occupancy of the streets. Appellant rightfully used the highway for the erection of its lines and was rightfully using it at the time the municipality was formed. The statute, however, did not give it, or any other company of like character, the exclusive privilege, but any other company incorporated for a similar purpose or as many as might be formed might use the same highway, the only limitation to such use with respect to the appellant being that occupancy ought not to be allowed to injure or interfere with the physical property of the appellant."

We also said in that case: "When it entered on the streets of the village with its poles and other equipment, however, no right could be predicated on the statute."

As declared in the above-mentioned case, the appellant had the right, and still has the right, to use the highway, but it acquired no other right under the statute. Even if the acceptance by the appellant by constructing its system along the highway amounted to a contract, it could not be extended beyond the right given under the statute, and that was the right over the public highways and streets of cities and towns, but the act expressly provides that the permission of the proper municipal authorities shall be obtained for the use of such streets.

In other words, the State granted the right to all corporations like the appellant to use the public highways outside of cities and towns, and to use the public highway

within cities and towns after getting permission of the proper municipal authorities.

Appellant does not claim that it got permission from the municipal authorities, and it has no right under this statute to occupy the streets of West Memphis without first getting permission from the municipal authorities.

The appellant, not having secured permission of the authorities, West Memphis had a right to grant an exclusive franchise to the appellee. Crawford & Moses' Digest, § 7492; Act of 1929, p. 1207; *El Dorado* v. *Coats,* 175 Ark. 289, 299 S. W. 355; *Natural Gas & Fuel Corp.* v. *Norphlet Gas & Water Co.,* 173 Ark. 174, 294 S. W. 52.

It will be observed that the above authorities are to the effect that a franchise granted by a municipality to a corporation to furnish light and power, when accepted by the corporation, becomes a binding contract.

The appellant, however, contends that it was rightfully using the streets of West Memphis. It is true that it was rightfully using the highway through West Memphis, but it was not rightfully using the streets of the town after it became incorporated, because the statute expressly provides that it must get permission from the municipal authorities.

Appellant cites the *State* v. *Iowa Telephone Co.,* 175 Iowa 607, 154 N. W. 678, Ann. Cas. 1917E, 539, and quotes at length from the opinion in this case. The Iowa case, however, is construing a State statute which expressly authorized persons to construct telephone or telegraph lines along the highways of the State and erect the necessary fixtures, and the court said: "Now, the primary question in the case is whether or not by the enactment of these laws, commencing with the act passed in the year 1888 and ending with those appearing in the Code of 1897, the Legislature intended thereby to forfeit the rights already acquired by a telephone company under § 1324 of the Code of 1873, as amended by the acts of the nineteenth General Assembly, and to require such a company already occupying the streets and alleys of a city to secure through action of the city council and by a referendum vote the right to use the streets and alleys upon which it had already placed its poles and lines

under specific authority from the Legislature; or was it the intent of the Legislature to authorize cities to regulate such companies as were already using the streets and alleys under the grant of the Legislature, and all others which might secure the right to so use the streets and alleys, by general and uniform legislation applicable to all, and to further provide that no franchise to use the streets and alleys should thereafter be granted, renewed, or extended, except upon a referendum vote of the people. It seems clear to us that the latter is the proper interpretation to be put upon these laws. It must be remembered that the franchise spoken of is not the general franchise of a corporation, domestic or otherwise, granted by a sovereign, but a franchise for the streets, alleys, etc., of the city. The latter the defendant had directly from the Legislature, and, as we have seen, it was perpetual in character, subject, if at all, to forfeiture by the Legislature itself. It did not need to be renewed or extended; and, having one already, no further grant was necessary."

In Iowa, at the time the telephone company erected its poles and system, there was no provision for municipalities granting a franchise to such company, but the franchise was granted by the State of Iowa, and it included the right to operate on all public highways, which included streets of cities and towns in Iowa at that time. The only question in the Iowa case was whether the subsequent legislation forfeited the franchise of the telephone company.

We have no such question here. The Arkansas statute does not undertake to give the right to appellant and other companies to occupy the streets and alleys of incorporated towns, but expressly provides that the permission of municipal authorities shall be had in order to do that.

The Iowa case was by a divided court, and a dissenting opinion was written by Judge Weaver, which was concurred in by Judge Preston. However, the Iowa case is not applicable here because, under the Iowa statute, the Legislature granted the franchise, and not the municipality, and under our statute the municipality must grant the right.

The appellant states that another case directly in point is that of *Iowa Telephone Company* v. *Keokuk*, 226 Fed. 82. That case, however, was decided by the Federal District Court, and it was there stated that the Supreme Court of Iowa had passed directly upon the question, and that it was the duty of the Federal court to accept the decision of the highest court of the State as correctly interpreting the legislative will.

But, as we have already said, when these corporations secured from the State their rights to erect their systems, there was no provision in the Iowa statute to the effect that permission of the municipal authorities should be had. At that time municipalities in Iowa could not grant franchises, and the only authority was the Legislature. Therefore these authorities are not applicable.

If the appellant had a contract, as it claims, any ordinance of the town of West Memphis or a State statute that impaired the obligation of that contract would be void; but, if appellant has a contract with the State, which we do not decide, it is a contract that must be strictly construed, and, when so construed, its rights are necessarily limited to the public highways outside of municipalities.

The ordinance of the town of West Memphis does not, and cannot, interfere with appellant's occupancy of the highway through the town of West Memphis, but its rights are confined to the highway passing through the town, and it would have no right to serve any persons in the town of West Memphis.

The ordinance, which was accepted by the appellee, thereby making a contract, gives the exclusive right to appellee, and to permit any other corporation to serve any part of the town of West Memphis would impair the obligation of the appellee's contract.

It is contended, however, by the appellant, that it had occupied some of the territory of West Memphis prior to the incorporation of the town, and that the subsequent incorporation could not affect its rights. This contention is like the contention of parties when they establish plants and property outside of the corporate

limits of a city and the city is thereafter extended so as to include the plant or property.

Appellant, of course, knew that the town of West Memphis might be incorporated, and, of course, it knew that, if so, it would have the right to grant franchises and grant permission to occupy its streets.

This court has said: "The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population. Under these circumstances, private rights must yield to the public good, and a court of equity will afford relief, even where a thing, originally harmless under certain circumstances, has become a nuisance under changed conditions." *Ft. Smith* v. *Western Hide & Fur Co.*, 153 Ark. 99, 237 S. W. 724; *Bickley* v. *Morgan Utilities Co.*, 173 Ark. 1038, 294 S. W. 38.

The city of Little Rock passed an ordinance granting to telegraph companies the right to construct poles, etc. The Mackey Telegraph Company constructed poles within the corporate limits of the city of Little Rock and also a number of poles outside the city limits. The ordinance of the city provided for a tax of fifty cents for each pole, etc. Of course, it could not tax poles without the city limits. The limits of the city were thereafter extended, and the city sought to collect for poles that were in the city limits at the time, but when erected were outside the city limits. This court and the United States Supreme Court both held that, when the city limits were extended, it had authority under the ordinance to tax the poles that were originally outside the city limits.

There would seem to be no difference in property taken into a town or city by extending its limits and taking it in by incorporating the town. In either event, the property that had been constructed or erected prior to the extension or organization would not be within the corporate limits, and, after the extension or organization, would be.

It is next contended by the appellant that the town of West Memphis did not have power to grant an exclusive franchise that would have the effect of excluding the appellant from West Memphis. It secured no rights in West Memphis under the statute authorizing it to construct its lines, except to use the highway through the town, and it is not excluded or molested in this right. Whatever else it did in the town of West Memphis, except to use the highway, was unauthorized by the statute.

The next question is the question of damages. The trial court found that the appellant had furnished electricity to the inhabitants and consumers of the town of West Memphis after the date of completion of appellee's plant and distribution system. The amount of damages was ascertained by the court by taking evidence to show the amount of revenue received from the customers after appellee's right under the ordinance accrued, and deducting from the amount of this revenue the amount it would cost to serve these inhabitants. The finding of the chancellor on this is not against the preponderance of the evidence.

We find no error, and the decree of the chancery court is affirmed.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE *v.* MCCRAY.

4-2929

Opinion delivered March 20, 1933.

Moreau P. Estes, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

McHaney, J. Appellee is the beneficiary named in a policy of insurance for $500 issued by appellant on the life of her husband, Jonas McCray, dated November 3, 1930, premiums being due and payable semi-annually on May 1 and November 1. The cash premium was paid, but the premium due May 1, 1931, was not paid when due nor within the grace period. The policy provided for a grace period of 30 days for the payment of any premium after the first "during which time the insurance shall continue in force." And further: "If any premium or installment of premium be not paid before the end of the period of grace, then this policy shall immediately cease and become void," etc. It further provided that "This policy may be reinstated at any time after default in the payment of any premiums * * * upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company hereon, and the payment of overdue premiums, with interest at six per cent. per annum."

The premium due May 1, 1931, not having been paid when due, nor within the period of grace, the policy lapsed, but on August 1, 1931, same was reinstated. Thereafter, on May 10, 1932, more than one year from the date of the policy, but less than one year from the date of reinstatement, the insured Jonas McCray, committed suicide. The policy contained a suicide clause as follows: "If, within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

Proof of death was duly made and payment of the amount due under the policy demanded. Payment was refused, and this suit followed, which was tried before the court on an agreed statement of facts, substantially as above set forth, resulting in a judgment against appellant for $500 with interest at 6 per cent. from May 20, 1932, 12 per cent. penalty and attorney's fee of $100 for services in the circuit court, and an additional $100 for services in the Supreme Court, if appealed to that court.

The defense in the circuit court and in this court was and is that appellant was only liable for the premiums paid by the insured (for which amount it offered to confess judgment) for the reason, as it contends, that the clause against suicide within one year ran from the date of reinstatement of the policy, and not from the date of the policy itself. Appellant says: "If the clause began to run from the date of the original policy, the judgment of the lower court was correct." We do not understand there was ever but one policy, and it bore date of November 3, 1930. Certainly there was never but one policy issued by appellant to insured. It lapsed and became void after 30 days, from May 1, 1931, until August 1, 1931, during which time there was no insurance, but on the latter date the very same policy, not a new or different one, was reinstated by the payment of all delinquent premiums and furnishing evidence of insurability satisfactory to appellant. There is no room for the contention that any new or different contract or policy was in force after reinstatement. By agreement between the parties, a forfeiture of the policy was set aside, and the same contract was reinstated. No new policy was issued, and none contemplated. By the express terms of the policy, it is provided that: "If, within one year from the date of issue of this policy, the insured shall * * * die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon." It does not provide that the company's liability shall be thus limited if the insured shall die by his own hand within one year from the date of reinstatement, should the policy lapse. Time is to be reckoned "from the date of issue of this policy," not from the date of reinstatement, nor from the date of any other policy. No doubt appellant could have so worded its policy, but it has not seen fit to do so. We see no ambiguity in the matter, but, if there were, under the settled rule of this court, we would be bound to construe the clause most strongly against appellant.

The reinstatement clause above set out was a part of the contract giving the right so to do to the insured and could not arbitrarily be refused by appellant, if said clause were complied with. Appellant can not, by

reason thereof, engraft on the contract a new condition or otherwise restrict its liability by conditions not contained therein. *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412; *Security Life Ins. Co.* v. *Leeper,* 171 Ark. 77, 284 S. W. 12; *Equitable Life Assurance Soc.* v. *King,* 178 Ark. 293, 10 S. W. (2d) 891.

In the Leeper case, *supra,* there was a lapse by reason of failure to pay a premium, but was reinstated on application made a few days later. The application for reinstatement recited an agreement that, "in the event of self-destruction, whether sane or insane, within one year from the date of approval by the company of this application for reinstatement, the amount payable as a death benefit under said policy shall be equal to two annual premiums on said policy, and no more." Leeper committed suicide within a year from the date of reinstatement, and the company defended on the ground of suicide. This court held that the case was ruled by the Adams case, *supra,* and said: "The only provision in the policy now before us with respect to suicide related to the period running from the date of the original policy, and, since the policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to suicide, appellant had no right to impose that additional feature upon the insured in procuring reinstatement." In the case now under consideration, the application for reinstatement, if one, was silent in this respect, but, even had it so provided, it would not be effectual to accomplish the purpose for which appellant contends in the absence of such a provision in the policy itself.

Appellant also contends that it should not be taxed with the penalty and attorney's fee imposed by statute because it says it defended in good faith, the question involved not having been heretofore decided by this court. As we have already seen, the question litigated had been decided, but, assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith,* 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh,* 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow

the Circuit Court of Appeals in *Standard Acc. Ins. Co.* v. *Rossi,* 35 Fed. (2d) 667, and *Inter-Southern Life Ins. Co.* v. *McElroy,* 38 Fed. (2d) 557. This question is now settled, and we decline to reconsider the matter.

Affirmed.

TAYLOR *v.* HILDEBRAND POSTER ADVERTISING COMPANY.

4-2861

Opinion delivered March 20, 1933.

Sam Rorex, N. R. Hughes and *Owens & Ehrman,* for appellant.

Gaughan, Sifford, Godwin & Gaughan, for appellee.

BUTLER, J. P. T. Hildebrand, prior to April 13, 1929, operated a bill posting business in Ouachita and Union counties. On that date a company, was incorporated, known as the Hildebrand Poster Advertising Company, the incorporators being P. T. Hildebrand, Mildred W. Hildebrand, his wife, and M. A. Welty. This corporation took over the business formerly operated by Hildebrand individually, but there was no change in the method of operation, and Hildebrand continued to conduct it as though it was his own, depositing all the moneys

of the corporation in his personal bank account, and in every other way handling it as his private business, rather than as a separate and distinct entity.

On January 7, 1930, according to minutes found, a special meeting of the board of directors and a special meeting of the stockholders of the company were presumably held. At that time, according to the company's stock book, the stockholders were as follows: M. A. Welty, Mr. and Mrs. Hildebrand, J. W. Coan, and J. M. Barker. Both meetings show Mr. and Mrs. Hildebrand and J. W. Coan as the only stockholders present. The minutes of each meeting contain waiver of notice of the meeting and special consent thereto, and a space was left after the names of those signing as stockholders for additional signatures, but no others appear to have signed.

J. W. Coan testified that he was secretary of the company and recalled the meeting. On cross-examination, however, he testified that he did not attend the meeting, but read the minutes as they were written on the book.

At that purported meeting a resolution was adopted authorizing the issuance of $50,000 in bonds to be secured by a trust deed of all of the company's property, and further empowering J. L. Marks & Company, Chicago brokers, to act as "exclusive fiscal agents for this corporation in issuing, disposing of and selling the aforesaid bonds." None of these bonds were ever sold by Marks & Company or the Hildebrand Company. A deed of trust was executed on January 22, 1930, in pursuance of the plan. This deed of trust is very lengthy and names the First National Bank of Camden, Arkansas, as trustee, delegating to it the authority to authenticate the bonds issued thereunder, and placing upon it various responsibilities for the protection of the bondholders. This instrument was recorded on June 26, 1930, in Ouachita County, and on July 2, 1930, in Union County. Subsequent to the execution of this deed of trust an amendment more fully describing the property covered thereby was executed. This amendment was filed for record on the same date as the original deed of trust. In other words, the deed of trust was held off record

until June 30, 1930, the date upon which the amendment was executed.

In the meantime, Hildebrand had been conducting the business of the corporation as though he owned it individually, and, in April of 1930, approached the American Exchange Trust Company of Little Rock for the purpose of making a loan for his company. The bank agreed to lend him $25,000 if he would give it a bill of sale to all the personal property of the company. In April, 1931, some of the stockholders filed a suit asking for the appointment of a receiver for the Hildebrand Poster Advertising Company, which petition the court granted. All of the petitioning stockholders had purchased their stock after the execution of the various instruments above described. There were however stockholders holding both common and preferred stock who were not present at the meeting authorizing the execution of the bonds and who did not sign any waiver of notice of the meeting. These stockholders were J. M. Barker, who owned 20 shares of common and 20 shares of preferred, and M. A. Welty, who owned 5 shares of common and 5 shares of preferred.

Sam Wilson, as special deputy bank commissioner, in charge of the American Exchange Trust Company, intervened and claimed the personal property under the bill of sale. The First National Bank intervened and set up the bond issue, together with the pledge of the bonds to it, for its indebtedness, claiming a first lien on the property. Numerous other parties intervened, among them Mr. L. B. Smead, claiming an interest in the bonds pledged by Hildebrand, subject to the assignment to the First National Bank. The officers of the First National Bank disclaimed any knowledge of the execution of the bill of sale to the American Exchange Trust Company. None of the other interveners testified.

Upon the hearing the court held that the claim of the American Exchange Trust Company, which had been reduced by a payment prior to Hildebrand's departure and which at the trial amounted to $21,760.52, including interest, was inferior to the lien of the First National Bank and the other intervener pledgees. The court accordingly gave judgment first to the First National

Bank, then to the other intervening pledgees, and lastly to the appellant. The property was ordered sold and the proceeds applied in that order.

The above is the substance of the statement contained in the brief of the appellant, which we find to be accurate, and, together with the following facts shown by the evidence, may be said to give an entire statement of all the relevant facts necessary to a determination of this appeal.

At the time Hildebrand applied for the loan from the First National Bank, he had in his possession $49,500 of the bonds of the Hildebrand Poster Advertising Company. He stated that he desired to borrow $7,500 from that bank, and that he expected to obtain an equal amount from the bank in Shreveport. The vice president and cashier to whom these bonds were presented was well acquainted with Hildebrand, and from his knowledge of the manner in which the business of the Poster Advertising Company had been conducted he thought that Hildebrand individually owned the business until the issuance of the bonds. At the time these bonds were presented, none of the officers of the First National Bank knew anything about the bill of sale having been given to the American Exchange Trust Company. The bonds to secure the money borrowed from that bank and the Shreveport bank were deposited in pledge with the First National Bank, and afterward the $7,500 note made to the Shreveport bank was assigned to the First National Bank. No inquiry was made of Hildebrand as to why he had possession of the bonds or how he had obtained possession of them, because it was the opinion of the officer who handled the matter that Hildebrand owned the business, and that he knew the bonds were secured by a mortgage on the assets of the Poster Advertising Company. At the time the bonds were first certified by the bank as trustee they were delivered to Hildebrand, and the bank had no knowledge of what disposition had been made of any of them nor any information except that they were in the possession and control of Hildebrand at the time the loan was secured.

Hildebrand managed the business of the Advertising Company as if it was an individual matter. He was

also active vice president of the Merchants' & Planters' Bank, in which it appears most of the money that the company earned or that Hildebrand borrowed was deposited. He did not have a separate account for the advertising company, but all of the business of the corporation was run through his personal account. From time to time Hildebrand had regular audits made of the business of the company, and the auditor, in stating the account of the business, showed the $15,000 evidenced by the two $7,500 notes, as pertaining to the business of the advertising company, and the indorsement on the cashier's check shows that it was deposited in the account of Hildebrand for the advertising company. Other moneys seem to have been handled through a bank at El Dorado where an account in the name of the Hildebrand Poster Advertising Company was maintained.

The trial court found that the proceeds of the notes were received by and for the benefit of the advertising company, and that Hildebrand was authorized by its directors to negotiate the bonds and pledge the same as collateral security; that the First National Bank was the lawful holder of the bonds of the company of the face value of $49,500, and that these bonds were secured by a deed of trust duly recorded, and that the First National Bank had a lien which was prior and paramount to that of the other interveners including the appellant. Judgment was given all of the interveners for the amount of their respective claims and the property of the corporation ordered sold and the proceeds applied, first, to the payment of the costs, second, to the First National Bank to the amount of $21,245.56, and the remainder, if any, to the interveners in the order named in the decree.

From that decree the Bank Commissioner prosecutes this appeal and presents to the court the following questions: (1) That regarding the validity of the claims of the First National Bank and of the other interveners who claimed an interest in the pledged bonds; (2) that of the validity of the bond issue; and (3) that of the priority of the claims.

Counsel for the appellee state, and this appears not to be contradicted, and we assume it to be a fact, that

the money derived from the sale of the property of the advertising company made by order of the court is not sufficient to pay its claim. Therefore, if the decree of the trial court as to it should be sustained, it is unnecessary to discuss the validity of the claims of the other interveners or their priority with respect to each other. The trial court found as a matter of fact that the proceeds of the notes, the basis of the claim of the First National Bank, were received by, and used in, the business of the advertising company. There is but little evidence on this branch of the case. The entire business of the advertising company was conducted by Hildebrand as if it had been his individual business, and he is the only one who could tell with any degree of certainty just how the money was applied. His testimony could not be obtained, but we think there is some evidence to warrant the conclusion reached by the chancellor, which is certainly not against the preponderance of the testimony. We agree with the contention of the appellee however, that the mortgage bonds became a debt against the Hildebrand Poster Advertising Company in the hands of the First National Bank because it appears to have been a holder of these for value without any notice of their invalidity or of the equities of the appellant Bank Commissioner. The bonds were payable to bearer, and it is to be assumed that the holder thereof was either the owner outright or had the authority to dispose of them by assignment or by pledging them as collateral security; that is, where a bond is payable to bearer and has not matured, the holder of it is presumed to have obtained the instrument in good faith and for value. Sections 7818, 7822, 7825, Crawford & Moses' Digest.

We are of the opinion that the trial court was justified in its conclusion that the First National Bank was an innocent purchaser of the bonds and had the right to assume that Hildebrand was the owner of the bonds or that he had the authority to pledge them for his personal obligation.

"When negotiable railroad bonds, perfect in form, payable to bearer, and certified by the trustee to evidence that they have become obligatory, are placed by

the company in the hands of its president to sell or exchange for its benefit, they are valid in the hands of the purchaser in good faith before maturity, though they were disposed of by the president for his own benefit after consolidation of the company with other companies, and though, at the time of the purchase, two of the semi-annual interest coupons attached to each bond were past due." *Long Island Loan & Trust Co.* v. *Columbus C. & I. C. Ry. Co.,* 65 Fed. Rep. 455.

The contention is made by the appellant that the bonds were void because they were issued in violation of article 12, § 8, of the Constitution, and because of this there could be no innocent holder for value. That section is as follows:

"No private corporation shall issue stocks or bonds, except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void; nor shall the stock or bonded indebtedness of any private corporation be increased, except in pursuance of general laws, nor until the consent of the persons holding the larger amount in value of stock shall be obtained at a meeting held after notice given for a period not less than sixty days, in pursuance of law."

In the case of *Washer* v. *Smyer,* 109 Tex. 398, 211 S. W. 985, the court had under consideration a section of the Constitution similar to ours above set forth. It was there said:

"There is no declaration in the constitutional provision that a transaction in which something other than money, property or labor is received in payment for the corporation's stock shall be utterly void. It prohibits such a transaction, and therefore makes it unlawful, but that is the extent to which it goes. If a security be accepted in payment for the stock, such, for instance, as a subscriber's note, which is not property for such a purpose, the Constitution does not say either that it or the stock issued for it shall be void. The acceptance of the note in payment for the stock and the issuance of the stock are only interdicted. The word 'void' is used but once in the constitutional provision, and that, it is to be noted, is not in the clause which prohibits the issuance

of stock for other than money, property or labor. It is in the distinct clause which says that all fictitious increases of stock or indebtedness shall be void. While the term is found in that clause of the section, the framers of the Constitution avoided its use in the other. It must be assumed that they did so deliberately. There is an essential difference between prohibiting a certain form of transaction—making it unlawful—and declaring that it, with all securities issuing out of it, shall be utterly void. It is a distinction familiar in the law. In order to hold a negotiable note unenforceable in the hands of a *bona fide* holder, it is not enough that it be founded upon an illegal consideration. It is not sufficient that it issue from a transaction prohibited by law, or one even denounced as criminal. To avoid it in the *bona fide* holder's hands, there must be a constitutional or statutory provision which expressly, or by unavoidable implication, declared it or the transaction of which it is a part to be void. Such is the rule announced by Chitty, Story and Daniel. It is the rule followed by this court and generally by courts elsewhere."

The above language was quoted with approval in *Park* v. *Bank of Lockesburg,* 178 Ark. 669, 11 S. W. (2d) 483, which was a case where a certificate of stock was issued, not for money but for a promissory note in violation of article 12, § 8, *supra.* There the court held that for the reasons stated by the Texas court the stock was not absolutely void but voidable, and that one lending money in good faith and taking as collateral security the stock certificate, regular in form and carrying no notice of infirmity on its face, was an innocent holder for value. That case cites in support of the view reached *German Bank* v. *Deshon,* 41 Ark. 331; *Bankers' Trust Co.* v. *McCloy,* 109 Ark. 160, 159 S. W. 205, and *Bank of Manila* v. *Wallace,* 177 Ark. 190, 5 S. W. (2d) 937. In the last case the appellee admitted the execution of the note sued on but denied liability on the ground that the note was given for stock in violation of the Constitution. The appellant contended that the note was not given for stock, and that it was an innocent purchaser. The trial court, after hearing the testimony, directed a verdict in

favor of the appellee, and this court, held that it was a question for the jury to say whether the note was given for stock in a corporation and whether the purchaser of the note was an innocent purchaser. See also *City National Bank* v. *DeBaum,* 166 Ark. 18, 265 S. W. 648.

As between the original parties to the bill of sale by which the American Exchange Trust Company sought to secure its loan, it may be treated as an equitable mortgage, but as to all others it was in form and legal effect a bill of sale and as such was not entitled to be recorded; and, as possession of the property was suffered to remain with the vendor, it was not notice to third parties.

As between the appellant and the appellee National Bank, we are of the opinion that the decree of the chancellor should be affirmed, and, as the assets of the advertising company have been sold by order of the court and the fund arising therefrom is not sufficient to pay off the first lien, it is unnecessary to pass on any of the other questions raised, and the decree will be affirmed on the whole case.

RICHARDS *v.* MCCALL.

4-2935

Opinion delivered March 27, 1933.

Virgil Greene and *Hughes & Davis,* for appellant.

Harrison, Smith & Taylor and *C. M. Buck,* for appellee.

JOHNSON, C. J., (after stating the facts). The first insistence of counsel for appellants for reversal of the case is that a verdict should have been directed in favor of appellants. It is argued that there was no testimony showing that Emma Kate Hall was acting as agent for her father, C. A. Richards, in driving the automobile at the time of the collision. On this point it suffices to say the appellants admitted that C. A. Richards was the owner of the car; that he had a minor daughter attending school; that his daughter, Emma Kate Hall, was at liberty to use the car when she wished and for whatever purposes she desired. From these admissions and other testimony in the record, the jury was fully warranted in finding that Emma Kate Hall was the agent of C. A. Richards in the operation of the car at the time of the collision.

It is next insisted on behalf of the appellants that the court erred in giving, of its own motion, instruction No. 8, in which the court told the jury that, if they found the defendant, Addie Richards, had authorized his daughter, Emma Kate Hall, to act for him in taking his child to school and bringing her from school when he was not present and had given her general authority to do so, it

would not be necessary for him to give her special or specific directions or authorization in every instance.

We think that the trial court did not err in giving this instruction. It submitted to the jury the question of the authorization of the father to the daughter to per form a service for him and was applicable to the facts presented in testimony.

It is next insisted that the court erred in refusing to give defendant's requested instruction No. 3. This instruction reads as follows:

"You are instructed that, if you find that the defendant, Emma Kate Richards (Hall), was driving the automobile of the defendant, C. A. Richards, and had taken the car and left her home for the purpose of going to the schoolhouse to get her sister, and that at that time she was authorized by the defendant, C. A. Richards, to do so, and in doing so she deviated from the purpose of her father, C. A. Richards, so that at the time of the accident she was not on the regular, most convenient and direct route from his home to the schoolhouse, you will find for the defendant, C. A. Richards.

The trial court was eminently correct in refusing to give this instruction. It is not the law that the driver of the car, as agent for another, must travel on the regular, the most convenient or direct route from a point of beginning of a journey to the point of destination. The test is, has the party deviated from the course of employment for the purpose of performing some individual errand not in the interest of the master, or in the furtherance of duty?

It is next insisted on behalf of appellants that the undisputed testimony was to the effect that at the time of the collision Emma Kate Hall was not performing any duty in behalf of her father, but, on the other hand, was upon an errand of her own. We think the testimony is to the opposite effect. The uncontradicted testimony is to the effect that Emma Kate Hall had returned to the intersection of Main and 7th streets for the specific and only purpose of turning to the left and going immediately to the schoolhouse to perform the errand for her father. So it is, if the collision occurred after she had resumed the

performance of the errand for her father, it is immaterial whether she had just previously to that time performed an errand of her own.

It is next insisted on behalf of the appellants that the appellee's contributory negligence in endeavoring to pass the appellant's car at the point of intersection of Main and 7th streets precluded his right of recovery. The negligence and want of care of each of the parties on this question were submitted to the jury on proper instructions, and we think the finding of the jury on this issue is conclusive upon this court.

It is our opinion that the case of *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, and the cases of *Featherston* v. *Jackson,* 183 Ark. 373, 36 S. W. (2d) 405, and *Morton* v. *Hall,* 149 Ark. 428, 232 S. W. 934, have no application to the facts in this case.

The judgment of the trial court is in all things affirmed.

STATE EX REL. ATTORNEY GENERAL *v.* CHICAGO MILL & LUMBER CORPORATION.

4-2988

Opinion delivered March 27, 1933.

[redacted]

[redacted]

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

W. R. Satterfield and *Daggett & Daggett,* for appellee.

JOHNSON, C. J., (after stating the facts). As indicated in the statement of facts, this is the second appeal in this case. By referring to the former opinion, it will be found that the State brought suit against the Chicago Mill & Lumber Corporation and the Paepcke Corporation, two foreign corporations, to recover back taxes alleged to be due for the years 1927 to 1930, both inclusive, by reason of gross undervaluation in the assessments of the machinery and manufactured lumber at the mills of said corporation at West Helena and Blytheville, Arkansas. This court held that there was no personal liability of the Paepcke Corporation and that a recovery, in any event, could only be had for property now situated in the State of Arkansas which had passed into the hands of the Chicago Mill & Lumber Corporation. The case was reversed and remanded for further proceedings in accordance with the principles of equity and not inconsistent with the opinion.

In this suit act 281 of 1931 was not argued by counsel on either side, and was not considered by this court.

After the rendition of the opinion of this court on the former appeal and on September 26, 1932, this court determined the case of *State ex rel. Attorney General* v. *Anderson-Tully Company,* wherein act 281 of 1931 was brought to the attention of this court. In the Anderson-Tully case, *supra,* which was an overdue tax proceeding

on account of a gross undervaluation assessment on real estate, this court specifically held that a recovery could not be had by the State except for actual fraud of the taxpayer in making his assessment. The court held:

"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," etc.

It is insisted that the Anderson-Tully case, *supra,* is not authority in the instant case, because it is said that the property here in controversy is personal property, whereas the property involved in the Anderson-Tully case was real estate. It is difficult to see just why that the rule should be different in reference to the assessment of personal property and the assessment of real property. Under the statutes of this State the owner of real property is required to list his property for taxation. The same is true with reference to his personal property. The tax assessor is not bound by any value placed upon either real or personal property by the owner.

The court has reached the conclusion that act 281 of 1931 is conclusive of all the issues now presented, and for this reason no other question will be discussed or decided in the case. Prior to this enactment a showing by the State that the property of the taxpayer had been grossly under-assessed was sufficient to allow a recovery in behalf of the State. Section 1 of act 281 of 1931 reads as follows:

"That, after the assessment and full payment of any general property, privilege or excise tax, no proceedings shall thereafter 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."

Evidently, it was the purpose of the Legislature to change the law in reference to, and to regulate the collection of, overdue taxes in this State.

In the case of *White River Lumber Co.* v. *State,* 175 Ark. 956, 2 S. W. (2d) 25, this court used the following language:

"We are of the opinion that the statute (collection of overdue taxes) was intended to give the State the right to recover back taxes where there had been a gross undervaluation of the property in the hands of the corporation," etc.

Previous to the White River Lumber Company case, *supra,* this court had held in *State* v. *K. C. & Memphis Railway & Bridge Co.,* 117 Ark. 606, 174 S. W. 248, as follows:

"It was evident that the statute was intended to afford a complete remedy for the collection of back taxes," etc.

The White River Lumber Company case, cited *supra,* was appealed to the Supreme Court of the United States, and is reported in 279 U. S. 692, 49 S. Ct. 457, where it was held that the overdue tax act did not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

It is perfectly evident that the Legislature had in mind the White River Lumber Company case and all other decisions of this court in reference to the collection of overdue taxes when it passed act 281 of 1931.

If the Legislature said what it meant and meant what it said in § 1 of act 281 of 1931, "That, after the assessment and full payment of any general property, privilege or excise tax, no proceedings shall thereafter be brought or maintained for the reassessment of the value on which said tax is based, except for actual fraud of the taxpayer," then it must be perfectly evident that the State cannot recover where the property owner has made an assessment of property with the county assessor of the county, and has paid the taxes regularly assessed thereon, unless it can be shown that actual fraud has been practiced by the taxpayer in making the underassessment. The only allegation in the complaint in this case

is that the property was grossly underassessed, and no facts are alleged which would show or amount to actual fraud.

The proviso "that failure to assess tax as required by law shall be *prima facie* evidence of fraud" does not save the situation here presented. This proviso means exactly what it says. "Failure to assess taxes as required by law" does not mean that an underassessment has been made. It is perfectly natural for the property owner to appraise the value of his property for taxation at a lower sum than the county assessor would do. It is perfectly natural for people to have different opinions about the value of property. We think that this proviso means that, if the party fails to assess any article of property with the assessors, in so far as this article of property is concerned, such assessment would be fraudulent, but where an assessment is made and the complaint is about, and only about, the difference in value of the property, this would not amount to fraud.

This court took a definite and deliberate position in reference to the prosecution of overdue tax suits under act 281 of 1931 in the Anderson-Tully case, cited *supra,* wherein real estate assessments were involved, and we are of the opinion that all that was said by the court in the Anderson-Tully case in reference to real estate assessments should have full application in this case, and that the issues determined in the Anderson-Tully case settled and determine all issues presented in this case.

It is the opinion of the court that the complaint filed herein does not state facts sufficient to constitute a cause of action against the appellee, Chicago Mill & Lumber Corporation, and that the chancellor was correct in sustaining a demurrer thereto.

Let the judgment be affirmed.

HUMPHREYS and MEHAFFY, JJ., dissent.

MEHAFFY, J., (dissenting). I do not agree with the majority in holding that the complaint filed does not state facts sufficient to constitute a cause of action, and in holding that the demurrer should be sustained.

The majority opinion cites *State ex rel. Atty. General* v. *Anderson Tully Co.,* 168 Ark. 170, 53 S. W. (2d) 17.

The writer filed a dissenting opinion in the Anderson-Tully case which is reported on page 175 of 168 Ark. I shall not repeat what was said there with reference to act 281 of the Acts of 1931 being retroactive. Reference is made to the dissenting opinion there for a discussion of that question.

The complaint states: "All of the property set out in the original complaint, which includes the machinery and stocks of lumber therein mentioned, in both Mississippi and Phillips counties, and on which taxes are sought to be recovered herein, is now and has been throughout the years 1927 to 1930, inclusive, and throughout the taxable periods for said years, in existence in the State of Arkansas. The percentage of value at which all property is required to be assessed for taxation in Mississippi and Phillips counties, and throughout the State of Arkansas, is, and has been throughout the period covered by the complaint, 50 per cent. of the true value thereof, said basis of assessment having been prescribed for each of said years involved herein by the Arkansas Tax Commission under the authority of the Constitution and statutes of the State of Arkansas."

It was further charged in the complaint that the amount set out in the original complaint constituted an assessment at only nine per cent. on the Phillips County property, and an assessment of only five per cent. on the Mississippi County property; that this constituted a gross underassessment of appellees' property. It was further stated that the lumber and machinery are extremely difficult to value on account of the large amount thereof, and that the fact that the taxing officers have not had access to the records relating thereto, said officials have been compelled to rely, and had actually relied in making the assessments aforesaid, on the representations of defendants as to the value of said properties. Said representations have not been fairly made to said taxing authorities.

There were other allegations in the complaint as to the underassessment, and appellees filed motion for the court to require the plaintiff to make the complaint more

definite and certain in certain particulars. The motion consisted of twenty typewritten pages and forty-seven separate paragraphs. Some of the paragraphs asked that plaintiff be required to state the names of the witnesses that filed the list for taxation, others to describe in particular the kinds of lumber and kinds of machinery, but some of the paragraphs asked that they be required to state the nature of the representations alleged to have been made by the corporate officials.

In response to this motion an amendment to the complaint was filed. One paragraph of the amendment states that both the assessments actually made, and the amounts at which the property should have been assessed, being expressly stated for each of the years 1927-1930, and for the property at West Helena and Blytheville separately, and this paragraph also stated that under the Arkansas statutes, lumber, manufactured articles, and machinery are assessed jointly under the head of "machinery and manufactured articles."

The amendment to the complaint further stated that the nature of the representations made by the corporate officials and agents of the defendant corporations for the years 1927-1930 was delivering a sworn statement of the value of defendant's machinery and lumber to the tax assessors for each of said years, which sworn statement showed the value of said lumber and machinery for said respective years, to be the figures at which said property was actually assessed for said years respectively, and which are specifically set out in the plaintiff's original complaint. Said representations of value were so grossly inadequate as to shock the conscience and constitute a fraud on the State, the counties, and school districts in which said property is located; that other similar property in the counties named was assessed at 50 per cent. of its true value, and the assessments on defendant's property was approximately 5 per cent. in Mississippi County and 9 per cent. in Phillips County.

We have copied enough of the complaint, we think, to show that there were sufficient facts stated to constitute a cause of action when the sufficiency of the com-

plaint is tested by general demurrer. The fact that appellees' property was assessed at from 5 per cent. to 9 per cent. of its value, and all other property in the two counties assessed at 50 per cent. of its value, is not a conclusion of law, but a statement of fact. If this is true, then the affidavit furnished the taxing authorities for the purpose of assessment was a statement of fact and not a conclusion of law. It is also stated as a fact that the affidavit and assessment constituted an actual fraud. These statements of fact may or may not be true. That could be determined however, only by the evidence.

We have frequently held that, in testing the sufficiency of a pleading by general demurrer, every reasonable intendment should be indulged to support it. Contrary to the common-law rule, under our Code every reasonable 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; *Ellis* v. *First National Bank,* 163 Ark. 471, 260 S. W. 714. It should be held in mind that allegations of fact in a complaint must be accepted as true on demurrer. *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. (2d) 517. Considering the statement of facts in the complaint as true and indulging every reasonable intendment as we must, we think the complaint states a cause of action.

"As in other cases, it is not sufficient to plead mere conclusions of law, but the facts constituting the fraud must be pleaded subject of course to the usual limitation that the evidence should not be set out; and if the facts are so set out that the adverse party is fairly apprised of what he is to meet, it is sufficient." 10 Standard Enc. of Proc., 53.

"If fraud has been alleged with sufficient particularity, we do not doubt that, whatever may be its final outcome, the case as made by the declaration discloses justiciable and actionable fraud. On the alleged in-

sufficiency of the declaration in point of particularity, we have but little to say. While the allegations of fraud in some respects are not as formal as may be desirable, we regard them as sufficient. It is true that the mere use of adjectives importing fraud or deceit cannot be permitted to supply the place of the essential facts constituting the fraud or deceit relied on. But an impracticable standard or particularity is no more required in allegations of fraud than in an indictment. Mere matter of evidence is not required to be stated. In the amended declaration all the facts constituting the fraud are, though somewhat informally, plainly alleged, and the defendant is fully advised of the case it is called on to meet." *Rogers* v. *Virginia-Carolina Chemical Co.*, 149 Fed. 1.

It is not necessary under our Code to plead the probative or evidential facts. It is sufficient if ultimate facts are alleged, which show the falsity of the representation.

The only question for the consideration and determination by the court is whether the facts alleged constitute a cause of action, and it is immaterial that the cause of action may be defectively stated if there are allegations of fact which constitute fraud. A statement of fact supported by the affidavit of the party that the value of the property is a certain amount, and a statement of fact that this is untrue, I think, is a sufficient statement to apprise the adverse party of what he is called on to meet. I therefore think the case should be reversed and remanded for trial.

I am authorized to state that Mr. Justice HUMPHREYS agrees with me in the views herein stated.

LEONARD *v.* HENRY.

4-2999

Opinion delivered March 27, 1933.

Buzbee, Pugh & Harrison, for petitioners.

R. W. Wilson, for respondent.

SMITH, J. Petitioner Leonard, who is the treasurer of the State of Arkansas, has filed in this court a petition for a writ of prohibition against Patrick Henry, as judge of the Bradley Circuit Court, to prevent that court from further proceeding with the trial of a cause there pending in which petitioner is a party in his official capacity as State Treasurer.

The petition alleges that on December 5, 1931, the State, on the relation of its Attorney General, filed suit in the Bradley Circuit Court against John C. Lee, as sheriff and collector of Bradley County, and the sureties on his official bond as collector of taxes, which alleged that Lee, as said collector, had collected, since January 1, 1931, moneys belonging to the State of Arkansas in the sum of $42,450.31, which the said Lee had failed and refused to pay into the State Treasury as required by law, but had unlawfully converted the same to his own use. It was alleged that, by reason of his failure to account for and pay over said moneys Lee has forfeited his right to commissions for making the collections, and had incurred the statutory penalty. Judgment was prayed against Lee and his official sureties.

On June 11, 1932, an amended complaint was filed containing allegations similar to those of the original complaint and, in addition, alleging that Roy V. Leonard was the duly elected, qualified and acting Treasurer of the State of Arkansas, and had given bond as such in the penal sum of $200,000, with the Union Indemnity Company as surety. That the said Lee, as collector, in attempting to make settlement of his tax collections with Leonard, as treasurer, had given checks on certain banks, which proved to be worthless, but Leonard, as treasurer, had accepted such checks as cash, and had issued to Lee a receipt showing full settlement; that Lee took the receipt, so issued by Leonard as treasurer, and presented

the same to the Auditor of State, and, upon the presentation and delivery thereof to the auditor, had obtained from that officer a quietus, thus making it appear that the said Lee had paid all of his indebtedness to the State of Arkansas, whereas the State has not been paid the moneys due by Lee as collector. The amended complaint prayed judgment against the treasurer and the surety on his official bond, as well as against Lee and the sureties on his official bond.

Summons was served on Leonard and his surety in Pulaski County.

On January 2, 1933, an amendment to the complaint was filed, which alleged that at various times and dates between April 1st and September 10, 1931, the defendant, Lee, as collector of Bradley County, collected the sum of $26,031.95 in taxes from the 1930 assessment of taxes, and paid the same to Leonard, as State Treasurer, by checks on various banks, which were duly collected, and that on sundry dates between March 4, 1931, and September 10, 1931, Lee, as collector of Bradley County, collected the sum of $35,150.38 belonging to the State, which was paid to Leonard, as State Treasurer, by checks which were duly honored. It was alleged that certain automobile license taxes were also collected by Lee and paid to Leonard, as treasurer.

It was further alleged that Lee, as collector, paid to Leonard, as treasurer, the sum of $66,182.33 by moneys collected as taxes for the year 1931 for the 1930 assessment thereof, and that at the request of Lee, and with the consent of Leonard, both acting in their official capacity, said money was unlawfully diverted from the purpose for which the taxes had been collected, and was used in making good certain indebtedness of Lee to the treasurer for 1930, and "said sum of money was paid to the credit of a fund in discharging an existing liability against the defendant, John C. Lee, to the State," and was unlawfully diverted at the request of Lee and so misapplied with the consent of Leonard, and these actions constituted them joint tort-feasors and made them and their bondsmen jointly and severally liable to the State

of Arkansas in the sums prayed for in the original complaint.

The defendant, Leonard, filed a motion to dismiss the suit against him and his surety, and, as grounds therefor, alleged:

"Roy V. Leonard on oath states: That he is a defendant in the above-entitled suit. That he is Treasurer of the State of Arkansas. That the suit is brought to recover from him on account of an official act done or omitted to be done. That no part of the said cause of action sued on arose in Bradley County. That he does not reside in Bradley County, but resides in Pulaski County. That he was not served with summons in Bradley County, but was served in Pulaski County and objects to the suit against him being tried in Bradley County."

For the reasons stated, it was alleged that the Bradley Circuit Court was without jurisdiction to proceed against Leonard as State Treasurer and the surety on his official bond.

The motion to dismiss was overruled, the court holding that it had jurisdiction of the cause of action alleged against the State Treasurer and his surety, whereupon, proceedings were filed in this court for a writ of prohibition.

The writ prayed for must be granted, for the reason that § 1175, Crawford & Moses' Digest, fixes the venue of such actions. This section reads as follows: "All actions for debts due the State of Arkansas, and all actions in favor of any State officer, State board or commissioner, in their official capacity, and all actions which are authorized by law to be brought in the name of the State, and all actions against such board or commissioner or State officer, for or on account of any official act done or omitted to be done, shall be brought and prosecuted in the county where the defendant resides."

The concluding phrase of this section, "in the county where the defendant resides," refers to the county of the officer's official residence, as the section relates to suits against an officer in his official capacity, and the county of his residence is therefore the place in which he performs the functions of his office. In the case of the State

Treasurer, the county in which that officer resides is, of course, Pulaski County, for it is there that he maintains his office and keeps the record thereof.

The reason for the statute is, no doubt, that the Legislature was unwilling to have the records of the officers and boards referred to in § 1175, carried out over the State and away from the place where they should be permanently kept. However, we are not required to determine the legislative purpose; it suffices to know the legislative fiat.

This § 1175 was construed in the case of *Edwards* v. *Jackson,* 176 Ark. 107, 2 S. W. (2d) 44, which was an action against the sheriff of Montgomery County and the sureties on his bond as such, which was brought in the Polk Circuit Court. It was alleged by the plaintiff in that suit that her husband had been wrongfully killed by the sheriff's posse, certain members thereof being residents of Polk County, who were served with process in that county. It was there insisted that, as the Polk County residents had been properly sued and served with process in that county, the right existed to sue the sheriff as a joint tort-feasor in that county. We held, however, that an action upon the official bond of a public officer had been localized by § 1175, Crawford & Moses' Digest, and could be brought only in the county in which the officer resided, and the suit against the sheriff and his sureties was dismissed upon demurrer, for the reason that the Polk Circuit Court was without jurisdiction of the cause of action, notwithstanding the allegation that all of the defendants were joint tort-feasors, two of whom had been properly sued in Polk County. In so holding, we said:

"The language and meaning of the statute on the questions involved herein is so plain as to admit of no construction. It was within the competency of the Legislature to enact it, is not in conflict with the Constitution of the State, and does not deprive appellants of any rights guaranteed by the Constitution of the United States.

"The venue of the action, as shown by the allegations of the complaint, was in Montgomery County, where the cause arose, no part of it having arisen in Polk

County, where the suit was brought, and the demurrer was properly sustained. *Bledsoe* v. *Pierce Williams Co.,* 147 Ark. 51, 226 S. W. 532; *Reed* v. *Williams,* 163 Ark. 520, 260 S. W. 438."

If it be objected that our holding makes it necessary to sue the collector and his sureties in Bradley County, and the treasurer and his surety in Pulaski County, although it is alleged that they are joint tort-feasors, it may be answered that the statute so requires, and we have held that "it was within the competency of the Legislature to enact it."

The writ of prohibition will therefore be granted as prayed, restraining the Bradley Circuit Court from further proceeding in the suit against the State Treasurer and his surety in the Bradley Circuit Court.

BROOKS *v.* PULLEN.

4-2970

Opinion delivered March 27, 1933.

John Mayes and *C. D. Atkinson,* for appellant.

George A. Hurst and *O. E. Williams,* for appellee.

SMITH, J. Appellants, Brooks and Dodd, filed, in the circuit court of Washington County, a petition for a writ of mandamus, which contained the following allegations: Petitioners are residents and qualified electors of Washington County, and were candidates, in the general election held in said county on November 8, 1932, for the offices of circuit clerk and sheriff of Washington County,

respectively. Certain electors of the county, made parties defendant, served at said election as election judges in the wards of the city of Springdale and in certain townships of the county, and, by virtue of their service as such judges of election, have in their possession one copy of the tally sheets and poll books for their respective voting precincts. That § 3833, Crawford & Moses' Digest, which is a portion of the chapter on Elections, provides that one of the certificates, tally sheets and poll books shall be retained by the judges free for the inspection of all persons. That these petitioners, individually and through their attorneys, agents and representatives, have made demand for an inspection of the certificates, tally sheets and poll books in the various voting precincts thereinbefore named of the election judges in their respective precincts, and that such election judges have refused to allow an inspection of such records, in violation of the laws of the State of Arkansas, and with the corrupt intent and purpose of fraudulently defeating these plaintiffs in their civil rights.

That the county election commissioners have certified their opponents as having been elected to the offices for which petitioners were candidates, and "these plaintiffs are preparing contests of said election, and, in order to comply with the law of the State of Arkansas in preparing their contests, it is necessary for them to inspect the certificates, tally sheets and poll books of the respective voting precincts hereinbefore set forth." That, in preparing their notice of contest of said election, petitioners are required to set forth in said notice the names of the persons who voted in said precincts whose right to vote they challenge, together with their objections to the qualifications of such voters, and, in order to do this, it is necessary that they examine the poll books in said voting precincts and obtain therefrom a list of the names of such persons voting in such precincts. That four hundred persons voted in said precincts whose right to vote they challenge.

Petitioners further alleged that "they have exhausted every means at their command and every other remedy available to them for obtaining an examination

of the poll books and other records in the possession of the election judges in said precincts."

It was alleged, in an amended petition, that, since filing the original petition, certain of the judges of election, made parties defendant originally, had permitted an inspection of the poll books in their possession, and the petition was dismissed as to such judges.

Upon these allegations, petitioners prayed that the judges who still refused petitioners the right to examine the poll books and tally sheets in their possession "be notified of this proceeding, and be required to appear and show cause why they have refused to perform their official duty and obey the laws of the State of Arkansas in relation to the matter hereinbefore set forth, and that upon such hearing a writ of mandamus be issued commanding and compelling the said defendants to perform their official duty and allow these plaintiffs, their agents, attorneys and representatives, to inspect said records, and make such copies as they may see fit."

A demurrer was filed to the petition, which was sustained by the court, and, petitioners electing to stand on their petition, the same was dismissed, and this appeal is from that order and judgment of the court.

For the affirmance of the judgment of the court below it is insisted that the portion of § 3833, Crawford & Moses' Digest, quoted in the petition, is not mandatory, and many cases are cited to the effect that mandamus will not issue to control the discretion of an officer, election or otherwise, and that such an officer will not be required by mandamus to perform an act not required of him by law.

Section 7020, Crawford & Moses' Digest, confers upon circuit courts the power to issue writs of mandamus to the courts of probate, county courts, justices of the peace, and all other inferior officers in their respective circuits. This power has been exercised in many cases found in our reports.

Section 7021, Crawford & Moses' Digest, defines the writ of mandamus as "an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined

by law, and is granted on the motion of the party aggrieved, or of the State, when the public interest is affected."

Election judges are officers within the meaning of these statutes and have certain duties to perform which are defined by law. By § 3832, Crawford & Moses' Digest, they are required, after having held the election, to count the ballots, and to prepare and sign in duplicate a certificate showing the number of votes given for each person, and the office for which such votes were given, and to make a certificate showing these facts. This section further provides that, "after making such certificates, the judges, before they disperse, shall put under cover one of said tally sheets, certificates and poll books and seal the same, and direct it to the board of county election commissioners."

By § 3833, Crawford & Moses' Digest, it is provided that the said certificate and the ballots, sealed in separate packages, shall be conveyed by one of the judges, to be determined by lot, if they cannot otherwise agree, to the county election commissioners, and that "the other certificates, tally sheets and poll books shall be retained by the judges, free for the inspection of all persons"; and further: "It shall be the duty of the judges of election of the several precincts, after the ballots shall have been inspected and counted, to securely envelope all such ballots and send same, together with the certificate, tally sheets and poll books as aforesaid, to the county election commissioners, to be kept as hereinafter provided."

The present proceeding is not therefore one to establish a right, but is a proceeding, under authority of law, clearly given to all persons to inspect the certificate, tally sheets and poll books which the law requires the judges of election to keep for that purpose.

The petition for mandamus makes clear the purpose of petitioners in instituting this proceeding, which is to comply with the requirements of § 3850, Crawford & Moses' Digest, in instituting contests for the offices for which petitioners were candidates. This section defines the jurisdiction of the county court to hear and determine contests for the offices of circuit clerk and sheriff, and

certain other offices, and requires that "if any objections be made to the qualifications of voters, the names of such voters, with the objections, shall be stated in the notice (of contests)." An examination and inspection of the poll books is essential to comply with this requirement.

Petitioners are seeking to compel the election officers —the judges of the election—to perform a duty imposed by law, in the performance of which the officers have no discretion, to-wit, to keep the tally sheets and poll books, "free for the inspection of all persons." Petitioners show a substantial prejudice to themselves as candidates for public office if that right is denied them. We therefore construe the provisions of the statute as being mandatory.

The writ of mandamus should therefore have been awarded as prayed, and the judgment of the court below will be reversed and the cause remanded, with directions to make such orders as may be necessary to enforce the legal rights which petitioners allege and seek to inforce.

HUMPHREYS, J., dissents.

NATIONAL SURETY COMPANY *v.* STATE EX REL. CHAMBERLIN.

4-2940

Opinion delivered March 27, 1933.

Barber & Henry, for appellant.

Roy D. Campbell and *Horace Chamberlin,* for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Pulaski County, Third Division, to recover a law fee of $1,010 and interest due him

from the Equitable Casualty & Surety Company, a foreign corporation, which was authorized to do business in the State of Arkansas, alleging that appellant signed a qualifying bond under the requirements of § 6134 of Crawford & Moses' Digest, as amended by act No. 493 of the Acts of 1921, when the Equitable Casualty & Surety Company of New York entered this State for the purpose of conducting a fidelity and insurance business. Appellant filed an answer denying liability under the bond for an attorney's fee.

A jury trial was waived, and the court heard the case sitting as a jury, which resulted in a judgment in favor of appellee against appellant on its bond in the sum of $1,117.80, from which is this appeal.

The sole question involved on this appeal is whether the qualifying bond executed to the State of Arkansas by appellant as surety for the Equitable Casualty & Surety Company was intended to cover obligations other than the fidelity and guaranty contracts issued by that company.

The qualifying bond, signed by appellant as surety for the Equitable Casualty & Surety Company, is as follows:

"Know All Men By These Presents:

"That we, Equitable Casualty & Surety Company, as principal, and the National Surety 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 said State, then this obligation shall become void; otherwise to remain in full force and effect.

"Witness our hands and seals this 20th day of March, 1929.

"Equitable Casualty & Surety Company,
"By Robert Maloy,
(Seal). "Principal.
"Countersigned: National Surety Company,
"By A. Daniels,
"Surety.
"By E. B. Bloom,
"(Licensed Resident by S. S. Bowman, Agent for Arkansas.)
"(SEAL)."

It will be observed that the language of the bond is broader than the statute which the trial court read into it, but there is no conflict between the statute and the language used in the bond. Even if the statute were construed to cover liability upon the fidelity and guaranty contracts only, the language of the bond is broader, and covers "all claims and obligations arising or accruing in this State by virtue of any bond or contract made by said principal." It is unnecessary to decide the extent of the liability under the language of the statute when the language of the bond itself unambiguously binds appellant as surety to promptly pay all claims and obligations arising or accruing in this State by virtue of any contract made by the principal. There is no dispute in the testimony as to the employment under written contract of appellee, Chamberlin, by the Equitable Casualty & Surety Company, and that he performed legal services for it in the amount sued for.

No error appearing, the judgment is affirmed.

Mr. Justice BUTLER disqualified and not participating.

UNIONAID LIFE INSURANCE COMPANY *v.* HARKEY.

4-2896

Opinion delivered March 27, 1933.

Duty & Duty and *Ollie Collins,* for appellant.

Hogue & Burney, for appellee.

HUMPHREYS, J. This suit was instituted by appellee against appellant in the circuit court of Pulaski County, Third Division, to recover a balance of $200 alleged to be due her on an insurance policy issued by appellant to her father, J. O. Keef, in which she was named the beneficiary. The policy was issued to her father on the 24th day of March, 1928, in lieu of an assessment policy he had carried in the Mutual Aid Union, the business of which had theretofore been taken over by appellant. After the new policy was issued to her father, he paid the annual premium thereon until the date of his death on the 24th day of December, 1930. The new policy was in the possession of appellant. It was alleged that, after the death of the insured, appellant's agent called on appellee and represented that only $300 was due her on the policy, whereas $500 was due thereon, and that, on account of the false representations made, she settled and released the appellant for a cash payment of $300.

An answer was filed denying that the settlement was procured through misrepresentations of appellant's agent and pleading the settlement and failure to tender back the amount paid her in bar of the action.

The cause was submitted to the jury upon the pleadings, testimony, and instructions of the court, which resulted in a verdict and consequent judgment for $200 in favor of appellee, from which is this appeal.

The policy on its face is an absolute undertaking or agreement to pay appellee $500 upon the death of her father, the insured, and the issue of whether the agent induced the settlement and release upon payment of $300 through misrepresentations was a disputed question of fact which was submitted to the jury under proper instructions. Appellant is bound by the finding of the jury in that particular.

Appellant, however, contends for a reversal of the judgment because appellee failed to return the money paid her before bringing this suit. In the instant case, the jury found that the release was obtained through the misrepresentations of appellant's agent. The rule is that, where the release of an insurer's liability on a policy is obtained by fraud, the beneficiary is not required, as a prerequisite to the maintenance of his suit, to tender the consideration paid for such release, but may sue for the balance of the obligation after deducting the amount paid for the release. *Industrial Mutual Indemnity Co.* v. *Thompson,* 83 Ark. 575, 104 S. W. 200.

No error appearing, the judgment is affirmed.

HOOPER *v.* STATE.

Crim. 3826

Opinion delivered March 27, 1933.

[redacted]

Gordon B. Carlton, Feazel & Steel and *Ben Shaver,* for appellant.

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

KIRBY, J., (after stating the facts). It is insisted that the court erred in refusing to give requested instructions Nos. 2 and 6, in the admission of certain testimony, in

the refusal to discharge a panel of thirty special jurors; and that the testimony is insufficient to support the verdict, there being no testimony corroborating that of the accomplices.

Instruction No. 2 was sufficiently covered by the general instructions given calling attention particularly to a certain kind of testimony admitted about the facts, of which it was claimed the defendant had knowledge before the consummation of the robbery. The general instructions being correct, no error was committed in refusing to give this instruction, conceding, not deciding, that it was a correct declaration of law.

Instruction No. 6, on the question of corroboration of the testimony of accomplices, was fully covered by instruction No. 4, given by the court, and no error was committed in not repeating the instruction as No. 6. Trial courts are not required to give requested instructions which are fully covered in the court's charge. *Smith* v. *State,* 168 Ark. 253, 269 S. W. 995. See also *Middleton* v. *State,* 162 Ark. 535, 258 S. W. 995; *McClaskey* v. *State,* 168 Ark. 339, 270 S. W. 498; and *Bodner* v. *State,* 177 Ark. 424, 6 S. W. (2d) 550.

It is insisted that the court erred in refusing to dismiss a special panel of jurors selected by the sheriff on account of his prejudice against the defendant. The regular judge was disqualified in the Hooper cases, and Hon. Ben E. Isbell was selected to try them; and the court held that the sheriff was disqualified in serving jurors to try Hooper. Before this case was set for trial, and during the regular term, the trial judge ordered the sheriff to select 30 special jurors, and this case was subsequently set for trial, and it was to these 30 jurors that the defendant's motion to dismiss the panel went. Evidence was heard upon the motion which tended to show the sheriff's prejudice against the defendant, and also that this case was not set for trial at the time he selected the special panel of jurors. It will not be necessary to discuss the proof adduced on the part of the State in order to show that no prejudice resulted to the defendant by the use of these special jurors, for the reason that on the trial the defendant did not exhaust his peremptory

challenges, nor make any showing whatever that any particular person who served on the jury was prejudiced against him. The record reflects that he only exercised 16 challenges in all before the jury which tried the case was selected, and, not having exhausted his peremptory challenges, this constituted an implied admission that the jurors were unobjectionable, and he has no right to complain here. *York* v. *State,* 91 Ark. 582, 121 S. W. 1070; *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845; *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80.

It is next insisted that the court erred in admitting the testimony of Mrs. Hulse and Mrs. Mills, her daughter, to the effect that Biddy Hooper, another accomplice, brought Hulse some of the money obtained in the bank robbery after the robbery was committed and the robbers had left the State, the purpose of the conspiracy having been consummated. Although it is true that the acts and declarations of a conspirator are inadmissible against his co-conspirator after the accomplishment of the purpose of the conspiracy, such is not the case here. The purpose was to rob the bank and procure the money, and necessarily distribute it among those participating in the enterprise, and the conspiracy cannot be said to have ended so long as the money procured in the robbery had not been divided among the robbers. *Wiley* v. *State,* 92 Ark. 586-592, 124 S. W. 249.

This defendant was charged with the crime of accessory after the fact of the robbery, and it was not consummated as long as the defendant concealed the crime and protected the principals. In *State* v. *Gauther,* 231 Pac. (Ore.) 141, the Supreme Court of Oregon said: "The acts and conduct of one accomplice, during the pendency of the wrongful act, not only in its perpetration, but also in its subsequent concealment, are admissible against the other."

In *Miller* v. *State,* 88 Tex. Cr. R. 157, 225 S. W. 262, the Supreme Court of Texas, in passing upon the question, held contrary to appellant's contention, saying: "Under the evidence from the State's standpoint, the appellant and Corcoran were co-conspirators, and the object of the conspiracy was the acquisition of the property,

its sale, and the apportionment of the proceeds. Under this evidence, the conspiracy continued until its object was accomplished, and the acts and declarations of Corcoran in furtherance of the conspiracy were admissible, though in the absence of the appellant, and though made after the property had been taken. [Citing cases.] Even if the conspiracy had ended, the check was a part of the fruits of the crime, and its possession by the accomplice was admissible."

The conspiracy being still in existence, the testimony of Mrs. Hulse and her daughter to the fact that Biddy Hooper brought the money from defendant, appellant, to Mr. Hulse's house, he being one of the accomplices, and what he said with reference thereto are admissible and could be proved.

It is finally contended that there is not sufficient testimony corroborating the statements of the accomplices to support the verdict. The court has concluded otherwise, however. Mrs. Burke testified that she brought her husband and Cooper, the two bank robbers, to Mr. Hooper's house, where they all spent the night before the robbery, and she went on back to Texas the next day, leaving them there. Hulse's wife and daughter testified that Biddy Hooper brought Hulse money from the defendant, it being in half dollars, quarters, dimes and nickels, the kind of money taken from the bank; and there was other corroborative testimony sufficient to warrant the jury in finding that it connected the defendant with the commission of the crime. *Middleton* v. *State, supra.*

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

BRONX FIRE INSURANCE COMPANY *v.* COOPER.

4-2912

Opinion delivered March 27, 1933.

Verne McMillen and *J. J. DuLaney,* for appellant.

Jones & Jones, for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in rendering judgment for attorneys' fees, etc., in the case, insisting that it could not do so because appellees failed to recover the amount of the claim sued for.

The court, after hearing the testimony in the case and upon the appellants' offer to confess judgment for the amount sued for less the amount of the set-off claimed, instructed the jury that it was all appellants were entitled to, and instructed a verdict for appellees in the sum of $2,882.75. The judgment recites the offer to confess judgment and the amount, and that said sum of $2,882.75 being the amount which plaintiffs sued for less $116.25, which defendants set up in their answer as a set-off, etc., rendered judgment for the said $2,882.75 with costs.

There was no reply made by appellees to the answer of appellants claiming the set-off of $116.25, which amount was in fact conceded to be due upon the set-off, which was but a cause of action against appellees. Sections 1205-6, Crawford & Moses' Digest.

The claim as sued upon, however, was found to be correct and appellees entitled thereto in the judgment of the court, which allowed the claim and set-off of appellants, and returned judgment for the amount of the balance due, the difference between the amount sued for which appellees were entitled to recover and the amount of the set-off allowed appellants on their claim. In other words, the appellees recovered in their suit the full

amount sued for, which was reduced by a judgment for appellants on their set-off by the amount of it, judgment being in fact entered for the amount of appellees' loss less what they owed appellants on the claim setoff.

The failure of the insurance company to pay the amount of the loss within the time specified in the policy after demand subjected it to payment of attorney's fees upon the recovery under the policy, and it can make no difference in its liability to the payment of such penalty and costs that it failed to comply with and pay the loss when demanded, because the policy holder was indebted to the insurance company in a matter that could be set-off against the insured's claim of loss under the policy, that furnishing no justification for failure to pay the loss within the time specified in the policy, and not relieving against the penalty of the statute.

Neither did this constitute a demand for a greater sum than appellees were entitled to under the policy, and the court did not err in granting judgment for the attorneys' fee upon the motion therefor. *Life & Casualty Co.* v. *Sanders,* 173 Ark. 362, 292 S. W. 657; *Pacific Mutual Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764; *National Life & Accident Ins. Co.* v. *Sherrod,* 155 Ark. 381, 244 S. W. 436; *Home Life & Accident Co.* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648.

It could make no difference that the judgment of the allowance of the attorney's fee was made after the judgment was rendered on the policy, the matter having been postponed until another day for hearing the motion upon the question. It could be regarded in any event a motion to retax the costs, and there is no merit in the objection that the allowance of the attorney's fee was made at a time after the rendition of the judgment, the question being reserved until the later date.

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

NEW AMSTERDAM CASUALTY COMPANY *v.* DETROIT FIDELITY & SURETY COMPANY.

4-2931

Opinion delivered March 27, 1933.

Buzbee, Pugh & Harrison, for appellant.

Horace Chamberlin, for appellee.

MEHAFFY, J. This action was instituted by appellant to recover from appellee surety company for premiums due upon liability policies issued to the contractor, who had given a bond to the Highway Commission with the appellee as surety on said bond.

The Yellville Construction Company entered into a contract with the State Highway Commission for the construction of approximately twelve miles of grading and drainage on one of the Arkansas highways. On the same day it entered into the contract with the Highway Commission, it made a bond in conformity with act 368 of the Acts of the General Assembly for the year 1929,

said bond being executed by the Yellville Construction Company as principal, and by the Detroit Fidelity & Surety Company as surety. By the terms of the bond, the surety company guaranteed the performance of the contract and guaranteed the payment of all claims for labor, materials, supplies, etc. Under the contract and laws, the Yellville Construction Company was required to enter into contracts for the protection against claims for personal injury or property damage during the prosecution of the work.

The appellant issued two policies known as liability insurance policies, protecting the Construction Company against claims for damages to persons or property sustained during the construction work. These policies were in force during the entire prosecution of the work under the contract with the Highway Commission.

The appellant issued its policies to the construction company for certain premiums. It is alleged that the unpaid premium due on one policy is $2,527.01, and the unpaid premium due on the other policy is $402.65.

The complaint alleges that said policies of insurance were required to be carried by the Construction Company, and that the premiums therefor are within the protection of the bond of the Detroit Fidelity & Surety Company, and that said surety company and construction company are liable to appellant for said sums of money, with interest.

A paragraph of the bond given by the Detroit Fidelity & Surety Company is as follows: "Now, therefore, if the above bounden Yellville Construction Company shall in all things stand and abide by and well and truly observe, do, keep and perform all and singular the terms, covenants, guarantees and agreements in said contract to be observed, kept, done and performed, and each of them, at the time and in the manner and form therein specified, and shall do and perform all the labor and work and shall furnish all the material as specified in said contract and in strict accordance with the terms of said contract and the plans and specifications thereto attached and made a part thereof, and shall indemnify and save harmless said Arkansas State Highway Commission

against any loss or damage whatever kind and character, arising or occasioned by deeds of negligence of said principal, his agents, servants and employees, in the prosecution of the work or by reason of improper safeguards or incomplete protection to the work and shall pay all bills for material, labor and supplies entered into contingent and incident to the construction of said work, and shall complete said work within the time specified in said contract, then this obligation shall be null and void, otherwise to remain in full force and effect."

The last paragraph in the bond reads as follows: "Unpaid claims for material, labor and supplies entered into contingent and incident to the construction of said work or used in the course of performance of the work shall have a right of action on this bond, but payments thereon shall be postponed until all claims of the Arkansas State Highway Commission herein have been paid in full."

The bond mentioned above was given under the provisions of act 368 of the Acts of the General Assembly of 1929. The first section reads as follows: "That all bonds required by any commission or commissioners or board, or the agent or agents thereof, or any other public officer or officers for the construction of any public buildings, levee, sewer, drain, road, street, highway, bridge or other public buildings or works aforesaid, shall be liable for all claims for labor, material, camp equipment, fuel including oil and gasoline, food for men and feed for animals, labor and material expended in making repairs on machinery or equipment used in connection with the construction of said public buildings or works aforesaid, lumber and material used in making forms and supports and all other supplies or things entering into the construction, or necessary or incident thereto or used in the course of construction of said public buildings or public works; said bonds shall also be liable for rentals on machinery, equipment, mules and horses used in the construction of said public buildings or public works aforesaid, and all persons holding such claims shall have a right of action on said bonds."

Appellee filed a demurrer alleging that the complaint does not state facts sufficient to constitute a cause

of action against it, because act 368 of the Acts of 1929 of the General Assembly of Arkansas, and the bond referred to in the complaint, do not cover the items sued on. The only question for our consideration is whether the bond covers the items sued on.

The bond sued on is a statutory bond, and such bonds, executed in the form prescribed by the statute, are to be construed, as respects the rights of both principal and surety, as though the law requiring and regulating them were written in them. *Crawford* v. *Ozark Ins. Co.*, 97 Ark. 549, 134 S. W. 951; *Detroit Fid. & Surety Co.* v. *Yaffee Iron & Metal Co., Inc.*, 184 Ark. 1095, 44 S. W. (2d) 1085; *Zellars* v. *National Surety Co.*, 108 S. W. 548; 9 C. J. 34.

In construing this bond the court must construe it as if the law were written into it. It must, however, be construed as a whole, and, as against sureties, there is no implication to be made not clearly embraced within the language used. Sureties are only chargeable according to the terms of the bond. A bond, like other written instruments, should be so construed as to effectuate the reasonable intention of the parties. *Loeb* v. *City of Montgomery*, 7 Ala. App. 325, 61 So. 642; *Savage* v. *Neal*, 151 Tenn. 70, 268 S. W. 375; *Blyth-Fargo Co.* v. *Free*, 46 Utah 233, 148 Pac. 427; *U. S. Fid. & Guaranty Co.* v. *Iowa Tel. Co.*, 174 Iowa 476, 156 N. W. 727.

The law under which the bond sued on was given provides that the sureties shall be liable for all claims for labor, material, camp equipment, fuel including oil and gasoline, food for men and feed for animals, labor and material expended in making repairs on machinery or equipment used in the construction of said public buildings or work aforesaid, lumber and material used in making forms and supports, and all other supplies or things entering into the construction or necessary or incident thereto, or used in the course of construction of said public buildings or public works. The surety is liable on its bond for all the things above mentioned.

Where parties have entered into written agreements with express stipulations, they cannot be extended by implication. The presumption is that, having named

the things as the statute does in this case, those are all the things for which they intended to be bound under the instrument. The surety will not be bound by other things not mentioned. In other words, the surety is bound by the terms of the contract, and its liability cannot be extended by implication unless it was clearly the intention of the parties to the contract.

The bond, when the statute is read into it, does not provide for the payment of premiums to another insurance company.

The judgment is affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* GREER.

4-2941

Opinion delivered March 27, 1933.

Geo. B. Pugh and *Thos. S. Buzbee,* for appellant.

Ingram & Moher, for appellee.

MEHAFFY, J. The appellee, in December, 1931, delivered to the appellant, Chicago, Rock Island & Pacific Railway Company, a gasoline underground tank in good order, of the value of $50 consigned to A. L. Fuqua at Brewton, Alabama.

Appellee brought suit in the justice court, alleging that said tank was damaged by the negligence of appellant and was refused by the consignee at destination; that the damage was such as to render the tank worthless.

Appellant did not appear in the justice of the peace court, and judgment was rendered against it for the amount sued for. An appeal was prosecuted to the circuit court, where the case was tried, and the jury returned a verdict for $50, and judgment was entered accordingly. The case is here on appeal.

The appellee contends that the bill of exceptions does not show that it contains all of the evidence. We do not agree with the appellee in this contention. The record shows that the appellant did not offer any proof, and the record also contains the following statement: "The foregoing was all of the testimony introduced by the plaintiff."

If the record shows that it contains all of the testimony introduced by plaintiff, and also shows that defendant did not introduce any testimony, this is a sufficient showing that the bill of exceptions contains all of the evidence.

Appellee also contends that the record does not show when the motion for new trial was filed. The statute requires a motion for new trial to be filed within three days. The record shows that the trial was had on August 10, 1932, and the record also shows that the motion for new trial was overruled on August 10th. It

therefore must have been filed on the same day the judgment was rendered, and was overruled the same day.

Several letters were introduced in evidence over the objection of appellant. The first letter was one written by W. O. Bunger, superintendent of freight claims. The objection made to this letter was that it was hearsay. The writer advised the appellee about facts which he stated he learned from the agent at destination. Appellant's contention is correct. This letter was incompetent because it purported to state what another party had told Bunger.

The next letter introduced and objected to was from W. O. Bunger to the appellee, but the statements in this letter were also about facts not within the knowledge of the writer. This letter was improperly admitted in evidence over the objection of the appellant.

The next letter objected to was a letter from the consignee to the appellee. The consignee, Fuqua, could of course have testified as to the condition of the tank when it arrived at Brewton, but a letter written by him was not competent. The appellee should have taken Fuqua's testimony, and the other party should have had an opportunity to cross-examine him.

There was a letter introduced, however, written on the letterhead of the Louisville & Nashville Railroad Company, and addressed to the agent of appellant at Stuttgart, Arkansas, and signed by S. A. Jackson, agent. This letter shows that the agent at Brewton had received a letter on the 6th with reference to the shipment of the tank, and this letter of the agent at Brewton was in response to the letter written by appellant's agent. It shows that the tank was in bad condition when it arrived at its destination.

In appellant's motion for a new trial, it did not assign as error the court's ruling in permitting this letter to be read as evidence, and its objection to this letter is therefore waived.

The undisputed evidence shows that this tank was delivered in good order. Mr. J. M. Grimes, the freight agent for appellant at Stuttgart, testified as to having received the tank from appellee for shipment to Brew-

ton, Alabama. He made out the bill of lading. The bill of lading which was introduced showed that the tank was in good order when delivered to the carrier. There was no notation on the waybill that there were any holes in the tank. This witness also testified about the claim having been presented to him, but he was unable to say whether the letter signed by Jackson which he received was written by the agent of the delivering carrier.

The tank having been received in good order, and the letter of the agent of the delivering carrier showing that it arrived at its destination in bad order—in a damaged condition—made a *prima facie* case, and the burden was then upon appellant to show that it was not negligent in handling the shipment.

Appellant offered no evidence at all, or no explanation, and the evidence introduced by appellee was sufficient to justify the jury in finding for the appellee.

The judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* COX.

4-2932

Opinion delivered March 27, 1933.

Thos. B. Pryor and *H. L. Ponder,* for appellant.

Griffin & Griffin, for appellee.

McHaney, J. Appellee, Bernice Cox, aged 11, was injured at a public crossing in Bald Knob when her foot was caught in a bond wire attached to the rails of appellant's track to complete the circuit for signal purposes, which tripped her, caused her to fall across one of the rails, and injured her left side severely. Her suit against appellant resulted in a verdict and judgment in her favor.

The principal question argued is one of fact—whether the evidence was sufficient to support the verdict. We agree with the trial court that it was. It shows that this bond wire was right in the middle of the crossing, and had been permitted to extend over the top of the rails so as to form a loop a few inches above the rails. It was a copper wire about 2½ feet long and attached at each end to the side of a rail about 2½ inches below the ball of the rails. Ordinarily, this wire is covered with plank at a crossing, but in this case there was no plank, but gravel, and the wire had worked up above the rails, making a trap for pedestrians who might pass over it and hook a foot therein. It is true the appellee had passed over this crossing many times and three times the day she was hurt. She had not noticed the dangerous condition of the wire. Appellant was required to exercise ordinary care to keep its crossings reasonably safe for public travel, and certainly would not have the right to set a trap or a snare therein which might reasonably be expected to cause injury to another.

Nor do we think the little girl was guilty of contributory negligence as a matter of law. Not only was she a child of tender years and cannot be held to the same degree of caution and prudence as an adult person (*St. Louis, I. M. & S. R. Co.* v. *Sparks,* 81 Ark. 187, 99 S. W. 73, and *Gates* v. *Plummer,* 173 Ark. 27, 291 S. W. 816), but it might well be a question for the jury, even as to an adult person, as to whether it would be negligence to fail to see the wire in daylight and thereby avoid it.

Appellant cites the recent case of *Missouri Pac. Rd. Co.* v. *Richardson,* 185 Ark. 472, 47 S. W. (2d) 794. We

think that case is not analogous to this. There Richardson, an adult, was injured at a crossing by stepping on a small rock or gravel which caused his ankle to turn and twist his knee. We there held there was no liability, for the reason that, even though it be conceded that the company was negligent in permitting particles of gravel to fall from its trains, still the injury to Richardson was not a consequence that ought to have been foreseen. Here however any person would be bound to know that a short wire looped above the rails in a crossing is a trap for the unwary pedestrian which would likely cause a fall and consequent injury.

We find no error. Affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* COOK-BAHLAU FEED MANUFACTURING COMPANY.

4-2938

Opinion delivered March 27, 1933.

Carter, Jones & Turney and *Lamb & Adams,* for appellant.

John Sherrill, for appellee.

MCHANEY, J. Appellees, Cook-Bahlau Feed Manufacturing Company and Ætna Casualty & Surety Company, will hereinafter be referred to as principal and surety respectively. August 19, 1926, they executed and delivered to appellant the following bond: "We under-

take that the undersigned principal will, (1) within ten days from date of delivery of each shipment, surrender, duly indorsed, to the St. Louis Southwestern Railway Company the original shipper's order bill of lading covering such shipment or shipments which may, from time to time, be delivered by said railway company, upon the written order of the principal, stating that the bill of lading for such shipment has been lost or delayed, and also stating the true value of said shipment or, in case the same is lost, furnish the said railway company satisfactory written evidence of such loss; and, (2) indemnify said St. Louis Southwestern Railway Company, the successors and assigns thereof, and each connecting carrier participating in the transportation of said shipment, against all losses, costs, expenses, attorney's fees, claims, judgments and demands of whatever kind resulting from, or arising or growing out of, directly or indirectly, such delivery of such shipments, without production and surrender of each said order bills of lading issued therefor, or prior to the payment of any draft accompanying the same or for nonobservance of any provision contained in said bills of lading with reference to delivery."

This bond was on a form prepared by appellant, and continued in force and effect until failure of the principal in October, 1930. It was executed pursuant to § 793, Crawford & Moses' Digest. The principal was a large grain dealer in Pine Bluff, and received shipments of many cars of grain. Only two cars are involved in this litigation. Car UP No. 127131 containing oats reached Pine Bluff September 21, 1930. Shipper's order bill of lading with draft attached for $900 drawn on the principal reached Merchants' & Planters' Bank, Pine Bluff, September 19, two days before arrival of car, and principal was promptly notified thereof, either on that day or the next. Car MEC No. 5042, also containing oats, arrived September 28, 1930. Shipper's order bill of lading with draft attached for $1,028.23 reached the same bank September 25, three days before arrival of car, and notice was promptly given. Both cars were delivered to the principal by appellant without the surrender of the bills of lading and without requiring a

"written order of the principal, stating that the bill of lading for such shipment has been lost or delayed and also stating the true value of said shipment; or, in case same is lost, furnish the said railway company satisfactory written evidence of such loss." The drafts attached to said ladings were not paid by the principal, and appellant was required to pay the shippers for such merchandise. It thereafter brought this action against the principal and the surety to recover on the bond. The principal, being insolvent, defaulted, and judgment was had against it. The surety defended on the ground that the loss sustained was not covered by its bond. The trial court found in favor of the surety, and entered judgment accordingly.

We think the court correctly so held. While the bond is entitled "Blanket Indemnity Bond for Delivery of Shipper's Order Freight Without Surrender of Original Bill of Lading," it is not in fact such a bond. By its express terms it does not purport to indemnify appellant for all shipper's order freight it might deliver to the principal without surrender of B/L, but only in such cases as the B/L "has been lost or delayed," and only then on the written order of the principal so stating and the true value thereof, and, in case of loss, proof thereof satisfactory to appellant. The conditions upon which appellant might deliver shipper's order freight to the principal are plain and unambiguous. The object of both the statute and the bond was to facilitate the delivery of shipper's order freight where the B/L was lost or delayed. The original act shows this to be the fact, and the bond speaks for itself. The act is entitled: "An act to permit shippers and consignees of freight * * * to execute bonds to common carriers * * * in order to obtain possession of goods when they are unable to present and deliver the original bills of lading and receipts." One of the reasons for the act is recited in the second preamble as follows: "Whereas it often happens that the shipper or consignee fails to receive said bill of lading or original receipt, and the goods called for therein cannot be delivered on account of the absence of the original receipts and bills of lading, thus causing

delay and injury to the goods." No doubt the Legislature had in mind the convenience of the shipper or consignee and the perishable nature of the shipment. There would be no reasonable excuse for substituting a bond for the surrender of a B/L, which was not delayed or lost, for, if present to the knowledge of the consignee, all he would have to do would be to pay the holder of the draft and obtain the B/L. The language of the act is broad enough perhaps to authorize the carrier to accept a bond so general in its terms as to cover all deliveries of shipper's order freight as it might make without surrender of B/L, but it does not require such a bond to be executed. The bond in this case was not such a bond. It was clearly limited to such shipper's order freight which could not be delivered because of loss or delay of the B/L. In the case now before us the B/L in neither case was lost or delayed, and no written order was made by the principal so stating. Had the principal made such written order and stated that the B/L was either lost or destroyed and otherwise complied with the requirements of the bond, an entirely different case would be before us. It would then be more like the case cited and relied on by appellant—that of *Kansas City S. Ry. Co.* v. *U. S. F. & G. Co.*, 174 Ark. 318, 295 S. W. 705. In that case the bond was entirely different from the bond in this case. But paragraph numbered 2 of that bond was the basis of the principal defense of the surety, and it read as follows: "That neither the principal nor its agents nor employees shall request, accept or receive from said railway company the delivery or possession of any freight to which it would not be entitled upon the production and surrender of bills of lading or shipping receipts therefor, and that no delivery of freight on account of this bond will be requested or made where the draft with the bill of lading is then in any bank at point of delivery for collection."

The consignee in that case requested delivery, although the B/L was then in the bank at Fort Smith with draft attached. We held the surety liable. No such state of facts exists in this case. The bond is not so broad and all inclusive. No demand, written or otherwise, was

made on appellant for delivery, and no showing that the B/L was either lost or delayed. The parties to this contract are *sui juris*. Attorneys for appellant prepared the bond. Courts do not make contracts for the parties, but only construe them. The parties having made this contract in clear and unambiguous language, it is the duty of the court to construe it according to the plain meaning of the language employed, and not to enlarge or extend its terms on any theory of strict construction against appellant because it prepared the bond, or against the surety because it is a paid surety.

The bond having clearly named the conditions on which the surety would be liable, appellant must be held to show a breach of such conditions before it can hold the surety liable. Not having done so, the judgment must be affirmed. It is so ordered.

SMITH, J., dissents.

TAYLOR *v.* GREGORY SPECIAL SCHOOL DISTRICT.

4-2933

Opinion delivered March 27, 1933.

W. J. Dungan, for appellant.

Thomas Fitzhugh, for appellee.

BUTLER, J. The Gregory Special School District filed its complaint in the Woodruff Chancery Court against Walter E. Taylor, State Bank Commissioner, in charge of the Bank of Augusta & Trust Company, an insolvent bank, to have its claim adjudged as a preferred claim; the contention being that it became such by virtue of § 74 of act 169 of the Acts of 1931. The facts were

agreed to, and a statement of the same filed with the court as follows:

The president of the school district presented a school warrant to the bank on October 6, 1931, for $1,000 and obtained a check therefor drawn on the Memphis correspondent of the bank for the sum of $1,000, payable to Channer Securities Company. The bank presented the school warrant to the county treasurer and obtained a county treasurer's check for $1,000, drawn on the bank as subdepository of county funds, and said bank charged the treasurer's check to the account of the treasurer in the bank. The bank closed its doors as insolvent on the 7th day of October, 1931, and its assets were taken over by Walter E. Taylor, State Bank Commissioner. Because of the insolvency of the bank the cashier's check was not paid and had not yet been paid. The bank had its funds with its Memphis correspondent to pay the cashier's check when issued and when the bank closed its doors. The transaction did not add to the assets of the bank nor lessen its liabilities, but resulted in shifting on the books the $1,000 item from the treasurer's account to the account of "Drafts Outstanding."

The Bank Commissioner filed an answer to the complaint, and a decree was entered in favor of the school district, from which decree the Bank Commissioner has prosecuted this appeal.

That part of § 74, act 169, *supra,* relied on by appellee to sustain the decree of the court below is as follows: * * * "Provided that if the bank selected by the school board as a depository of its funds shall be unable to secure such school deposits as herein set out, it shall be authorized to accept such funds as a preferred deposit, and, in the event of insolvency, such preferred deposit shall be paid before other bank deposits are paid." This act was construed in the case of *Boone County Board of Education* v. *Taylor,* 185 Ark. 869, 50 S. W. (2d) 241, contrary to the interpretation placed upon it by the court below, which case, we believe, and that of *Taylor* v. *Dermott Grocery & Com. Co.,* 185 Ark., p. 7, 45 S. W. (2d) 23, settle the instant case against appellee's contention and call for a reversal of the decree of the trial court.

In the last-named case the grocery company obtained from the debtor a check on an account with the Chicot Trust Company and obtained from the said trust company a cashier's check in lieu thereof which he sent to his company. Before it reached the bank for payment the trust company became insolvent and was taken over by the Bank Commissioner. In that case it was held that the cashier's check had no preference over that of the other creditors and was allowed as a common claim. In the first-named case act No. 169 of the General Assembly of 1931, relied on in the instant case, was construed, the contention made being the same there as is now made here. In that case it was held that the act, in so far as it related to dealings of a school district with a bank, should be read and construed with the State banking laws, act 107, Acts 1927, for that act and § 74 of act 169, Acts 1931, affected the same subject-matter, and we said:

"The two acts of the Legislature are related to each other, and a statute is not to be construed as though it stood alone on any particular subject. It is well settled that repeals by implication are not favored; and, in construing any statute, the court should place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole. Where the harmony of the law requires, one statute may be construed as lengthening out another. So the act of 1931 was passed with reference to the general law upon the subject of winding up insolvent banks and fixing the liabilities and preferences of creditors to each other. Both acts, being related to each other, should be construed together as a part of an entire law of which both are a part. *State* v. *Sewell,* 45 Ark. 387; *Benton* v. *Willis,* 76 Ark. 443, 88 S. W. 1000; *McIntosh* v. *Little Rock,* 159 Ark. 607, 252 S. W. 605, and *Connelly* v. *Lawhon,* 180 Ark. 964, 23 S. W. (2d) 990. Applying this principle of law to the case at bar, we think the Legislature of 1931, when it provided in the proviso of the section under consideration that a bank should be authorized to accept school funds as a preferred deposit under certain contingencies, meant to use the words in the sense defined by the Legislature

of 1927, and meant that, in order for the bank to accept school money as a preferred deposit, the agreement must be in writing, in compliance with act No. 107, passed by the Legislature of 1927, as construed by this court in the cases above cited. In this way the two statutes would be read and considered together, and construed as a harmonious whole."

The chancellor erred in holding that the claim of the appellee school district was a preferred claim, and the decree will therefore be reversed, and the cause remanded with directions to allow the same as a common claim.

WHITE *v.* WILLIAMS.

4-2934

Opinion delivered March 27, 1933.

M. A. Matlock, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

BUTLER, J. This suit was brought by the appellant as a citizen and taxpayer against Blake Williams as sheriff and the surety on his official bond to recover for the use and benefit of Pulaski County the net profits received by the sheriff for feeding the county and federal prisoners confined in the Pulaski County jail during Williams' term as sheriff.

The complaint, as amended, alleged that the prosecuting attorney, when requested, had failed and neglected to join in the action or to bring a separate action. With the complaint was filed a bill of particulars setting out the sums received each month for feeding the county prisoners and the sums received for feeding the federal prisoners. It was alleged that Williams had made no accounting of the expense incurred in the feeding of the prisoners or what the net profits were; that he acted in this matter under color of authority of act No. 81 of the General Assembly of 1931.

It was alleged that the said Williams had received as a salary the sum of $5,000 per annum; that plaintiff was advised and believed that the sums received for feeding the prisoners were in excess of the amounts expended by the sheriff for the same, and the excess above the lawful costs expended by him increased the amounts received by him as sheriff above $5,000 per annum, and that plaintiff believed and alleged that the excess was over $10,000, and that act No. 81 was in contravention of article 19, § 23, of the Constitution; that plaintiff had no knowledge or means by which he could ascertain the amount expended by Williams for feeding the prisoners in excess of the actual cost thereof, and prayed that he

be required to account for and pay into the county treasury the net profits received by him.

To that complaint a demurrer was interposed and sustained.

It is first insisted that the complaint does not state issuable facts because its allegations are that plaintiff (appellant) is informed and believes that it cost appellee less than eighty-five cents per day to feed a prisoner, and that he believes appellee has received greatly in excess of the cost of feeding the prisoners. Where the facts are not alleged to exist, but there is a mere statement only that plaintiff has received information to that effect, a complaint is insufficient and is subject to demurrer, but where the charge is made upon information and belief, and there are averments in the complaint warranting the inference that the pleader asserts them to be true, the complaint is sufficient upon demurrer. *Holland* v. *Davies,* 36 Ark. 446; *Sebastian County* v. *Hocott,* 141 Ark. 301, 217 S. W. 258. It is the rule that, if, from the allegations of facts in the complaint together with every reasonable inference arising from all of the allegations, a cause of action is stated, the demurrer should be overruled. This is a suit for an accounting and from all the allegations we are of the opinion that it reasonably appears that the charge is made as a fact that appellee received for feeding the prisoners a sum in excess of the actual cost thereof and in excess of the sum of $10,000. We think therefore that the complaint was not subject to demurrer on the ground first urged. *Kilgore Lumber Co.* v. *Halley,* 140 Ark. 448, 215 S. W. 653.

The appellant here contends, as in the trial court, that the appellee is obliged to account for the moneys received for feeding the prisoners, and, if there was a profit, to pay the same into the county treasury. The appellee contends that there was no duty on his part to do this because of the provisions of act No. 81 of the General Assembly of 1931; that it was within the power of the Legislature to allow a reasonable lump sum to cover the expense of feeding the prisoners, and that this is what act No. 81 provided.

That part of the act involved in this case is a part of § 1, and reads as follows: "The expense of feeding prisoners in the county jail is declared by law to be the sum of eighty-five cents (85c) per prisoner per day, and the sheriff shall have charge of feeding the prisoners. Compensation therefor shall not be considered as fees of the office. The sheriff shall pay the expense of cook and janitor, also expense of lights, water and gas used for cooking."

Article 19, § 23, of the Constitution of 1874, which, it is claimed the act as interpreted and applied in the court below offends against, is as follows: "No officer of this State, nor of any county, city or town, shall receive directly or indirectly, for salary, fees and perquisites more than five thousand dollars net profit per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation."

The act of the General Assembly passed February, 1875 (Section 4633 *et seq.*, Crawford & Moses' Digest), in aid of the above provided that it should be the duty of certain named State officers and of each county, city, town or village officer receiving fees or emoluments of office to keep a record book in which on each day all moneys or other funds received in payment of fees or by way of emolument pertaining to the office shall be entered. Further provision was made in that act to the effect that said record books kept by county officers should be kept open for the inspection of the judges of the circuit and county courts of the county, and that each officer coming within the purview of the act should make an annual report under oath beginning at the end of the first year of his term of office, and that the county officers should make this report to the judge of the circuit court in which "shall be set forth the amount of money or other evidence of value, if any, received during the year preceding on account of such office whether from salary, fees or other emoluments or perquisites of such office," and, if the total amount of the receipts of office shall exceed in par funds the sum of $5,000, the officer shall

further report the amount expended by him in the conduct of his office for said year which shall be deducted from the gross amount of receipts, and, if the balance shall exceed the sum of $5,000 in the case of a county officer, it shall be paid into the treasury of the county.

In determining whether an act of the Legislature violates the Constitution, it must be presumed that the Legislature acted in good faith and within constitutional limits and its acts will be upheld unless its application would necessarily come within the inhibition of some provision of the Constitution.

We approach the question of the constitutionality of the act involved with this principle in mind and with recognition of the legislative power to fix a certain sum as expenses in any reasonable manner where, by so doing the Constitution is not violated. In support of the constitutionality of the act in question, we are referred by counsel to cases of other jurisdictions and to our own case of *Mays* v. *Phillips County,* 168 Ark. 829, 274 S. W. 5, 279 S. W. 366. We refrain from reviewing the cases cited from other jurisdictions because the question before us must be determined from a consideration of the peculiar language in our Constitution and laws, and we think that the case of *Mays* v. *Phillips County, supra,* has no application, for the reason that the question now before us was not presented to the court in that case.

No case has before arisen where the amounts received by sheriffs for feeding prisoners as a part of the total salary allowed was involved, but it is apparent to us that any profit made for this service would be an emolument or perquisite of office, as it would be received by the individual holding office by virtue of the same, and, as under the Constitution, in determining the total amount of the salary, account must be taken of all fees and perquisites directly or indirectly received by the officer as such, it is manifest that the profits made from feeding prisoners would be just as any other perquisite and must be accounted for. Therefore the declaration of the Legislature that the expense of feeding prisoners is eighty-five cents per prisoner per day, which should not be considered as fees of the office, is inoperative, if its practical

application would serve to increase the salary of the officer beyond the limit fixed by the Constitution.

The language of the Constitution and the enabling act is so clear and explicit that it may not be evaded in any way whatsoever, and where the Legislature enacts a law having the necessary effect of evading the limit set by the Constitution, such act is void. This, under the allegations of the complaint, is the effect of the act in question.

In fixing the compensation of members of the Legislature in certain amounts, the Constitution provided that they should receive no compensation, perquisite or allowance except in the manner named. By resolution of the House and, on a later day, of the Senate, it was resolved that the sum of $100 should be paid to each member for expenses incurred while attending the Legislature. In the case of *Ashton* v. *Ferguson*, 164 Ark. 254, 261 S. W. 624, this court held that this was nothing more nor less than an allowance and was in violation of the Constitution. We can see no difference in principle between the question considered in that case and the one here involved. It is very ably argued that the policy of act No. 81 was wise and expedient, that the amount named as expenses for feeding the county prisoners was not unreasonable to the extent that the court would take judicial notice that it was such. The answer is that its effect clearly might be to compensate appellee in a sum greater than that fixed by the Constitution, and, however wise or reasonable it might be, it is none the less a violation of the plain provisions of the Constitution.

Appellee seeks to distinguish between the expense of feeding federal prisoners and county prisoners and argues that as to the first it was a matter solely between the United States Government and appellee personally. This is not true however for the sums received by him from the Government were received because he was a county officer and by virtue of his office. These sums therefore stood on no different footing from the fees received from any other source because appellee is required to account for all fees and perquisites received, either directly or indirectly.

We are of the opinion that the trial court erred in sustaining the demurrer. The judgment is therefore reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings.

SMITH and MCHANEY, JJ., dissent.

COMMON SCHOOL DISTRICT NO. 42 *v.* STUTTGART SPECIAL SCHOOL DISTRICT NO. 22.

4-3021

Opinion delivered April 3, 1933.

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

Ingram & Moher, for appellee.

JOHNSON, C. J., (after stating the facts). It is apparent that this controversy hinges upon the validity or invalidity of the order of the county board of education made and entered March 8, 1930. This order of the county board of education does not show upon its face that any petition by property owners was ever filed with said

county board of education prior to its enactment. It does not show upon its face that any notice was given of any contemplated changes in the boundary lines of said district prior to the entry of said order. For these reasons the trial court held the order of the county board of education, made and entered as aforesaid, void.

It is the contention of the appellant district that all defects or omissions of said county board of education in making and entering said order aforesaid were cured by § 54 of act 169 of 1931, which section reads as follows:

"Section 54. All districts formed by action of the county board of education of any county prior to the passage of this act are hereby made districts under the provisions of this act, and any errors, omissions, or defects in the procedure of creating such district are hereby cured, and the action creating any such district is hereby ratified. Provided this section shall not be construed as validating any action of a county board of education concerning which a valid suit in a court of competent jurisdiction is now pending."

The pertinent language in § 54 is, "and any errors, omissions, or defects in the procedure of creating such district are hereby cured." Notwithstanding the county board of education on March 8, 1930, when it made and entered this order establishing the boundaries between the two districts, had no authority in law to effect the same except after a petition and notice had been filed, these defects and irregularities may be validated and cured by a subsequent act of the Legislature.

This court has held: "Where the irregularity consists in doing some act, or in the mode or manner of doing it which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one." *Green* v. *Abraham,* 43 Ark. 420.

This court has also held: "When a deed or other conveyance is invalid by reason of the failure of the parties thereto to conform to some formality imposed by the statute, the Legislature may by a subsequent act cure the defect and give the deed such effect as the parties intended it should have at the time of its execution." *Pelt* v. *Payne,* 90 Ark. 600, 30 S. W. 426.

We think that § 54 of act 169 of 1931 is applicable to the order of the county board of education made and entered on March 8, 1930, and that all omissions and irregularities therein, whether by lack of petition or notice, are cured and validated by said act, and that said order of the county board of education of Arkansas County has established the true boundary line between said two districts.

It is next insisted on behalf of the appellee that, even though this court should hold that the order of the county board of education establishing the boundary between the two districts was a valid and binding contract between the districts and properly promulgated by the county board of education, yet that part of the order which permits the high school children in District 42 to attend the high school in District 22 is not enforceable. We cannot agree to this contention. It would certainly be inequitable and unjust to permit the appellee district to receive benefits under the order of the county board of education yet refuse to comply with the conditions on which it was granted. We think that this part of the order of the county board of education should be treated as a transfer of the children of appellant's district to District 22 for school purposes. When this is done, we only treat the order of the county board of education as it has been treated by the parties themselves for the past two years. District No. 42 and District No. 22 have treated this as a valid order since its promulgation in March, 1930, up to and until this suit was filed, and we know of no valid reason why they should not continue to do so.

It is next insisted on behalf of appellee that the order of the county board of education, in effect, is to say to appellee: "Regardless of changed conditions, we formerly had a small area which we traded to you—you cannot—the Legislature cannot in the future exercise any authority over this situation—you cannot make any change of boundary or do anything that would disturb our invalid agreement."

Counsel for appellee are mistaken in this view. By a long line of decisions of this court, the Legislature is vested with full authority to create school districts and

change their boundaries at will; the Legislature may delegate this authority to any inferior department of the government such as the county court, the county board of education or any other agency it may desire. This order of the county board of education does not in any wise infringe upon the authority of the Legislature or any subordinate agency to change the boundaries between these two districts or to create new districts out of this or any other territory.

This court is of the opinion that the order of the county board of education of Arkansas County made on March 8, 1930, establishing the boundaries between appellant, District No. 42, and appellee, District No. 22, is now a valid and binding order of said board by reason of act 169 of 1931, and that the order, in so far as it permits children in District No. 42 in all grades above the eighth grade to attend appellee's schools in District No. 22, should be treated as a valid transfer of said children of District No. 42 for school purposes, and that this should be done until a change may be effected in said districts by the Legislature or some other subordinate agency authorized to effect a change.

For the reasons aforesaid, the decree of the Arkansas County Chancery Court is reversed, and remanded with directions to the chancellor to enter a decree in conformity with this opinion, and that a mandatory injunction be issued to carry out these directions.

KIRBY, J., dissents.

TAYLOR *v.* CASSELL.

4-2947

Opinion delivered April 3, 1933.

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W. F. Reeves, for appellant.

A. J. Parks and *N. J. Henley,* for appellee.

JOHNSON, C. J., (after stating the facts). This appeal is prosecuted from a decree of the chancery court of Searcy County wherein the claim of Cordelia Cassell, guardian, against Walter E. Taylor, State Bank Commissioner, was allowed, classified and preferred as against common creditors of said insolvent bank.

The decree of the Searcy County Chancery Court was rendered on July 6, 1932, which was sometime prior to the rendition of this court's opinion in the case of *Taylor* v. *Bankers' Trust Company,* 186 Ark. 1109, 57 S. W. (2d) 1059, decided by this court on October 31, 1932.

Learned counsel for appellee states the issues in this case in brief as follows:

"There is only one distinction to be made between the case at bar and the one decided by this court October 31, 1932, wherein Walter E. Taylor, Bank Commissioner, was appellant and the Bankers' Trust Company, guardian, was appellee. In the case just cited the guardian was associated with a trust officer, who was required by the guardian's bond to also sign the checks drawn against the funds deposited. Whereas in the present case there was no trust officer associated with the guardian, and the guardian alone could draw against the funds held by her for the benefit of her wards."

This court has reached the conclusion that the case of *Taylor* v. *Bankers' Trust Company,* cited *supra,* decided all the issues presented on this appeal. The mere fact that there was a trust officer to countersign checks executed by the guardian could not possibly make any difference. This court decided in the case cited that, where the United States Government paid over money to a guardian, it thereby lost control and dominion over such fund and was not thereafter interested in its deposit. The trust officer acting in the Bankers' Trust Company case was not acting in behalf of the United States Government, but, on the contrary, was acting in behalf of the

surety company which had become the surety for the guardian.

In the case at bar, as in the Bankers' Trust Company case, cited *supra,* the United States Government, upon surrender of checks to the guardian, lost all dominion and control over the proceeds of said checks, and therefore was not thereafter interested in its deposit. The guardian was at liberty to make deposit of funds at her discretion; therefore § 3466 of the Revised Statutes of the United States has no application.

Since the rendition of the opinion of this court in *Taylor* v. *Bankers' Trust Company, supra,* the Supreme Court of the United States on March 13, 1933, passed upon the exact question here presented and held: "War risk insurance and disability compensation paid by Government to guardian of war veteran and deposited in bank was not entitled to priority upon bank's insolvency as "debt due United States," within Revised Statute 3466 (31 USCA, § 191), because the guardian, appointed by the State court was not an agent or instrumentality of the United States, and payment to the guardian vested title in the ward, and operated to discharge the obligation of the United States in respect of such installments." *Spicer* v. *Smith,* 53 S. Ct. Rep. 415.

For the reasons aforesaid, the decree of the Searcy County Chancery Court will be reversed, and the cause remanded with directions that the claim be allowed only as a common claim against the assets of said insolvent bank.

MAPLES *v.* MAPLES.

4-2907

Opinion delivered April 3, 1933.

J. W. Atkinson, for appellant.

M. V. Moody, for appellee.

SMITH, J. This appeal is from a decree of the Pulaski Chancery Court rendered on May 14, 1932, in which the court refused to vacate and set aside a prior decree rendered on July 31, 1931, which last-mentioned decree had declared void a decree rendered on December 20, 1917, in the Pulaski Chancery Court in which B. F. Maples had been granted a divorce from his wife, Emma Lou Maples. The decree of July 31, 1931, appears to have been rendered in an *ex parte* proceeding, whereas the decree from which this appeal comes was an adversary proceeding in which the two women hereinafter referred to appeared and were heard.

The testimony developed the following facts: B. F. Maples filed suit for divorce in the Pulaski Chancery Court in 1917 against Emma Lou Maples, his wife, upon the ground of desertion, and upon service by the publication of a warning order a decree of divorce was rendered in proper form on December 20, 1917. Testimony was offered at the trial, from which this appeal comes, to the effect that the allegation of the complaint in that case that the plaintiff, B. F. Maples, was a resident of the State of Arkansas was false, he being at the time a resident of the State of Alabama, and to the further effect that the allegation that his wife, the defendant, had deserted him was also false.

After the rendition of the decree of divorce on December 20, 1917, B. F. Maples married Bertha D. ten days later in Lincoln County, Tennessee, and on December 26, 1918, a child was born, who was given his father's full name. After this second marriage Maples returned to the community in Alabama, where he had resided with the wife from whom he obtained the divorce in this State, and continued to reside in that community. He was, however, drafted into the Army of the United States, and, while serving in that capacity at a training camp in the State of Mississippi, his death occurred on August 24,

1918. On July 24, 1924, a death compensation benefit was awarded Bertha D. and her son, B. F., Jr., by the United States Veterans' Bureau in the sum of $65 per month, which they have since continuously drawn from the Government.

B. F. Maples lived with his second wife in the same county in Alabama and not many miles from the home of his first wife, who, when asked, "When did you first learn that B. F. Maples had married Bertha D. Maples?" answered, "Soon after the marriage." And she testified also that she learned that a child had been born "some three or four months after my husband's death." When asked, "When did you first learn that Bertha D. Maples was drawing monthly death compensation benefits as the widow of B. F. Maples from the Government?" answered, "Something like a year ago."

It may be said that the testimony establishes the fact that the original decree of divorce was procured in this State through a fraud practiced upon the court, in that B. F. Maples was not a resident of the State of Arkansas as he had alleged in his complaint. Whether he could have furnished any explanation of the apparent fraud if he were alive is a matter of speculation.

It may also be said that Mrs. Emma Lou Maples proceeded with reasonable expedition after discovering that a death benefit had been awarded to the widow of B. F. Maples; but this is not the date to be considered in determining whether she has been guilty of laches.

Without questioning the good faith of either of these unfortunate women, it may be said that neither is now the wife of B. F. Maples, who is dead. They are both single women. The case is like that of *Moyer* v. *Koontz*, 103 Wis. 22, 74 Am. St. Rep. 837, in which the Supreme Court of Wisconsin said: "The object of such a suit as this, when the husband is alive, is to adjudicate that whereas by the existing fraudulent decree the plaintiff is made single, she shall, by the demanded judgment, be adjudicated to still be married. It is the converse of the divorce suit, where the relief sought is that, whereas the plaintiff is now married, she may be adjudged to be

single. But, in a case like this, where, by the irrevocable act of death, her status as to her deceased husband has become fixed as that of a celibate, no such question can exist to be acted on. No decree that the courts of Wisconsin can render can change that status. It then becomes a mere adjudication as to a record, for the purpose of satisfying a sentiment or affecting property rights. As is well said in 2 Nelson on Divorce and Separation, § 1054: 'The proceeding will be a mere contest for property, for, if the decree is vacated, the survivor cannot be restored to marital rights' (or status)."

The case of *Graham* v. *Graham,* 54 Wash. 70, 102 Pac. 891, was one in which a decree of divorce was attacked upon the ground that it had been procured through fraud practiced upon the court, and is very extensively annotated in L. R. A. 1917B, the annotation extending from page 409 to page 512. The annotator says in his note that: "Whoever would have a judgment set aside on the ground that it was obtained by fraud, duress, accident, mistake, or surprise must act diligently in seeking relief, and the rule requiring diligence and prompt action attacking judgments upon such grounds is the same respecting decrees of divorce as other judgments and decrees."

Among the numerous cases cited in support of this statement of the law is our own case of *Corney* v. *Corney,* 97 Ark. 117, 133 S. W. 813, in which a headnote reads as follows: "Where the defendant in a decree of divorce waited two years before taking steps to vacate the decree upon the ground of the fraud of her attorneys and until the plaintiff had married another woman, her application should be denied on account of laches."

We there quoted from Bishop on Marriage and Divorce (vol. 2, § 1533) as follows: " 'There are excellent reasons why judgments in matrimonial causes, whether of nullity, dissolution or separation, should be more stable, certainly not less, than in others, and so our courts hold. The matrimonial status of the parties draws with it and after it so many collateral rights and interests of third persons that uncertainty and fluctuation in it would

be greatly detrimental to the public. And, particularly to an innocent person who has contracted a marriage on faith of the decree of the court, the calamity of having it reversed and the marriage made void is past estimation. These considerations have great weight with the courts, added whereto there are statutes in some of the States according a special inviolability to such judgments.' "

Here, the first wife, having been advised that her husband had married another woman in 1917, waited until after her husband was dead and until 1931 before proceeding to have the divorce decree vacated. We feel constrained to hold that she waited too long, and is barred by her laches.

The decree of the court below, from which this appeal comes, which vacated and set aside the decree of divorce, will therefore be reversed, and the cause will be dismissed.

CONSOLIDATED INDEMNITY AND INSURANCE COMPANY *v.* FISCHER LIME & CEMENT COMPANY.

4-2948

Opinion delivered April 3, 1933.

M. Danaher and *Palmer Danaher,* for appellant.

Owens & Ehrman and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

SMITH, J. Separate suits were brought by the Fischer Lime & Cement Company and the Big Rock Stone & Material Company against the Merrill Engineering Company and the Consolidated Indemnity & Insurance Company as the surety of its codefendent, which suits were consolidated and tried together, and a decree was rendered in favor of both plaintiffs against both defendants.

The Merrill Engineering Company entered into a contract with the State Highway Commission to construct a part of a State highway, and gave bond, as required by law, for the due performance of the contract, with the Consolidated Indemnity & Insurance Company as its surety. Each plaintiff furnished the contractor with certain material used in the performance of the construction contract, upon which partial payments were made. The value of the material and the balance due thereon is not disputed, and only the surety company has appealed from the decree adjudging liability against both defendants.

The surety company defends upon two grounds, (1) that no statement of the account was filed with the secretary of the Highway Commission within thirty days after the completion of the work as required by § 53 of act 65 of the Acts of 1929 (vol. 1, Acts 1929, page 326); and (2) because no action was brought on the bond until more than six months after the date of the final estimate of the construction work given the contractor by the State Highway Commission as required by § 3 of act 368 of the Acts of 1929 (vol. 2, Acts 1929, page 1487).

As to the defense that the claim was not filed with the secretary of the Highway Commission within thirty

days after the completion of the work, it may be said that it is first insisted by appellees that there was a substantial compliance with the statute in this respect. It is also insisted that this requirement appearing in act 65 was repealed by implication by act 368, and, as we have concluded that appellees are correct on this last proposition, we do not decide whether they are also correct on the first.

It is quite obvious, in fact it does not appear to be questioned, that the bond sued on was executed pursuant to the requirements of act 368. There had, prior to the enactment of this statute, been numerous suits, which finally came before this court on appeal, in which questions were raised as to the extent of the liability of the surety on contractors' bonds, and act 368 was made broad enough in its terms to include all items which had been previously questioned or would likely be used or employed subsequently in the performance of the construction contracts there enumerated.

Section 53 of act 65 requires a bond in an amount at least equal to the amount of the contract. Act 368 does not specify the amount of the bond. Section 53 of act 65 enumerates the items for which, and the persons to whom, the surety shall be liable, and there follows in the same paragraph the provision that claims for the material, etc., there above-mentioned, "shall be filed with the secretary of the Highway Commission within thirty days after the completion of the work." Act 368 includes all the items embraced in act 65, and adds materially to the liability of the surety, without imposing the condition that claims against the bond be filed with the Highway Commission, as does act 65.

Act 65 provides that the contractor's bond shall be conditioned "as the Commission (Highway) may require," whereas § 3 of act 368 provides that the bond shall specifically include liability "for the things enumerated in § 1 hereof," and further provides that "the failure or refusal of said officer or persons to include said provisions in said bonds shall not prevent the holders or owners of claims, as provided in § 1 of this act, from collecting said claims or bringing suits and enforc-

ing such claims against said bonds." Immediately following is a provision regulating such suits, which does not contain the requirement that the claims be exhibited to and filed with the Highway Commission, but it is provided only "that all suits to enforce claims on bonds as provided herein shall be commenced within six months from the date of final estimate to the contractor."

Section 53 of act 65 contains no limitation as to the time within which suits may be brought, provided the claim is filed with the secretary of the Highway Commission within thirty days after the completion of the work, or within six months from the time the work was abandoned by the contractor, if such were the case, unless the Commission should enter an order extending the time for filing such claims. Act 368 does contain a limitation upon the time within which suits shall be brought, which period of limitation runs, not from the time of filing the claim with the Highway Commission, for no such requirement is imposed, but "from the date of final estimate to the contractor." The only condition upon the right to sue under act 368 is that the suit shall be commenced within six months from the date of final estimate to the contractor.

As a general rule, repeals by implication are not favored, and courts are reluctant to hold that there has been an implied repeal of a statute where that purpose was not expressed. This subject was thoroughly and recently considered in the case of *Louisiana Oil Refining Company* v. *Rainwater,* 183 Ark. 482, 37 S. W. (2d) 96. In the application of the rule stated, we there first held that a statute under review had not repealed a prior statute by implication, but, upon further consideration under a petition for rehearing, we concluded that there had been an implied repeal, and, in so holding, it was said: "As stated by Mr. Justice FIELD in *United States* v. *Tynen,* 11 Wall. (U. S.), p. 88, and quoted with approval on rehearing in *Mays* v. *Phillips County,* 168 Ark. 829-833, 279 S. W. 366: 'When there are two acts on the same subject, the rule is to give effect to both if possible; but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates, to the

extent of the repugnancy, as a repeal of the first, and, even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' And this is true, even though the old act contains 'provisions not embraced in the new.' *Wilson* v. *Massie,* 70 Ark. 25, 65 S. W. 942; *Chicago, R. I. & P. Ry. Co.* v. *McElroy,* 92 Ark. 600, 123 S. W. 771; *Eubanks* v. *Futrell,* 112 Ark. 437, 166 S. W. 172; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; *State* v. *White,* 170 Ark. 880, 281 S. W. 678. The difficulty is not in stating the rule, as it appears to be one of universal application, but in applying it to a given case."

We therefore announce our conclusion that, as act 368 is a later act and impliedly repeals the requirement as to filing claims contained in the earlier act, filing the claim with the State Highway Commission is not made a condition essential to bringing suit under the later act.

The question remains whether the suit was commenced within six months from the date of final estimate to the contractor, and upon this question of fact the testimony was to the following effect: The actual construction work was completed on August 25, 1931, and the procedure in regard to obtaining final estimates in this and other similar contracts was as follows: The engineer having supervision of the work inspected it and checked it, making such measurements as were required to ascertain the amount due the contractor. The report thereon would be sent to the district engineer having charge of the work in the district where the work had been done for inspection, and any revision thought necessary. The district engineer then made report to the State Highway Commission in Little Rock, where Mr. Zass, in charge of this department, rechecked the work. In the instant case this was done by Mr. Zass on September 25, 1931, on which date the estimate was mailed to the contractor at its office in Jackson, Mississippi, with the request that the usual release be executed by the contractor, in which the latter, if he executed the release, agreed on the total payment to be made. This was done pursuant to article 9

of the general specifications, under which this and similar contracts were let, reading as follows: "The Commission, upon the receipt of the engineer's certification of completion and final estimate, and upon receipt of satisfactory evidence from the contractor that all persons furnishing labor or materials have been paid in full, and all persons claiming damages to property or person because of the carrying on of this work have been settled with, or their claims dismissed, or the issues joined, shall certify the estimate for final payment, after previous payments have been deducted, and shall notify the contractor and his surety of the acceptance of the road. On delivery of the final payment, the contractor shall sign a written acceptance of the final estimate as payment in full for the work done. All prior partial estimates and payments shall be subject to correction in the final estimate and payment." When the requirement in this particular had been met, all the papers in the case were then referred to the auditorial department of the Commission for action by it, subject to the final review of the chief engineer of the Highway Department. On October 7 Zass wrote the contractor as follows: "Gentlemen: The final estimate on this project has been passed to the auditor and is now ready for payment with the exception of the settlement of a claim filed by R. M. Leatherman, of Lonoke, Arkansas, in the amount of $673.70, which includes a labor bill of Craig Harper, in the amount of $153.50. Please furnish this office with evidence that the above claim has been satisfied and the voucher will be released."

Zass testified that the estimate sent the contractor on September 25 was not supposed to be a final and conclusive statement as to the amount due, but was an intermediate step taken in order that the contractor might examine it and make claim for any additional amount to which he considered himself entitled, and that in the instant case the contractor was not satisfied with the estimate, which was for $7,280.60, but claimed an additional credit of $750. Upon this subject the vice president of the Merrill Engineering Company having the settlement in charge testified as follows: "After talking with Mr. Zass, and Mr. Zass went with me to some other de-

partment—I forget the gentleman's name that we talked to about that—and they agreed to allow the $750, and I just added it in pencil, and we never received another typewritten copy.'' The witness fixed the date of this revised and final estimate as of October 1, 1931, and we think it was from that date that the six months' period of limitation should be computed, as the statute does not run from the date of a preliminary estimate, but from the date of the final estimate, which we construe to mean the conclusion and determination of the person having final authority to make that finding.

In the case of *Southern Surety Co.* v. *Western Pipe & Steel Co.*, 16 Fed. (2d) 456, the headnote reads as follows: ''Under a contract for public work, providing that final payment should be made within 30 days after the final estimate had been approved by the chief engineer, the date of 'final settlement of the contract,' within the meaning of act August 13, 1894, as amended by act February 24, 1905 (Comp. St., § 6923), was not when the final estimate was made by the district engineer, but the date of its approval by the chief engineer.''

As both suits were brought within less than six months after October 1, 1931, they were brought within the time limited by law. The judgments must therefore be affirmed, and it is so ordered.

SMITH *v.* MERGENTHALER LINOTYPE COMPANY.

4-2936

Opinion delivered April 3, 1933.

John C. Ashley and *Shields M. Goodwin,* for appellant.

Fred A. Isgrig, for appellee.

HUMPHREYS, J. Suit to recover a judgment for $894.44 and to foreclose a chattel mortgage was instituted in the chancery court by appellee, a foreign corporation engaged in manufacturing and selling linotype machines, against appellant, who had purchased a second-hand linotype machine from it. At the time of the institution of the suit, a balance of $894.44 was due on the machine, which appellant refused to pay. The notes evidencing the balance and the chattel mortgage given on the machine to secure them were made the basis of the suit.

The defense interposed to the suit by appellant was that the contract was void and nonenforceable because made in the State by a foreign corporation without first complying with the laws of the State authorizing it to do business here.

The cause was submitted to the court upon the pleadings and testimony, resulting in a finding that the transaction was interstate and a judgment for the amount sued for and a decree of foreclosure, from which is this appeal.

The record reflects that appellee, a foreign corporation, had its main office and factory in New York with an office at New Orleans as headquarters for its traveling salesmen; that it manufactured and sold linotype machines through its traveling salesmen on written orders which had to be approved and accepted, before effective, by its executive officers in the State of New York; that it sold to *The Herald,* a newspaper published at Rison, a new linotype machine, taking as part payment a second-hand linotype machine, in the latter part of 1926, which it stored or left in place in said newspaper office until it disposed of same in February, 1927, to appellant; that the sale was made by appellee's traveling salesman to appellant on appellant's written proposal to pay $50 cash and notes in $20 denominations, which proposition was accepted by the executive officers of ap-

pellee in New York; that, pursuant to the agreement, appellant executed a series of fifty-seven notes for a total amount of $1,596.50, the purchase price of the machine, and a chattel mortgage on the machine to secure same dated February 14, 1927, and payable at Rison, which were mailed to appellee in New York on the 21st day of February, 1927; that the mortgage was recorded in Izard County on the 12th day of March, 1927; that, upon receipt of the notes and mortgage, the machine was shipped directly from Rison to Melbourne.

The sole question presented to this court on trial *de novo* upon the pleadings and testimony is whether the transaction was interstate or intrastate. The sale of the new linotype machine to *The Herald* was clearly an interstate transaction. The acceptance of the old linotype machine in part payment therefor was allowable as a part of the interstate transaction, as much so as if the whole consideration had been paid in cash. The right to convert the property thus received in payment of the new linotype machine into cash and negotiable paper was a necessary incident to the interstate transaction and a continuation thereof. Otherwise, it would have been necessary to incur the expense of shipping the second-hand linotype machine out of the State in order to convert it into money or its equivalent. The statutes of this State requiring foreign corporations to comply with certain conditions before doing intrastate business were not intended to place such a burden upon the enforcement of good faith interstate transactions. The facts in the instant case bring it within the rule announced by this court in the case of *L. B. Powell Company* v. *Roundtree,* 157 Ark. 121, 247 S. W. 389, and approved in the later case of *Linograph Company* v. *Logan,* 175 Ark. 194, 299 S. W. 609.

No error appearing, the decree is affirmed.

INDEPENDENCE COUNTY *v.* INDEPENDENCE COUNTY BRIDGE DISTRICT No. 1.

4-2943

Opinion delivered April 3, 1933.

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

I. J. Matheny, for appellee.

HUMPHREYS, J. By act No. 338 of the General Assembly of 1925 a bridge district was created for the purpose of building a bridge across one of the principal rivers of the State in Independence County, and along the route was one of the State's principal highways. In order to ascertain and report to the bridge commissioners the resources that might be obtained to aid in building the bridge, a committee was appointed to secure the promise of aid from the State and from the county.

The county court of Independence County made and entered the following order:

"On this day was presented to the court the petition of I. J. Matheny, secretary of Independence County Bridge District, stating to the court that said bridge dis-

trict commissioners have met and organized and are preparing to circulate petitions to the landowners of said district with a view of ascertaining whether a majority favor the construction of said bridge. Petitioner further states that, should said bridge be constructed, the lands of the district would be bonded to pay for said construction. The petitioner further alleges that said bridge if constructed would be of material benefit to the whole county of Independence, and praying the court that a perpetual order be made paying out of the special road fund of the county yearly, five thousand dollars upon said bonds.

"And the court, being fully advised in the premises, is of the opinion that said bridge, if built, will be of material benefit to said county, and that said county should pay a part of the expense of said bridge, and further that said payment should be made from the special road fund of the county.

"It is therefore considered, ordered and adjudged by the court that said appropriation of five thousand dollars be and the same is hereby made perpetual to be paid yearly upon said bonds should same be issued."

By order of the bridge commissioners, a statement was printed and circulated to the taxpayers, informing them that the State of Arkansas had agreed to bear one-half of the expense of constructing the bridge, and that Independence County would donate from turnback money the sum of $5,000 per annum to aid in the payment of the bonds, and upon this statement the taxpayers signed the petition circulated in majority, both as to number and value, to tax themselves in order to build the bridge. Bonds were issued and sold and the bridge was constructed at an approximate cost of $600,000.

The record is silent as to the date when the bridge was completed and as to the number of bonds that had matured and the interest due thereon.

In August, 1932, the bridge district filed a claim in the usual form against the county for $5,000 on the "donation or appropriation of special road funds for Independence County by order of the county court made and entered of record June 1, 1925." The claim was dis-

allowed by the court in an order which also rescinded and set aside the order of the court made June 1, 1925. On appeal to the circuit court, the proceedings in the county court in 1925 were offered in evidence and also the testimony of the present county judge and clerk regarding the status of the turnback funds, the number of miles of county roads and the condition of the roads, from which it appeared that, if the $5,000 per annum were paid from the turnback fund, there would not be sufficient funds from that and other sources to maintain the county roads in a usable condition. The county judge testified from the facts within his own knowledge and the information he had received that he had concluded that it was not for the best interest of the county and the various road districts thereof that payment be made under the order of June 1, 1925.

On the pleadings, exhibits and evidence adduced, the case was submitted to the circuit court, which held that the order of the county court of June 1, 1925, constituted a binding contract upon the county, that it could not be abrogated by the present county judge, and adjudged that the claim should be allowed directing its judgment to be certified to the county clerk of Independence County, and that the order and judgment of the county court last made be set aside and held forever naught.

On appeal to this court, it is contended by the county: First, that the order or judgment of the county court made June 1, 1925, was not a final judgment in that it was indefinite and conditional; and, second, that the court had no authority to make the order because it was an attempted diversion of the turnback money from the uses authorized by the act of the General Assembly which granted said funds to the county.

(1) The argument is made that the order or contract is indefinite and uncertain because no definite number of payments was agreed upon or incorporated into the order. It is true that the order or contract does not specify the number of payments to be made, but it is clear that such annual payments are to continue during the life of the bonds and no longer. The final payment of the county is necessarily restricted to the final pay-

ment of the bonds. It is not to be supposed, as suggested, that the bridge commissioners would unduly extend the payment of the bonds in order to continue indefinitely the county's contribution to the enterprise. It is common business knowledge that, in order to float a large bond issue, the payment thereof must be within a reasonable time.

(2) The order or contract, on its face, provides that the annual appropriation for a contribution to the enterprise shall be paid out of the special road fund, or what both appellant and appellee treat as the gasoline turnback fund, by the State to the county. It is argued that, at the time the order or contract was made, the gasoline turnback fund could not be used in building bridges. The special acts of the Legislature relating to the use to be made of the turnback fund provided that it may be used "for constructing and maintaining roads"—"for use on county roads"—and "for aid of county highway fund." See act No. 5, § 21, Special Acts of 1923; act No. 147 of Acts 1925; acts Nos. 11 and 18 of Acts of 1927. The provisions quoted above from the special acts referred to are broad enough to include building and maintaining bridges, which are necessary integral parts of highways. The mere fact that building and maintaining bridges is specially mentioned in act No. 63 of the Acts of 1931, relative to the use of turnback fund, does not mean, as argued, that a different Legislature in passing the prior acts intended to prevent the use of the turnback fund in building and maintaining bridges. Had all the acts been enacted at the same session of the Legislature, there would be some force in appellant's argument that special reference made to the use of the fund for building and maintaining bridges in the last act and not in the prior acts evidenced an intention that such use thereof was not intended by the Legislature in the prior acts. Not so when the several acts were enacted at different times by different Legislatures. Under these circumstances, the intention of each act would and must depend largely on the breadth and scope of the language used.

Lastly, it is argued that the contract or order was void because contrary to public policy. The record does

not reflect that any injury resulted from the contract. The petition filed in the county court to obtain the donation to the enterprise alleged that the construction of the bridge would be of material benefit to the whole county of Independence, and the order and contract recited that the construction of the bridge would be of material benefit to the county.

The judgment is affirmed.

SMITH and BUTLER, JJ., dissent.

BUTLER, J., (dissenting). In my opinion, the judgment is void on every ground stated by counsel for appellant, and I respectfully dissent.

In the first place, the judgment was not final but was contingent upon an event which might never happen. That it has happened does not render the judgment valid, for that must be determined from the language of the judgment itself. It is for no definite amount but for a yearly fixed sum for an indefinite and uncertain period: "It is therefore ordered, etc., * * * that said appropriation be, and the same is hereby, made perpetual."

Judgments must be certain. Their validity and binding force must rest upon facts existing at the time of their rendition. They take their validity from the action of the courts, and not from what persons may or may not do after the court has rendered such judgments. *Consolidated, etc., Co.* v. *Huff,* 62 Kan. 405; *Puette* v. *Mull,* 175 N. C. 535; *Johnson* v. *Carver,* 175 Pa. 200.

The following statement is made in the majority opinion: "It is true that the order or contract does not specify the number of payments to be made, but it is clear that such annual payments are to continue during the life of the bonds and no longer. The final payment of the county is necessarily restricted to the final payment of the bonds." In order to find warrant for this statement, the court must go beyond the language of the judgment and indulge in surmise and speculation. This, I submit, is an improper way to interpret the language of a judgment or to test its validity. Continuing, the court says: "It is not to be supposed, as suggested, that the bridge commissioners would unduly extend the payment of the bonds in order to continue indefinitely the

county's contribution to the enterprise. It is common business knowledge that in order to float a large bond issue the payment thereof must be within a reasonable time." It is, perhaps, true that the bridge commissioners would not intentionally extend the payment of the bonds, and that the maturities of the bonds will fall due within a reasonable time, but it does not follow by any means that the payment will not be unduly extended beyond the maturity, and may be for a long time thereafter, from causes arising which could not have been reasonably foreseen or prevented. It is also "common business knowledge," which has been sharpened and made alert by recent events, that bonds which were expected to be paid at a certain time may, unhappily, never be paid or their payment extended to a far distant day. Therefore, if the judgment means what it says, it is entirely possible that the $5,000 per annum payment may be indeed perpetual. I repeat that the order appears to me to violate the first requisite of a valid judgment; that it must be certain in the amount which must be paid.

The special road fund named in the judgment was a gift from the State to the county, and the former had the right to, and did, prescribe and limit its use. That prescription and limitation is clear and explicit. The controlling law at the time the county court rendered its judgment is to be found in § 21 of act No. 5 of the Extraordinary Session of 1923, and thus speaks: "The funds thus paid into the county highway improvement fund shall be by the county court expended upon the public highways of said county, and it shall be the duty of the county court to fairly and equitably apportion the funds so paid into the county highway improvement fund at the option of the court among the various road districts and road improvement districts or road districts only in said county for the purpose of constructing and maintaining the road, whether hard surface or earth road, and such apportionment shall be made by the county court after taking in consideration the relative importance of the roads of the county."

In the cases of *Stanfield* v. *Kincannon,* 185 Ark. 120, 46 S. W. (2d) 22, and *Anderson* v. *American Bank &*

Trust Co., 178 Ark. 652, 11 S. W. (2d) 444, we held that the fund received from the State by the county, called the "turnback fund," is not county revenue, but State revenue; and in *Hastings* v. *Pheifer,* 184 Ark. 952, 43 S. W. (2d) 1073, we held that it is immaterial by what name the fund is called where it is shown that it was received from the State to be applied to a specific purpose. In all of the acts dealing with State aid to the counties for the improvement of highways, prior to act 63 of the Acts of 1931, State aid was limited to the improvement of county roads. In the last-named act, which is not retroactive and therefore cannot affect previous orders made with respect to the turnback fund, the power is given county courts to expend a part of the fund for the payment of bridges built by bridge districts, the amount to be paid the bridge districts to be determined by the county court or judge thereof. That act, however, as we have seen, relates only to the disposition of the turnback fund from and after the passage of that act.

We have held that county bridges were a necessary and integral part of the road which crossed them and expenses therefor were to be considered as expenses incurred on county roads; but it is a far cry from a county bridge to a bridge such as the one involved in the instant case. This is a bridge one and a half miles long erected at a cost of $600,000 across one of the principal rivers of the State and as a part of one of its main highways, and to say, as does the court, that "the provisions above (referring to the acts of the Legislature) are broad enough to include building and maintaining bridges which are necessary parts of the highways" is to totally ignore the character of the bridge under consideration which, in no sense, is a county bridge and the expenditure from the turnback fund thereon was wholly unauthorized.

The court says: "Lastly, it is argued that the contract or order was void because contrary to public policy. The record does not reflect that any injuries resulted from the contract." On this point the facts are undisputed that the county has 900 miles of unsurfaced roads

to maintain, and that there would be left from the turnback fund after the $5,000 appropriation demanded is paid a little in excess of $6,000 which, with the three-mill county road tax, will be totally inadequate to maintain the roads of the county. It seems to me that much injury will result. It is to be presumed that the vast majority of the county's population resides on or near the county roads, and, if these become impassable, as it is the opinion of the county officers they will, but little good will result to the people from the magnificent bridge and the State's highway and the enforcement of the order of the county court will, in the end, prove disastrous to the county.

It is my opinion that the judgment of the circuit court should be reversed, and the order of the county court declared void.

Mr. Justice SMITH concurs in the view here expressed.

GAGE *v.* INMAN.

4-2892

Opinion delivered April 3, 1933.

[redacted]

Lee G. King, for appellant.

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

KIRBY, J., (after stating the facts). It is insisted that the court erred in denying the appellants' prayer for reformation of the mortgage, and also in rendering personal judgment against appellant, Mrs. Florence Gage, there being no testimony showing execution of the note secured by the mortgage by her, and she having denied its execution and any indebtedness whatever to appellees.

Mrs. Gage testified that she had made no agreement with any one to mortgage her South Ozark property, and had no intention of mortgaging same, and did not know at the time she signed the mortgage that her property was included therein. That, if she had known it, she would not have signed same, and that her purpose and intention in signing the mortgage was to relinquish, subject to the conditions of the mortgage, her right of homestead and dower in and to her husband's Webb City real estate. That she did not sign the note made by her husband and Mr. Inman and Mr. Harris to Mr. Volentine.

The scrivener, who prepared the mortgage upon the request of one of Mr. Inman's boys and wrote into the mortgage the description of the town lots as furnished him by appellee's son, stated that he presented the mortgage to each of appellants, and each appeared to understand what the purpose was, and that each signed it apparently without reading it.

Harris, one of the appellees, stated that it was his understanding that the agreement was that the appellees were to have a mortgage on Ed Gage's Webb City property and nothing more.

Gage testified that his agreement with appellees was that he was to mortgage his Webb City real estate, and nothing else. That, when he signed the mortgage that

was presented to him by Mr. Law, he did not know that other property than his Webb City property was described therein; that he signed the mortgage without reading it, and did not furnish the numbers of his property or its description to Mr. Law at all.

The testimony was clear, unequivocal and decisive that there was no agreement between the appellees and the appellants that Mrs. Gage's separate property should be mortgaged, and no intention on their part to execute a mortgage thereon. It likewise showed that Mrs. Gage had not executed the note for securing the payment of which the mortgage was given. The court erred in holding otherwise and in not reforming the mortgage and excluding from its provisions lots 7, 8, 9, 18, 19 in block 1, South Ozark, in the reformation thereof.

In addition to the testimony of witnesses already set out, the mortgage itself does not purport to have been executed by Mrs. Gage with any intention to bind herself except in releasing dower and homestead to her husband's property conveyed therein. The granting clause of the mortgage, which was exhibited with the complaint, reads:

"KNOW ALL MEN BY THESE PRESENTS:

"That Ed Gage, for and in consideration of the sum of one dollars ($1) to us in hand paid, and the premises hereinafter set forth, do hereby grant, bargain, and sell unto John T. Harris & John Inman, and unto their heirs and assigns forever, the following property, situated in Franklin County, Arkansas:

"Lots (2, 3, 6) 7, 8, 9, 18, 19, block one in South Ozark, and lots 4 & 24, west side or west half (½), lot 5 in block one. Also lots 7, 8, 9, 10, 11, 12, 13, in block one in Webb City, Ark."

The warranty clause reads:

"I hereby covenant with the said John T. Harris & John Inman that I will forever warrant and defend the title to the said property against all lawful claims."

The relinquishment of dower and homestead clause reads:

"And I, Florence Gage, wife of the said Ed Gage, for the consideration aforesaid do hereby release unto the said John T. Harris & John Inman all my right of dower and homestead in and to the said lands."

The sale was on condition that said Ed Gage was indebted to the said Inman and Harris, etc., and the clause reads in part:

"Now, if I shall pay said moneys at the times and in the manner aforesaid, then the above conveyance shall be null and void." After authorizing the sale of the property, etc., the mortgage concludes:

"And the proceeds of said sale shall be applied, first, to the payment of all costs and expenses attending said sale; second, to the payment of said debt and interest, and the remainder, if any shall be paid to the said grantor."

In the last clause it was said: "We hereby waive any and all rights of appraisement or redemption, etc.," and the instrument was signed by C. E. Gage and Florence Gage. The acknowledgment shows only Ed Gage as grantor in the first section thereof; and the voluntary appearance of Florence Gage, his wife, who certified that she, in the absence of her husband and of her own free will, "executed the foregoing deed and signed and sealed the relinquishment of dower and homestead therein expressed, for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband."

The mortgage itself does not purport to be and was not a conveyance by Florence Gage of her property or any other property, except the relinquishment of dower and homestead, etc., by her in accordance with its terms. Her name was not included in the granting clause, nor any other clause of the instrument that would show any intention to mortgage the property, except for security of the payment of the debt of C. E. Gage, none of which she owed or had agreed to pay according to the terms of the note, which was not executed by her. In the construction of deeds, the first clause thereof controls and under our numerous decisions, the wife not having joined

in the granting clause thereof, it is held that her relinquishment of dower and homestead would not have effect to convey the fee. *Jones* v. *Hill,* 70 Ark. 34, 66 S. W. 194.

She could, of course, have mortgaged her separate property to secure her husband's debt, but she did not do so in the execution of this instrument, the only effect of which was to relinquish her right to dower and homestead in his lands according to the recitals and provisions of the mortgage.

The court also erred in rendering a personal judgment against the wife. She denied in her answer that she had executed the note, denied any indebtedness whatever to appellees, and there was no proof contradicting her statements or tending to show that she had executed the note or was in any way obligated to its payment; and the court's finding otherwise was certainly contrary to the great preponderance, if not all, of the testimony.

The decree must therefore be reversed, and the cause remanded with directions to reform the mortgage by excluding therefrom the separate property of the wife; and judgment of foreclosure should be rendered only against the husband's property as shown therein for payment of the judgment against him for liability upon the note upon which appellees were indorsers and for security of which the mortgage was executed. No personal judgment should have been rendered against the wife, she being entitled to a reformation of the mortgage to exclude her property therefrom, and she should have judgment for her costs herein expended. It is so ordered.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY
v. DAVISON.

4-2848

Opinion delivered April 3, 1933.

[redacted]

Roy Penix, for appellant.

Giles Dearing, for appellee.

KIRBY, J., (after stating the facts). It is undisputed that Sadie Davison was in no way related to the insured, nor did she have an insurable interest in her life as the court told the jury. It is likewise undisputed that the insured, Lucy Mitchell, was suffering from heart disease and dropsy and not in sound health on the day of the application, nor on the date of the issuance of the policy, and that the policy was never delivered to Lucy Mitchell.

It is insisted that, because of the provision in the application that "no obligation shall exist against the company unless the policy of insurance issued in pursuance thereof shall be delivered to the insured," the policy was void for want of delivery. An insurance company may limit its liability to recovery of premiums paid if an insured was not in sound health on the date of the policy, and a condition that the policy shall not take effect unless delivered during the lifetime and good health of the insured is a valid condition precedent to the liability of the company. 37 C. J. 405; *American National Ins. Co.* v. *Lacey,* 182 Ark. 1158, 34 S. W. (2d) 757; *Jenkins* v. *International Life Ins. Co.,* 149 Ark. 265, 232 S. W. 3; *Pyramid Life Ins. Co.* v. *Belmont,* 177 Ark. 576, 7 S. W. (2d) 32; 37 C. J. 400.

Although a provision in the policy that there should be no liability of the insurance company unless the insured was in sound health at the time the delivery was made can be waived, this policy limited the liability of the company to the return of the premiums paid, the company having the right to declare the policy void at any time within the contestable period if it discovered that the insured suffered with certain kinds of diseases, heart disease, etc., and was a provision that could not be waived merely by a soliciting agent having no authority to issue policies or pass upon applications; and under the terms of the policy it was stipulated that there could be no waiver thereof except "by being specifically recited in the 'Space for Indorsements'," which was not done in this case. *Souza* v. *Metropolitan Life Ins. Co.,* 270 Mass. 189, 170 N. E. 62.

The undisputed testimony here shows that the insured was afflicted with both heart disease and dropsy when the application for the policy was made, wherein it was stated that she had had neither disease, and that she died of said diseases within two weeks from the date of the application, and on the afternoon of the day the policy of insurance was delivered, not to the insured but to the beneficiary who had no insurable interest in the life of the insured. Under these circumstances the clause in the policy limiting the liability to the return of

the premiums, etc., and giving the company the right to declare the policy void would be binding, and was such a condition as could not be waived by the agent delivering the policy. *National Life Ins. Co.* v. *Jackson,* 161 Ark. 297, 256 S. W. 378.

The soliciting agent and the superintendent of the company, respectively, had no authority to waive any provisions of the policy or to pass on the application for the insurance, it being necessary for it to be submitted to the home office. *Sadler* v. *Fireman's Fund,* 185 Ark. 480, 47 S. W. (2d) 1086; *American Ins. Co.* v. *Hampton,* 54 Ark. 75, 14 S. W. 1092; *Inter-Southern Life Ins. Co.* v. *Holzhauer,* 177 Ark. 927, 9 S. W. (2d) 26.

The contention that there was a waiver of the provision of the policy relative to Bright's disease and diseases of the heart, kidneys and liver, etc., by the statement, conceding it to be true, of appellee that she notified the agent delivering the policy on the day of its delivery that the insured was sick and he should go to see her, is not warranted, since it could not have given knowledge to the company that the insured was suffering from heart disease and dropsy, both of which diseases she stated she had never had at the time of her application for the policy two weeks before. In other words, it would not be notice that the sickness of the insured resulted from any of the diseases mentioned in the said warranty or representation in the application. 14 R. C. L. 1172-73.

As said in *Planters' Mutual Ins. Co.* v. *Loyd,* 67 Ark. 585, 56 S. W. 44: "Nor will an act which impliedly waives one ground of forfeiture affect another forfeiture of which the company and its agent were ignorant."

The undisputed testimony shows that appellee had no insurable interest in the life of the insured, and the jury could have found that the suggestion was made by her that she would furnish the money to pay the premium if the insured would make the policy payable to her. The court should have instructed the verdict on the ground that the policy had not been delivered to the insured during her lifetime.

The judgment is reversed, and the cause dismissed

SMITH *v.* WALKER.

4-2955

Opinion delivered April 3, 1933.

Jordan Sellers, for appellant.
Coulter & Coulter, for appellee.

MEHAFFY, J. This suit was begun in the Union Chancery Court by Belle Walker and her husband, G. F. Walker, against the appellant, J. M. Smith.

Appellee, at one time owned an interest in certain real estate in Gregg County, Texas. This land became valuable oil producing property. The appellee, prior to December, 1931, had executed conveyances to all of her interests in these lands. In an effort to recover some interest in the property, she gave a power of attorney to J. R. Cheek.

The appellant learned that the appellee had some interest in oil lands in Texas, and he went to see her about representing her in recovering her interest in the lands. He was told at the time he visited her that she had entered into contracts with other parties, but he

finally entered into a contract with the Walkers to represent them for one-half of what he recovered, and appellees say that he was to "knock out these other parties."

The Walkers, at this time, lived at Texarkana, and the appellant brought them to El Dorado and secured an order of the probate court of Union County declaring appellee insane, and appointing appellant as her guardian. Appellant filed a bond as guardian in the sum of $200, with G. F. Walker, husband of Belle Walker, and Walter L. Brown, attorney, as his sureties. After appellant was appointed guardian, he entered into a contract with Walter L. Brown, attorney, to represent him in recovering his ward's interest in the property in Texas, and agreed to pay Brown one-half of any amount recovered. Brown then employed the appellant to investigate the facts.

Suit was thereafter instituted in the district court of Gregg County, Texas, by Walter L. Brown as next friend of Belle Walker, an insane person. Appellant was a party to this suit, both in his individual capacity and as guardian.

On December 5, 1931, the court heard evidence and adjudged Belle Walker sane, and the Sinclair Oil & Gas Company was ordered to pay $15,000 to clear the property of the Walker claim; $7,500 to Cheek, who held power of attorney from appellee, and $7,500 to Belle Walker. The Sinclair Oil & Gas Company gave Cheek and Belle Walker each a draft for $7,500. Walter L. Brown, after appellee had indorsed her draft and delivered it to him, gave her his check for $3,750. Brown indorsed the Sinclair draft and delivered it to appellant with instructions to deposit $3,750 to Brown's account to cover the Walker check. Appellant paid Brown $600 and a lawyer in Texas, where the case was tried, $300, and of the $3,750, the appellant received $2,850 in addition to what he paid the attorneys.

On January 11, 1932, after the decree of the court in Texas finding Belle Walker to be sane, the probate court of Union County, Arkansas, declared her sane. In June, 1932, after appellee had been declared sane by the Union

County probate court, this action was begun against appellant to recover $2,850.

Appellant filed a demurrer to the complaint alleging that the court had no jurisdiction, and filed answer alleging that as a matter of fact Belle Walker never was insane, and that she was adjudged sane by the district court of Gregg County, Texas; denied that he collected any money for her as guardian or otherwise; denied that he had converted $3,750 to his own use, and denied his insolvency. The chancery court found in favor of appellee in the sum of $2,882.22, and the case is here on appeal.

The appellee, when she brought suit, caused writs of garnishment to be issued against the banks, and two of the banks answered showing the money appellant had on deposit, and the court also ordered that the contents of the safety deposit box in the First National Bank of El Dorado be impounded, etc.

The appellant who, as guardian, made the contract with Brown, the attorney, was not a lawyer, but a physician practicing at Smackover, Arkansas. Appellant claims that he spent about five or six weeks in Texas investigating the matter, and spent considerable money. He does not, however, testify as to what he spent money for, nor does he claim to have kept any account of the amounts expended. Mr. Brown made a trip out to Texas when the suit was tried in Gregg County, but he spent very little, and is not claiming anything in this suit.

It is earnestly contended by appellant that the probate court alone had jurisdiction, and he relies on the Constitution and laws of Arkansas. The constitutional provision relied on reads as follows: "The judge of the county court shall be the judge of the court of probate, and have such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the circuit court, or may be hereafter prescribed by law." Constitution, article 7, § 34.

The statute quoted and relied on is § 2256, and reads as follows: "The court of probate shall have original jurisdiction in the following cases:

"First. In all matters relating to the probate of last wills and testaments, the estate of deceased persons, executors, administrators, guardians, and persons of unsound mind and their estates.

"Second. In the settlement and allowance of the accounts of executors, administrators and guardians."

This suit did not involve the estate of a person of unsound mind, because both the Texas court and the probate court of Union County had declared the appellee sane, and the appellant himself testified that she had never been insane. Therefore this suit did not involve a person of unsound mind, or the estate of a person of unsound mind. It did not involve any settlement or allowance of the accounts of executors, administrators or guardians, and therefore the authorities relied on by appellant have no application.

It was not claimed by the appellant in this suit that the appellee was insane. There is no doubt from the record that the guardian was appointed for Belle Walker for no other purpose than to assist in getting the conveyances theretofore made by Belle Walker set aside, so that she might recover her interests in the Texas lands. There was nothing for the probate court to do, and this suit does not involve any matters that are within the jurisdiction of the probate court.

"The courts of chancery have no power to take such cases out of the probate courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake or impending irremediable mischief, is universal; extending over suitors in all courts, and over the decrees of those courts, obtained by fraud, or rendered under circumstances which render it inequitable that they should be inforced. Hence any frauds in the settlements of administrators or executors may be corrected. When that is done, if there be still a necessity for continued proceedings in the course of administration, such proceeding should go on in the probate court, upon the basis of the reformed settlement. The object of chancery intervention having been accomplished, the jurisdiction in equity should cease with the necessity. Otherwise the courts

of chancery might make themselves courts of probate, in violation of the spirit and intention of the Constitution. If however there be no continuing necessity for a further course of administration; if the assets be collected in, and the debts be all ascertained, and nothing remains but to fix the liabilities of administrators, executors, and their sureties, and the rights of creditors, legatees and distributees, and to make adjustment on equitable principles, all that business comes within the more facile and effective operation of the remedial processes peculiar to equity practice." *Reinhardt* v. *Gartrell,* 33 Ark. 727. The doctrine announced in the Reinhardt case has been constantly adhered to by this court.

The undisputed proof in this case shows that there is no continuing necessity for a further course of administration. There are no assets to be collected, and, so far as the record shows, there are no debts, and nothing remains to be done by the probate court. The record however in this case shows that the Texas court and the probate court of Union County had both declared Belle Walker sane. The judgment of the probate court in Union County declaring her sane was in January, 1931. This suit was begun about five months after she was adjudged sane by the Union County Probate Court.

Section 5835 of Crawford & Moses' Digest is as follows: "If it be found that such person has been reformed or restored to his right mind, he shall be discharged from care and custody, and the guardian shall immediately settle his accounts, and restore to such person all things remaining in his hands belonging or appertaining to him."

The Supreme Court of Montana, construing statutes very similar to ours, said: "The language of § 2973, above, is susceptible of but one construction, namely, that the judicial determination that the ward is of sound mind, and capable of taking care of himself and his property, and the adjudication of his restoration, do, *ipso facto,* terminate the guardianship." *Scheuer* v. *Kinman,* 31 Mont. 606, 79 Pac. 244; 22 Cyc. 1146. In support of the above declaration the court cites: Woerner's American

Law of Guardianship, § 150; *Probate Judge* v. *Stevenson,* 55 Mich. 320, 21 N. W. 348; and Ex parte *Latham,* 41 N. C. 406.

The court in the Montana case further said: "If the contention of the respondent could be maintained, then the guardianship continues, and a person *sui juris,* against his own will, is subject to the control and government of a guardian, which in itself involves a contradiction of terms and a legal impossibility." The court in the same case also said: "Likewise, the authority of the probate court, after the order of restoration is made, is limited to requiring the guardian to make such final report, and to discharge such guardian from his trust."

If, after the order of the Union Probate Court declaring Belle Walker sane, appellant could still act as her guardian, then a person *sui juris,* against her own will, would be subject to the control and government of a guardian.

It was not necessary for the probate court to make an order discharging the guardian, although it was proper that it should have done so, but he could not serve as guardian for a person *sui juris.* No person can serve as guardian for another who is of full age and *sui juris.*

The probate court might never enter an order discharging the guardian, but whether it did or not would not affect her right to maintain suits and manage her own affairs.

The probate court would have had no jurisdiction in this case. "Probate courts have no common-law jurisdiction. The nature, extent and exercise of the jurisdiction of probate courts depend on the terms of the constitutional and statutory provision, and they cannot exercise any powers other than those which have been expressly conferred upon them, or which are necessarily implied from those conferred." *Moss* v. *Moose,* 184 Ark. 798, 44 S. W. (2d) 825.

The court in the above case further said, speaking of probate courts: "Taking into account the magnitude of the property interests which they have in charge, these courts should be required to proceed in exact con-

formity to law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdictions by other courts."

After the order declaring Belle Walker sane, the only thing the probate court could have done was to order the guardian to make settlement, but in this case there was no settlement of any kind to make, and there was no property in the hands of the guardian as such. He had received this money which belonged to the appellee, and the chancery court had jurisdiction, because it was sought not only to recover the money, but to impound the money of appellant in certain banks. He was not sued as guardian, and he does not claim that he held this money as guardian. The suit might have been brought in circuit court, but, even if the circuit court was the proper court in which to bring suit, appellant would have been required to file a motion to transfer to circuit court, which he did not do.

The appellant, as guardian, claims that he made a contract with the attorney, Walter L. Brown, and that Mr. Brown then employed appellant to go to Texas to make investigations. The guardian had no authority to employ counsel to prosecute a suit on behalf of the estate in another State.

"The court there expressly recognized the rule to be that every grant of administration is strictly confined in its authority and operation to the limits of the State which granted it, and does not extend to other States. Hence we are of the opinion that the probate court could not confer upon the administratrix any authority to employ counsel and to prosecute suits on behalf of the estate of the decedent in the State of Texas. Ancillary administration would have been necessary in the State of Texas to have accomplished that purpose." *Miller* v. *Oil City Iron Works,* 184 Ark. 900, 45 S. W. (2d) 36.

The record in this case shows that some sort of an agreement was made with the Sinclair Oil Company, and this agreement seems to have been that appellee's interest in the lands was $15,000. Appellee was therefore entitled to $7,500 according to the agreement testified

to by appellant. The court below gave her judgment for $2,800 instead of $2,850, and appellee prosecutes a cross-appeal to reverse the finding of the lower court in not allowing her the $50. Under the decisions of this court, there is no authority for employing counsel, or other agencies, in another State. Appellee was therefore entitled to $2,850 instead of $2,800.

The judgment of the chancery court is therefore affirmed on appeal and reversed on cross-appeal, and judgment given here for the additional $50 with interest.

ROSE *v.* SPEAR.

4-2952

Opinion delivered April 3, 1933.

James D. Head, for appellant.

Shaver, Shaver & Williams, for appellee.

McHANEY, J. This is an interpleader's suit brought by appellee, Sanderson, against appellant and appellee, Spear, for the purpose of having a judicial determination of the title to certain bearer bonds of the Hotel Grim Company which had belonged to appellant. Spear, who will hereafter be referred to as appellee, filed his interplea and cross-complaint against appellant, claiming to be the owner of said bonds, and that he delivered them to Sanderson to be held pending determination of the title thereto as between him and appellant, and alleged that he had acquired same "in due course," for value, and without notice of any adverse claim thereto, and that he was therefore entitled to the possession thereof. Ap-

pellant filed his answer and claim to the bonds, alleging that he was the owner and entitled to the possession thereof, and that he had parted with the possession of said bonds by connivance, fraud and theft.

Trial resulted in a finding by the court that about April 1, 1932, appellee, for value and before maturity obtained said bonds as collateral for a loan of $1,000, was an innocent purchaser and entitled to hold same to the extent of $1,000 with interest from April 1, 1932, at 6 per cent. Decree was accordingly entered, declaring a lien for such sum in appellee's favor with costs, and ordering the bonds sold to satisfy same if appellant failed to pay same in 60 days. This appeal comes from that decree.

Two grounds are urged for a reversal: (1) That appellee is not an innocent holder for value "in due course," without notice; and, (2) that appellee obtained said bonds through, or by reason of, a gambling transaction.

The facts, briefly stated, are as follows: Appellant owned, prior to April, 1932, $4,500 of bearer bonds of the Hotel Grim Company. None of the bonds were past due. The latter part of January, 1932, he was approached by a man named Wallace, who stated that he desired to purchase a mine in Nevada and would pay appellant, a real estate operator, a commission of 5 per cent. if he would handle the purchase thereof for him. The stranger, Wallace, bore a forged letter of introduction to appellant from a friend. He represented that the owner of the mine, one Roy F. Fellows, would be at the Hotel LaFayette, in Little Rock, and induced appellant to go up there with him to consummate the deal, which failed to go through because Fellows demanded $5,000 cash. They returned to Texarkana where Wallace pretended to try to borrow money from his partner and was unsuccessful, but he placed a certain amount of cash in appellant's hands, raised his commission to 10 per cent., and induced appellant to put up with Fellows said bonds to secure the balance of the cash payment of $4,000, which would be held by Fellows for one year until final payment was made by Wallace to Fellows, and the latter executed and delivered to appellant the following receipt: "Received of Andrew Rose $4,500 in bonds, Hotel Grim, Texarkana,

Texas, as collateral for $4,000 to be paid in one year from this date. Dated this 27th day of January, 1932. Nos. 81-136-174-212-289-441-442-443-444. Subject to title of land. (Signed) R. F. Fellows.'' This receipt was written by appellant, who also gave Fellows a check for $500, which was later cashed. Fellows executed and delivered a deed to certain property in Nevada, but it was found to have forfeited for taxes. Shortly thereafter, or within a few days, appellant became suspicious of the deal and of Wallace and Fellows and finally determined that he had been victimized.

Appellee acquired the bonds in a gambling house in Hot Springs about March 1, 1932, at night, from two men he did not know, but whom he had seen playing the games in the place for some nights, by lending them $1,000 on the bonds. He knew nothing about how they were acquired, or from whom, but did know Mr. Conway, of Texarkana, who was connected with the Hotel Grim. Thereafter, about April 16 he went to Texarkana to sell the bonds, but the people he wished to see were out of the city. He went back again and saw Mr. Sanderson about selling them to him. Sanderson, thinking they were the bonds appellant had owned, notified him and they all met at Sanderson's office. Appellant claimed them, and appellee left them with Sanderson, as above stated, until their title could be judicially determined.

Under this state of facts, we cannot say that the finding of the trial court is against the preponderance of the evidence. We must try the case on the record made in this case and not upon the record in another or different case that might reflect upon the credibility of either party. Under the Negotiable Instruments Law, § 7818, Crawford & Moses' Digest, a holder in due course is defined as follows: ''A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or

defect in the title of the person negotiating it." Section 7822 provides what is necessary to constitute notice of defect in title as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

This was the state of the law prior to the passage of the Negotiable Instruments Law. *Bothell* v. *Fletcher,* 94 Ark. 100, 125 S. W. 645; *Holland Banking Co.* v. *Booth,* 121 Ark. 171, 180 S. W. 978; *Broadway Bank* v. *Mason,* 176 Ark. 812, 4 S. W. (2d) 5. A careful examination of the testimony fails to convince that actual knowledge of any infirmity in the instruments, or defect in the title of the bearer, was brought home to appellee, or that it shows "knowledge of such facts that his action in taking the instrument amounted to bad faith." As said by this court in *Beam* v. *Copeland,* 54 Ark. 70, 14 S. W. 1094: "The right of such a holder is not defeated by circumstances calculated to excite suspicion or prompt inquiry, unless of such a character as proves that he acted in bad faith." Here the most that can be said from the record is that the bonds were taken at an unusual hour and at an unusual place for such transactions to occur, but we feel that these circumstances were not of such a character as to prove bad faith.

Nor can we agree with appellant that the bonds were acquired in a gambling transaction. They were not won or lost at gambling. A loan was made upon them in a gambling house. Whether the money so loaned was later lost in gambling, the proof does not show. Nor was this an issue in the court below.

Affirmed.

JOHNSON, C. J., disqualified and not participating.

FOSTER *v.* TAYLOR.

4-2928

Opinion delivered April 3, 1933.

[redacted]

U. A. Gentry and *Carrigan & Monroe,* for appellant.

Geo. R. Steel and *W. P. Feazel,* for appellee.

McHANEY, J. On January 21, 1930, A. M. O'Quinn and wife executed and delivered to one Peppers their notes for $15,000 secured by deed of trust on 115.6 acres of land, which was to become due and payable October 15, 1930. The land described in the deed of trust was erroneous as to one 40 acres, it being described as the northeast quarter of the northwest quarter of section 34, whereas it should have been described as the northeast quarter of the northeast quarter, and it is undisputed that O'Quinn and wife intended to correctly describe the land known as the O'Quinn peach orchard, and that they did not own the northeast quarter of the northwest quarter, and that the description was inserted by inadvertence, oversight or honest mistake in drawing the mortgage. Said notes and mortgage were transferred on January 21, 1930, for value and before maturity to the Planters' Bank & Trust Company. Thereafter, O'Quinn defaulted in the payment of said indebtedness, the Planters' Bank & Trust Company became insolvent, and was taken over by the Bank Commissioner for liquidation, and on August 4, 1931, suit was brought by the Bank Commissioner against O'Quinn and wife and Peppers to foreclose said deed of trust, and a decree was granted in accordance with the prayer on September 10, 1931. Appellant was not made a party to this action, although on January 21,

1931, O'Quinn and wife executed and delivered a second mortgage to the Hope Fertilizer Company to secure their note to it in the sum of $2,381.91, given for a pre-existing debt, due October 1, 1931, with interest at 8 per cent. to maturity and 10 per cent. thereafter. The mortgage covered the O'Quinn peach orchard, the same 115.6 acres, but correctly described the 40 acres of land in controversy as the northeast quarter of the northeast quarter of section 34. This mortgage to the Hope Fertilizer Company, after correctly describing the land, contained this clause: "It is understood that this is a second mortgage on the above-described land." This mortgage was before maturity and for value assigned to appellant, who is the wife of the president of the Hope Fertilizer Company.

Pursuant to the decree of the court in favor of the Bank Commissioner of September 10, 1931, all the land described in the mortgage to the Planters' Bank & Trust Company was sold, and the Bank Commissioner became the purchaser, which sale was approved by the court and deed executed to the Bank Commissioner. After the sale the Commissioner received information of the error in the description of said 40 acres and obtained a quitclaim deed from O'Quinn and wife to the northeast quarter of the northeast quarter and executed and delivered to the owner of the northeast quarter of the northwest quarter his quitclaim deed thereto to clear up his title. Thereafter, on March 13, 1932, appellant, as assignee of the Hope Fertilizer Company, brought this action to foreclose the second mortgage, making the Planters' Bank & Trust Company, the Bank Commissioner and the liquidating agent defendants in this action. Appellant there claimed, and is now claiming, that her second mortgage became a first mortgage on the 40 acres of land misdescribed in the Peppers' deed of trust. The chancery court found that the mortgage given to Peppers, as corrected by the quitclaim deed executed by O'Quinn and wife to the Bank Commissioner since the foreclosure of the mortgage, constituted a superior and paramount lien to the lien of appellant under the mortgage executed to the Hope Fertilizer Company. A decree was accordingly entered, but, inasmuch as neither appellant nor the Hope

Fertilizer Company was made a party to the first foreclosure suit, that appellant was entitled to the privilege of redeeming the lands from the Bank Commissioner by paying the full amount of his debt within 90 days.

As above stated, appellant's mortgage contained the condition that: "It is understood that this is a second mortgage on the above-described lands." This clause was inserted pursuant to agreement between O'Quinn and the Hope Fertilizer Company. O'Quinn's indebtedness to it was past due, and it was trying to collect its debt or obtain security for it. In response to a letter from it, O'Quinn wrote the company as follows: "Your letter to hand relative to giving further security on the fertilizer note due you from me. I told your Mr. Helms after his questioning me that the only further security that I could give on the note would be a second mortgage on the real estate. Personally, do not see that you will be any further secured, but, if it will assist you in your financing, I am entirely willing to give such a mortgage. I am giving you a description of this orchard property, and you can have a second mortgage form filled out and mail this to me for my signature, and, if you wish, I will have the same recorded at the courthouse in Howard County and mail it to you."

It accepted O'Quinn's proposition, prepared a mortgage which correctly described the lands in the orchard, and embodied the agreement therein that it was a second mortgage on the lands described. Appellant, as assignee of the Hope Fertilizer Company, acquired no better title than it had, which was by agreement a second mortgage only. True, it did not state that it was second or subject to any particular mortgage, but we think that is unimportant, even as against an unrecorded mortgage, for all that appellant's assignor took was a second mortgage, which made it subject to a valid prior first mortgage, whether recorded or not. We so held in *Haney* v. *Holt*, 179 Ark. 403, 16 S. W. (2d) 463, written by the late Chief Justice HART. In that case the first mortgage was not filed or recorded, not being subject thereto for lack of acknowledgment. The second mortgage contained this clause: "This mortgage is second to a previously re-

corded mortgage." It was there said, quoting from *Young* v. *Evans-Snider-Bush Com. Co.,* 158 Mo. 395, 59 S. W. 113: "This agreement of plaintiffs, substantially recited in their mortgage, to take their security subject to the defendant's prior mortgages, which were an equitable lien upon the cattle, valid between the parties thereto, obviously takes the defendant's case, upon this issue, out of the principle of the Arkansas case aforesaid, upon which plaintiffs rely, and brings it within the well-settled doctrine recognized and enforced in that State, as well as in the other States of the Union, that 'one who takes a conveyance, absolute or conditional, which recites that it is second or subordinate to some other lien or incumbrance, can in no proper sense claim that he is a purchaser of the entire thing. He purchases only the surplus or residuum after satisfying the other incumbrance'; and 'a mortgage expressly providing that it shall be subject to a prior mortgage is subject to it, independently of the fact that the prior mortgage is not of record; nor will it alter matters to record the subsequent mortgage first.' Jones, Chat. Mortg., § 494; 5 Am. & Eng. Enc. Law (2d ed.) 1015; 2 Cobbey, Chat. Mortg., § 1039; *Clapp* v. *Halliday,* 48 Ark. 258, 2 S. W. 853. The plaintiffs, by accepting their subsequent mortgage under the circumstances aforesaid, ceased to be strangers to the defendant's prior mortgages, and were thereby brought into contractual relations with said mortgages, and they imposed limitations upon the interest acquired by them in the property, to the extent of defendant's equitable lien under said prior mortgages, subject to which they agreed to take. There is nothing in the statutes of Arkansas, or in the rulings of the Supreme Court of that State thereupon, prohibiting the making or impugning the validity of such a contract."

See also *Wells* v. *Farmers' Bank & Trust Co.,* 181 Ark. 950, 28 S. W. (2d) 1059, and *Gunnels* v. *Farmers' Bank of Emerson,* 184 Ark. 149, 40 S. W. (2d) 989. In the latter case the second mortgage to Gunnels, as here, recited that it was a "second mortgage on" the lands described in the mortgage to the bank. We there held that the case was ruled by *Haney* v. *Holt,* and said: "In

the instant case, as in the case of *Haney* v. *Holt, supra,* the second mortgage was taken while the first mortgage was a subsisting lien, and there was a contractual agreement in the second mortgage, which became a condition upon which the conveyance was made, that is, that it was second to a prior mortgage." So here the mortgage to the fertilizer company was taken on the condition that it was a second mortgage on the land therein correctly described. That was all O'Quinn was willing to give, and but for that condition he would have given no mortgage at all. The fact that 40 acres was misdescribed in the first mortgage did not work any prejudice to its rights, and, because of such condition, neither it nor its assignee is in any position to complain because O'Quinn gave appellee a quitclaim deed thereto. Undoubtedly Peppers, the bank, or the Bank Commissioner after insolvency of the bank, could have had a decree of reformation of the instrument at any time so as to show the correct description, as it is undisputed in this record that O'Quinn intended to give and Peppers to receive a mortgage correctly describing the orchard, and not land belonging to a stranger to the whole transaction, and this would work no injury to appellant or her assignor, as all they ever had was a second mortgage on said property.

Since appellant was not made a party defendant in the foreclosure of the first mortgage, she would have the right to redeem in a reasonable time, which the court gave her.

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

JOHNSON, C. J., disqualified and not participating; KIRBY, J., dissents.

NESLER *v.* PARAGOULD.

Crim. 3831

Opinion delivered April 3, 1933.

Wm. F. Kirsch, for appellant.

Jeff Bratton, for appellee.

BUTLER, J. This case was tried before the circuit court, sitting as a jury, on an agreed statement of facts, from which it appeared that the appellant, Nesler, is engaged in the grocery business in the city of Paragould, and, incident thereto, makes exclusive use of a one-half ton inclosed truck making deliveries to customers, for which no extra charge is made over and above the price charged customers who buy at the counter and themselves carry away the merchandise. Appellant had been charged as a license fee $5 under city ordinance No. 416, which was amendatory of city ordinance No. 406, and which provided that all persons, firms or corporations, except persons, etc., paying dray license on automotive vehicles, who owned and used other motor vehicles, should pay a privilege license of $5. In addition to this, there was demanded of appellant an additional $5 on said delivery truck under ordinance No. 417, which he declined to pay, and this action was brought for a violation of that ordinance. The court found the appellant guilty and assessed a fine against him, from which judgment is this appeal.

The question presented involves the validity of § 10 of ordinance No. 417. This ordinance, by its title, purports to be "an ordinance to license and to regulate

all persons, firms and corporations engaged in any of the following vocations, callings or businesses within the city limits of the city of Paragould, Arkansas." Section 1 of the ordinance makes it unlawful for any person, etc., to engage in or pursue any of the vocations, callings or businesses thereinafter named in the ordinance without having first obtained a city license, etc. Then follow thirty-six sections naming various callings and vocations, such as livery stables, patent medicine vendors, and fixing license fees. It practically covers all of the callings that could be imagined in which one would engage in a city the size of Paragould.

Section 9 of the ordinance fixed the license fee in varying amounts for horse drawn and automotive vehicles used for draying purposes. Section 10 reads as follows:

"For each person, firm or corporation operating delivery wagons or motor vehicles for delivery purposes the licenses shall be as follows:

"For each two-horse wagon $5 per annum.

"For each one-horse wagon $3 per annum.

"For each one-half ton truck $5 per annum.

"For each additional half-ton $5 per annum."

It is this section which is questioned in the instant case.

The appellee seeks to find authority for the enactment of this section under the provisions of § 7529 of Crawford & Moses' Digest, which provides in part as follows: "They shall have power * * * to regulate the transportation of articles throughout the streets and to prevent injury to the streets from overloaded vehicles," and § 7606, *Id.*, which provides that "the city council shall have the care, supervision and control of all the public highway bridges, streets, alleys, public squares and commons within the city; and shall cause the same to be kept open and in repair, and free from nuisance," and under § 7618, *Id.*, by which cities of the first and second class are authorized to enact ordinances for classified occupation tax or license.

The right to enact ordinances is a power conferred on municipal corporations by legislative grant, and therefore its authority to legislate is limited to the authority

found in an express grant of power, or which is necessarily implied in the express grant in order to make effective the attainment of the purpose for which the express authority is given. *Argenta* v. *Keath,* 130 Ark. 337, 197 S. W. 686. It follows, therefore, that, unless the authority to enact § 10 of ordinance No. 417 is to be found in the sections noted either expressly conferred or arising from necessary implication, the city council is without power, and § 10 of the ordinance is invalid.

Counsel for appellee insists that the delivery by a retail grocer of the purchases made to his customers in a vehicle constitutes a business and comes within the meaning of § 7618, *supra,* and that, as he says, the vehicles necessarily occupy the streets to a greater extent than vehicles operated by other persons; that the wear and tear on the streets from their use is a matter of importance which may be considered by the council and the use of delivery trucks adds to the police duties of the city in directing traffic; that for these reasons that part of § 7529, *supra,* and § 7607, *supra,* are applicable. We are of the opinion that neither of the sections relied upon by the appellee warrant the contention made. The appellant was engaged in a retail grocery business, and the delivery of the purchases made by his customers was merely an incident to the business itself and could in no just sense be deemed to be a separate business. Section 7618, *supra,* as before stated, provides for a classified occupation tax or license fee for the privilege of conducting any business within the city. This is not the nature of the ordinance under consideration, but undertakes to impose license fees on certain specific callings permitted by various statutes. We think that part of § 7529, *supra,* relied upon, has no application, for it manifestly refers to the transportation of articles of an unusual character which, either from their weight or some inherent quality, might work injury to the streets or inconvenience or might endanger the public.

Section 7607, *supra,* relied on, relates merely to the supervision and control of the public ways, and gives authority to the city to keep them open, in repair and free from nuisance and can have no bearing on the ques-

tion before us. The city council has authority under § 7532 of Crawford & Moses' Digest to regulate and license wheel vehicles kept for hire. This section would have no application, for appellant operates no vehicle for hire, but uses his truck in connection with his business as a retail grocer.

By § 7444 of the Digest authority is conferred on the city to require its residents to pay a tax not to exceed $5 per annum for each motor vehicle operated, and the appellee has exercised that power under ordinance No. 416 amendatory of ordinance No. 406, and appellant has offered to comply with these provisions. It appears that the city's right to tax motor vehicles not used for hire is limited by § 7444, *supra,* and the burden sought to be imposed upon the appellant for the use of his truck in addition to the $5 prescribed by § 7444 is invalid and cannot be sustained.

The judgment of the trial court is therefore reversed, and the case against the appellant is dismissed.

STREET *v.* SHULL.

4-2953

Opinion delivered April 3, 1933.

Claude V. Holloway and *Geo. W. Emerson,* for appellant.

Trimble, Trimble & McCrary, for appellee.

BUTLER, J. On November 8, 1930, the appellant, Dr. H. N. Street, brought suit in the court of common pleas in Lonoke County against the appellee, O. L. Shull, to recover for professional services as a physician, the same having been rendered at various times between February 13, 1920, and July 23, 1929. The appellee filed an answer and cross-complaint, in which cross-complaint he alleged that Dr. Street was indebted to him in the sum of $360, the price of an automobile purchased from him by one Woodall which appellant agreed to pay by deducting from Woodall's salary (Woodall was then in the doctor's employ) the sum of $15 twice a month and pay the same to the appellee. He alleged that the doctor was further indebted to him in the sum of $846.54 as expense incurred in removing railroad rails from one location to another, which expense the doctor had agreed to pay.

This cause reached the circuit court, where the appellant demurred to that portion of the cross-complaint relative to the Woodall matter upon the ground that the same was within the statute of frauds and barred by the statute of limitation. The demurrer was never passed upon by the court, and the appellant filed a reply to the cross-complaint denying the alleged agreement for the payment of the automobile, and that appellant had collected any sums from Woodall to be applied to the purchase price thereof, and pleaded in bar the statute of frauds and that of limitation; and as to the claim for removing the railroad equipment he alleged that the same was removed under a contract which limited the recovery to the sum of $1.

On the trial of the case, it developed that the appellant and the appellee at one time had been interested in a short line railroad; that, in addition to appellee's interest in the railroad, he owned several miles of spur track which led to a sawmill he then owned and operated, and this spur track was used to haul lumber manufactured at the sawmill to the short line railroad. Appellee sold

his interest in the railroad to the appellant, and agreed that the latter should continue to use the spur track for a time, and that upon the request of appellee the appellant was to take up and move the rails to a certain point on the main line of the Rock Island Railroad. At the time of these transactions a written contract was entered into between the two containing numerous provisions which have no relevancy to this lawsuit except that part which is as follows:

"That said second party agrees to, at the termination of the free use of the above mentioned rails, take up and deliver said rails from the terminus of the rails leased from the C. R. I. & P. R. R. Co. at or near Glahe's sawmill to a point at sawmill of said party of the first part known as the Seaton Mill on T. M. Fletcher's place near the Wat Worthen Railroad Dump, together with all attachments thereto, to said party of the first part, f. o. b. cars, McCreanor, Arkansas, at second party's own expense, and, if said second party neglects or fails to deliver said rails when demand is made therefor by the said first party, his agents or assigns, reserves the right to enter upon said property and take up and remove same at the actual costs and expense of said second party and pay to said first party, by reason of his failure, refusal or neglect to carry out this contract, the sum of $1 as liquidated damages for said refusal or delay."

Appellee was permitted to testify over the objection of appellant as to the request made that the rails be moved as provided in the contract and the refusal or failure of the appellant to comply therewith, that he was obliged to remove them himself at an expense of $846.54, an itemized statement of which he introduced. Over appellant's objection appellee was also permitted to testify as to what the mutual understanding between them was regarding the removal of the rails, and that it was their understanding that if he (appellee) was obliged to move the rails he was to be paid the expense thereof, and if he (the doctor) failed to move the rails the appellee was to be paid $1 in addition to the actual costs; that this was their understanding as to what was meant by the $1 as stipulated damages. Appellee was

permitted to testify without objection that he sold an automobile to Ed Woodall, who at the time was working on the railroad which then belonged to Dr. Street, and the latter agreed to pay $30 per month until the automobile had been paid for; that, subsequent to this agreement between the two, Dr. Street informed him that he had collected the price of the automobile from Woodall and that no part of this had been paid to him. He further testified that he was not informed by Dr. Street as to his indebtedness on the doctor's bill until some time in 1927 when the controversy arose between them over some bills owing by the doctor to the appellee, and then it was that mention was made of the doctor's bill, and the appellee informed the doctor that he was ready to settle with him, but that nothing further was done. He admitted that he owed the doctor the amount sued for, subject to the set-offs, but that the doctor owed him the difference between the amounts he had collected for the automobile and the expense for moving the rails.

Appellant testified denying having made the agreement relative to the Woodall matter or that he had collected any money from Woodall for the appellee on the purchase price of the car. Regarding the written contract, he stated that appellee brought it to him already prepared, and he refused to sign it because the space for the amount of liquidated damages was blank, but that he agreed to sign the contract if that space should be filled in for the sum of $1; that this was done, and he thereupon signed the contract.

The court instructed the jury as follows:

No. 1A. "If you find from the testimony that the parties to the contract agreed that the liquidated damages in removing the rails as mentioned in the contract to be $1, then O. L. Shull would be bound thereby, and your verdict should be for the plaintiff."

No. 2A. "The plaintiff in this case is H. N. Street and the defendant is the cross-complainant, O. L. Shull. Shull admits he owes Dr. Street this doctor's bill, the amount of $304. Dr. Street would be entitled to recover this amount plus interest at the rate of 6 per cent. from July 23, 1929, to date. Shull, in his cross-complaint, con-

tends that Dr. Street is indebted to him for more than the amount he admits owing him. If you find that to be true from the evidence in this case, you would strike a balance and subtract the amount of $304 plus interest at the rate of 6 per cent. from July 23, 1929, to date, from the amount you find for Shull, if you do find for him, provided that you find that the debt of Shull's exceeds that of Dr. Street's. If you find that this is a binding contract, entered into between these two parties and that the liquidated damages should be only $1, then O. L. Shull would only be entitled to recover $1 and you will deduct that amount from the $304 plus interest thereon."

The jury was also instructed that it might determine from the testimony in the case as to what was the intention of the parties to the contract, whether, upon the failure of the appellant to remove the rails, the appellee was entitled to be paid for the reasonable expense actually incurred in moving them plus $1 as damages; or whether it was the intention that the entire damages for moving the rails should be limited to $1 only; and that, "in determining whether or not damages were to be limited to the sum of $1, you have a right to take into consideration the testimony given on the part of the cross-complainant and testimony given on the part of the cross-defendant, and also to consider whether or not the sum stipulated appears to be a reasonable compensation for injuries occasioned by the failure of the said cross-defendant, H. N. Street, to perform the contract."

The court refused, at the request of appellant, to tell the jury to find for the appellee on his cross-complaint in the sum of $1. There was no request made, and the court did not give an instruction on the statute of frauds or that of limitation.

The jury rendered the following verdict: "We, the jury, find for the plaintiff on the cross-complaint in the sum of $486.78." There was no objection to the form of the verdict, and the court, treating it as a finding by the jury that appellee was entitled to recover on his cross-complaint the sum of $486.78 in excess of the doctor's bill of the appellant admitted to be due, rendered judgment to the effect that the appellant "take nothing

by reason of his cause of action, and that cross-plaintiff, O. L. Shull, do have and recover of and from the cross-defendant the sum of $486.78'' with interest and costs.

The appellant here contends that the court erred in refusing to sustain his motion to strike parts of appellee's cross-complaint and in not sustaining his demurrer to the cross-complaint. Sufficient answer to this contention is that the court did not refuse to strike, nor did it refuse to sustain the demurrer. It failed to make any ruling on the motion or on the demurrer, and, by failing to insist on a ruling and filing his answer, the appellant waived the motion and the demurrer. *Pratt* v. *Frazier,* 95 Ark. 408, 129 S. W. 1088; *Hill* v. *McClintock,* 175 Ark. 1063, 1 S. W. (2d) 564.

It is next insisted that the court erred in permitting the appellee to testify regarding the expense incurred in moving the rails and as to his understanding as to the agreement between himself and the appellant regarding the moving of the rails on the ground that this testimony tended to vary the terms of the written contract. We are of the opinion that the contract was sufficiently ambiguous to permit the testimony complained of, and that it did not tend to vary its terms but to clarify and explain them. The contract expressly provides that, should the appellee remove the rails upon the failure of the appellant to do so after request by the appellee, he was to receive payment of the expense incurred, and, as it is undisputed that the actual cost of moving the rails was more than $800 the sum stipulated is clearly out of all reasonable proportion to the actual expense, and, as it appears uncertain from the contract itself what was in the minds of the parties, the testimony explaining its terms was competent.

There was nothing at the time the contract was made or at any time thereafter, considering the nature of the contract, to make it uncertain or difficult to ascertain what the cost of moving the rails would be. In the instructions given by the court the issue on the amount of recovery under the contract to which objection was made was as favorable to the appellant as he was entitled to. *Barr* v. *Vaughan,* 134 Ark. 207, 203 S. W. 589; *American*

Bank & Trust Co. v. *Langston,* 180 Ark. 652, 22 S. W. (2d) 381; *Quaile & Co.* v. *William Kelley Milling Co.,* 184 Ark. 722, 43 S. W. (2d) 369.

The court instructed the jury that if they found from the evidence that the appellant had collected from Woodall any money for the appellee he would be entitled to recover whatever that amount was. It is insisted that this instruction should not have been given because the cross-complaint showed on its face that the claim was barred by the statute of limitation and by the statute of frauds. We have examined the complaint and do not find such to be the case as to the statute of limitation, and, if the evidence justified the conclusion that the appellant's claim was barred by reason of it, no request was made of the court to instruct on that subject. It will be remembered that there was testimony offered without objection to the effect that the Woodall money had been actually collected by the appellant and the complaint would be treated as amended as an action on this branch for money had and received. But it is clear that the jury disregarded the claim on the Woodall transaction, for the amount found by the jury on the cross-complaint is practically the difference between the cost of removing the rails and the doctor's bill.

From the record as abstracted and briefed, it is our best judgment that no prejudicial error was committed in the trial of the case. The judgment is therefore affirmed.

SOUTHERN ICE & UTILITIES COMPANY *v.* BRYAN.

4-2963

Opinion delivered April 10, 1933.

[redacted]

H. B. Means and *James D. Head,* for appellant.

John L. McClellan, for appellee.

JOHNSON, C. J., (after stating the facts). Appellant first complains that the trial court erred in permitting a nonexpert witness to testify that her children, after being exposed to ammonia fumes, "were pale and sick." This question was decided adversely to appellant's contention in the case of *Kansas City Southern Ry. Co.* v. *Cobb,* 118 Ark. 569, 178 S. W. 383, where the court held: "Where one person is acquainted with another, and they come in contact with each other frequently, it is not a matter of expert knowledge for one to tell whether the other appears to be sick or well. These are matters of common experience and observation, and a nonexpert witness, after stating the facts upon which his opinion is based, may even give his opinion in such matters."

Appellant next complains that the trial court erred in giving certain instructions on behalf of appellee, in refusing to give certain instructions on behalf of appellant, and in modifying certain instructions. The instructions given on behalf of appellee are quoted at length in the statement of facts.

Appellee's first instruction is a quotation from Ex parte *Foote,* 70 Ark. 12, 65 S. W. 706. Appellant contends that, notwithstanding the instruction is a correct definition of a nuisance, the same is academic in so far as application to this case is concerned. This is not the fact. A nuisance was the thing complained about, and, of course, it was perfectly proper for the trial court to explain to the jury and give to them a definition of what a nuisance was in law.

Appellee's instruction No. 2 was likewise a correct declaration of law, and the trial court did not commit error in giving it to the jury.

It is earnestly insisted on behalf of appellant that the trial court assumed in appellee's instructions that

the Bryan property was chiefly valuable for residential property when that was a sharply contested issue. Appellant is mistaken when it says that this was a contested issue in the lawsuit. The uncontradicted testimony shows that appellee and his family were occupying this property and residing thereon long prior to the time that appellant undertook and did establish its ice plant adjacent to his property, and this, notwithstanding it was notified by appellee that he protested its manufacturing plant adjacent to his home.

This court held in *Bickley* v. *Morgan Utilities Company, Incorporated,* 173 Ark. 1038, 294 S. W. 38: "And it may be said here that it matters not how well constructed or conducted an ice plant may be, it is nevertheless a nuisance if built and operated in a residential district so that it destroys the comfort of persons owning and occupying adjoining premises, creating annoyances which render life uncomfortable. Certainly, it cannot be said that the erection and operation of an ice plant within six feet of a bedroom window would not very greatly annoy the persons occupying the room, in addition to the fact, as shown by the proof in this case, that the property itself would be greatly damaged, worth much less than if the ice plant was not operated there."

The effect of the holding of this court in *Bickley* v. *Morgan Utilities Co., Inc., supra,* was that, whosoever undertakes to, and does, establish in a residential section an ice manufacturing plant is responsible as a matter of law for all damages which flow directly from its operation. This was the theory on which the instant case was presented to the jury by the court's instructions, and we think the court committed no error in so doing.

It is contended by appellant that certain of the instructions are in conflict with each other. To this we cannot agree. We think that when the court's whole charge is read together it presents the issues of the case concisely, fairly and clearly.

Appellant next complains that the trial court erred in telling the jury that, if they found for the plaintiff, they should award him the difference between the fair market value of his property immediately prior to the

erection of the ice plant and its fair market value after the erection and operation of said plant, it being contended on behalf of appellant that the correct measure of damage in the case was the difference between the rental value of the property prior to the erection of the ice plant and its rental value after the ice plant was erected and in operation.

The case of *Junction City Lumber Company* v. *Sharp,* 92 Ark. 538, 123 S. W. 370, is relied upon by appellant as establishing its contention. This case is not authority for appellant's contention. This court, in the *Junction City Lumber Company* v. *Sharp* case, *supra,* said: "In the case at bar it is not claimed that any injury was caused to the health by the maintenance of a nuisance, etc."

In the case at bar the testimony shows that people who occupied appellee's home were made sick by the ammonia fumes which were permitted to escape from its ice plant. Again, in the Junction City Lumber Company case, *supra,* the nuisance there complained of was a sawmill in close proximity to Sharp's home. This court knows that country sawmills are usually temporary in duration. In the instant case, the ice plant is of a permanent character and will probably be maintained much longer than appellee's dwelling. No intimation appears in this record that appellant expects to occupy its property for only a temporary length of time. On the contrary, the record reflects that its ice plant is a well-built and regulated establishment, and is of a permanent character, and therefore its continued operation will effect a continued injury to appellee and his property. Therefore, we think that the court was correct in giving this instruction on the measure of appellee's damage to the jury.

Other contentions are made by the appellant for reversal of the case, but we do not deem them of sufficient importance to discuss in this opinion.

Let the judgment be affirmed.

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

4-2905

Opinion delivered April 10, 1933.

C. T. Carpenter, for appellant.

Chas. D. Frierson, for appellee.

SMITH, J. Appellants, plaintiffs below, owned 270 acres of land near the mouth of a floodway constructed by Drainage District No. 7 of Poinsett County. The land is on the west bank of the St. Francis River, just below the mouth of the floodway. These lands lie within the district, and, to protect them from the waters discharging through the floodway, plans were prepared for improvements, designated as improvements 71, 73 and 74, consisting of a levee along the bank of the river, a ditch, and a watergate, which a paragraph of the complaint describes.

As a result of impounding the waters of the St. Francis and Little rivers in the reservoir constructed by the drainage district, and of discharging these waters through the floodway, plaintiffs' lands began to be flooded as soon as the floodway was opened, and they have been flooded every year since. This has resulted in great damage to plaintiffs' lands.

After the floodway was opened, plaintiff brought suit on November 5, 1923, for damages to his lands. Plaintiff alleged and offered testimony to the effect that a member of the board of directors of the drainage district told him that, if he would dismiss his suit, the board would complete the levees near the Crittenden County line which were planned to protect his lands from the backwater,

and would also adjust the assessments on other lands owned by the plaintiff. Later in the same year plaintiff had an oral understanding with the district board to the effect that the board would complete the levees and adjust the assessments, and plaintiff authorized the dismissal of his suit. Thereafter the board had its engineer make a survey of the proposed work and gave plaintiff a contract to perform it. To perform this contract plaintiff purchased a certain 40-acre tract of land, but the board failed to permit plaintiff to proceed with the work, for the reason that the district did not have the money to pay for it. The district took no steps to complete the work, and this suit was filed on June 12, 1929, to recover the same damages sued for in 1923.

The plaintiff was represented in the 1923 suit by L. C. Going, who had also filed a number of other suits against the district. Counsel for the drainage district wrote Mr. Going a letter in which he inquired what suits would be pressed for trial at the ensuing term of the circuit court where all the actions were pending. In answer to this letter, Mr. Going wrote:

"Your inquiry of the 24th is at hand, and, in reply to same, beg to say that the cases of W. P. Cooper, J. D. Dubard, Farmers' & Merchants' Bank and E. P. Burton against the drainage district will be dismissed at the coming term of the chancery court. I much prefer that they be dismissed at the cost of the defendant, but, if you cannot see your way clear to do this, we will dismiss them at our own costs.

"With reference to the cases of Dr. Baird, Causey, Sloan and Denton, beg to advise that I shall insist on trying these cases. I think the decision in the Saine case reported in the advance sheet of the Law Reporter on December 24th settles all the cases involving lands within the district."

The case Mr. Going referred to as being decisive of the suit of the plaintiff Burton and of certain other plaintiffs is that of *Sain* v. *Cypress Creek Drainage District,* 161 Ark. 529, 257 S. W. 49, in which case the opinion was delivered on December 24, 1923.

It is unnecessary to inquire whether Mr. Going was correct in his opinion that certain of his clients—the

plaintiff Burton, among others—were barred from recovering damages sued for or not under the Sain case, *supra.*

The cases referred to by Mr. Going were dismissed on May 12, 1924, at the cost of the drainage district, and the costs were paid by it. The attorney for the drainage district testified that he had no other understanding with Mr. Going except that reflected in the letter from him.

After hearing the testimony recited, the court dismissed the cause of action, and, by way of explanation of that ruling, said: "The court is of the opinion that the original judgment precluded a cause of action on the original matter, and that, if Burton had any cause of action subsequent to that time, it would have been upon the breach of the contract entered into between him and the district whereby he was to complete the work."

We concur in this view of the law, and therefore affirm the judgment from which is this appeal.

In 12 C. J., at page 337 of the chapter on Compromise and Settlement, § 33, it is said: "After a valid compromise agreement has been entered into, any subsequent remedy of the parties, with reference to the matters included therein must be based on the agreement, it operating as a merger and bar of all included claims and preexisting causes of action, and it is not necessary that the compromise shall have been performed." Many cases are cited in the note to the text quoted.

Plaintiffs below, appellants here, cite and rely upon the case of *Prothro* v. *Williams,* 147 Ark. 535, 229 S. W. 38, as authorizing this suit. In that case the owner of property in an improvement district had delayed having her damages assessed, as provided by statute, until after the expiration of the time limited by law for that purpose, but it was there held by a majority of the court that the limitations of the statute (as said in a headnote in that case), "as to the time in which a landowner may make complaint of assessment of benefits or damages in a drainage district, were not intended to deprive a property owner of the right to complain of such assessments where she was led into not making such complaint by the conduct of the commissioners of the district causing her to believe that the route of the ditch would be changed."

The controlling thought in that case was that the commissioners of the district had misled the plaintiff to an extent that amounted to a fraud upon her, in that she had relied upon their representations as to the permanent location of the ditch and had been deceived thereby, and that, as the commissioners had the power to alter the location of a ditch at any time before constructing the work, even after a judgment of the county court had been rendered confirming the assessment of benefits, the property owner in the district was not barred from suing for damages resulting from the location of the ditch at a particular place, where they were representing to the property owner that it would be located elsewhere.

In the instant case there is no allegation of fraud in the pleading, nor proof thereof in the plaintiff's testimony, nor argument to that effect in the plaintiff's brief. It is insisted that the district did not permit the performance of the contract under which the plaintiff had dismissed his suit, for the reason that the district ran out of money. Yet no action was taken by the plaintiff until 1929, when the right to sue upon this oral contract was barred.

It may be said, in this connection, that it is the contention of the drainage district that the suit was dismissed without any condition not expressed in Mr. Going's letter, and, for the reason there stated, to-wit, that the Sain case, *supra* was a bar to the original suit.

Counsel for the drainage district assign other reasons for the affirmance of the judgment appealed from which we do not discuss, as we think the reason assigned by the court for the conclusion reached is valid, and of itself sufficiently supports the judgment rendered. The judgment must therefore be affirmed, and it is so ordered.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* WOOLDRIDGE.

4-2942

Opinion delivered April 10, 1933.

Geo. B. Pugh and *Thos. S. Buzbee,* for appellant.

Caviness & George, John P. Roberts and *Evans & Evans,* for appellee.

SMITH, J. Appellee, the plaintiff below, recovered a judgment for personal injuries and for damages to his automobile upon testimony substantially as follows. On November 9, 1931, at about 6 or 6:15 o'clock P. M., the plaintiff was driving west in his automobile over State Highway No. 10 from Danville to Booneville. At a point on the highway about a mile and a half west of Wayeland, he was compelled to pass under the defendant's railway track by driving his car through and between pillars or piers extending from the ground in the middle of and on each side of highway No. 10 upwards to the defendant's railway track; in other words, through an underpass. A plat was offered in evidence showing the highway, the railroad, and a creek which it crossed on a 14-panel pile trestle. These panels, which support the railroad trestle or bridge, were twenty feet wide, and the witnesses placed the distance between these panels at from six to twelve feet. The railroad there runs nearly east and west, and the highway runs north and south, running under the railroad at a right angle. This road is divided by one of these piers. The travel west usually goes to the right of this dividing pier, and that to the east is on the left, but there is some use of the right side of the road by eastbound travelers and traffic. The highway south of the railroad makes a left turn as it runs through the underpass, and a right turn as it leaves it. The curve on

the south side is sharper than that on the north. Some of the witnesses speak of the curve which plaintiff followed as he approached the railroad as a right-angle curve, but the plat referred to, which was offered in evidence by the railroad company, and two pictures, which were offered in evidence by the plaintiff, show that it is not a right-angle curve, although it is a sharp one.

The pictures show that the outside piling of each of three piers is painted with stripes resembling large barber poles. These are the piers east of the road, west of the road and the pier in the center of the road. The preponderance of the testimony is to the effect that this piling had been painted before plaintiff sustained his injury, but there was testimony that the piling had been painted subsequent to that occasion, and the jury evidently accepted that version. There was testimony to the effect that there were three warning signs along the highway south of the railroad, the one nearest thereto reading: "STOP, SOUND YOUR HORN"; but testimony was offered on behalf of the plaintiff to the effect that only one of these signs was present when plaintiff was injured, and that this was so located that the curving road kept the lights of the car from shining thereon and rendering it visible after dark. There were no lights on the bridge. The Highway Department had worked this road a few days before plaintiff's injury, and, in so doing, had scattered loose gravel at the point of the curve.

Plaintiff testified that his car had good lights and good brakes, and that he was driving 25 to 30 miles per hour, and that he had "made all of the curve excepting just a little bit, when I turned the car down the side of the underpass." He did this because the piers presented to him the appearance of a solid wall into which he was about to drive. He did not run into any of the piling which are now painted, but ran off the highway about 8 or 10 feet before he got to the underpass. He stated that he "did not strike the center pillar, nor the next one, nor the next one, but it was the third pillar down in the branch that I struck."

At the point of the curve on the left side of the road there was a railing erected by the Highway Department

to prevent speeding cars from running off the road. Plaintiff did not run into this railing, but after driving beyond it, turned to the left, leaving the road in so doing, and ran into the creek.

Nicholson, a witness for the plaintiff, testified that he lived about 200 feet west of the highway and south of the underpass, and was standing on his front porch when plaintiff drove by his house. Plaintiff was driving "something like 30 miles an hour. He did not slow down until he got, I would say, 20 or 30 feet from the underpass. I heard his wheels skid and he went on over the dump."

Vaughan, a witness for the plaintiff, testified that he lived about 90 yards from the underpass on the north side of the railroad, and that when he reached the plaintiff the latter said, "I thought I was going right into a solid wall, and gave a turn," and then his car slid in the gravel, and he lost control of it. The car was running, according to this witness, "30 to 35 miles per hour," and he stated that "the highway man had just put that gravel in a day or two before, and it was banked in there a right smart." This witness further stated that, according to measurements which he made on the following day, the middle pier was 17 or 18 feet from the outside of the track of the plaintiff's car, in other words, instead of going through the underpass to the right of the middle pier, plaintiff turned off or skidded off before reaching it and ran a distance of 4 piers into the bridge.

A Mrs. Weatherall, testifying on behalf of the defendant, stated that she was in her home, 300 yards north of the underpass on the opposite side of the railroad, and she and her husband heard from that distance the noise of the impact as plaintiff's car struck the pier. She and her husband went at once over to the scene of the collision, and she said, as they reached plaintiff's car, "He was going quite a speed," and the plaintiff answered, "Yes, mam, around 40."

The negligence charged as constituting plaintiff's cause of action is that the railway company "had failed to build, erect and maintain a reasonably safe crossing or underpass across or under its line of railway on

highway No. 10 at said point west of Waveland, Arkansas."

The court charged the jury, without objection on the part of the plaintiff, that the railway company was under no duty to maintain lights at the underpass, and gave other instructions defining the duty of the railway company to maintain a safe crossing.

The railway company insists that no negligence on its part was shown, as it had no control of the location of the highway leading to its right-of-way, the route of the road having been recently relocated by the State Highway Department, and that it was an employee of the Highway Department, and not its own employee, who had so recently placed the gravel in the road where plaintiff's car skidded.

Without further recital of the testimony, and assuming, without deciding, that the defendant railway company was negligent in the particulars alleged, it appears more certain that the plaintiff was guilty of contributory negligence, and that this negligence was the cause of his injury. He knew he was approaching a railroad, although he had driven through this underpass on only one previous occasion and did not remember how the road divided. The railing on the left of the road was a warning that there was a curve and the consequent danger of rounding it too rapidly, even though the signs did not convey the information, either by not being seen or by not being present. Plaintiff must have known that he was on a curving road as he approached the underpass, yet he did not reduce his speed until he struck the gravel. Whatever the exact distance may have been between the panels or piers of the bridge, that space was half the width of the road, less the space occupied by the piling constituting the middle pier, and this space was ample for one to have driven through safely while exercising ordinary care. The road was level on both sides of the railroad track. When plaintiff became confused about the road he should have put his car in control, but he drove on with a carelessness which appears to us nothing short of recklessness.

The court should therefore have charged the jury, as a matter of law, that plaintiff's right to recover was

barred by his own contributory negligence, and, for this error, the judgment must be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

FOWLKES *v.* CENTRAL SUPPLY COMPANY.

4-2965

Opinion delivered April 10, 1933.

H. A. Midyett and *Tom W. Campbell,* for appellant.

Barber & Henry, for appellee.

SMITH, J. On July 24, 1931, the Central Supply Company filed suit on an account against B. M. Fowlkes in a justice of the peace court for Jefferson Township, in White County, and on September 2, 1931, judgment was rendered therein in favor of Fowlkes. The plaintiff prayed and perfected an appeal to the circuit court, and at the January, 1932, term thereof entered a nonsuit "without prejudice to the right of bringing another suit." On February 4, 1932, the supply company filed a new suit on the same cause of action in the White Circuit Court, to which suit the defendant pleaded the justice judgment

in bar. This plea was overruled at the July, 1932, term of the circuit court, and judgment was rendered for the plaintiff for the amount sued for, from which is this appeal.

For the affirmance of this judgment, appellee says: "The sole question at issue is whether a nonsuit without prejudice is tantamount to a dismissal of an appeal so as to leave a judgment of a justice court still in full force and effect."

The case of *Brenard Mfg. Co.* v. *Pate,* 178 Ark. 163, 10 S. W. (2d) 489, is decisive of this question and of this case. It was there held, to quote a headnote, that, "Where a justice of the peace, in actions on certain notes, rendered judgments in favor of the defendant, and on appeal to the circuit court a nonsuit was taken by the plaintiff, the judgments were properly *held* to be *res judicata* in a second action on the same notes."

The attempt is made to distinguish the instant case from the Brenard case, *supra,* upon the ground that the instant case was dismissed without prejudice to the right to bring another suit, whereas the appeal in the Brenard case was dismissed unconditionally. This distinction is not, however, of controlling importance.

It was said in the Brenard case that judgments of justices of the peace adjudicating the rights of parties to causes over which they have jurisdiction are effective and valid until set aside in some manner provided by law. Their enforcement may be suspended by appeals to the circuit court, provided bonds for that purpose are given as required by law, but the judgments remain effective and decisive of the question adjudicated, notwithstanding the appeal, until they are reversed or set aside.

Now, if a justice judgment is a valid adjudication of a question within the jurisdiction of the justice court, it becomes final and conclusive of the question adjudicated, unless an appeal be taken within thirty days after the judgment was rendered, and the appeal must be taken within that time, and not thereafter. Section 6513, Crawford & Moses' Digest. Here an appeal was taken within the time limited, but that appeal was dismissed. It is true that appellee announced that this action was taken without prejudice to its right to bring another suit. But

this condition was ineffective. It had no right to impose a condition, for the reason that it contravened the provisions of the statute in regard to appeals from judgments rendered in justice courts. The plaintiff could not disregard the judgment of the justice of the peace as it attempted to do. The judgment was in force as an adjudication of the question in issue, and the plaintiff could not set this judgment aside and render it ineffective by bringing another suit. The right to sue and enforce payment of the demand upon which the suit was based had been adjudicated, and the remedy provided by law to review this judgment was by an appeal to the circuit court within thirty days after the judgment was rendered, and not thereafter.

More than thirty days after the rendition of the judgment the appeal was dismissed, and the plaintiff's attempt to reserve a right not permitted by law was abortive. The appeal having been dismissed, and the thirty days having expired within which to appeal, the justice judgment became conclusive of the issue in the case, and the plea of *res judicata* should have been sustained.

Appellee insists that it had the right to abandon its appeal from the judgment of the justice of the peace and to take a nonsuit without prejudice to a future action under § 1201, Crawford & Moses' Digest, which provides that an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court. But this section has no application to suits reaching the circuit court on appeal from justice courts. It defines the practice in circuit and chancery courts and relates to suits brought in those courts. Here, before the nonsuit was taken, there had been a final submission of the cause to a court having jurisdiction thereof, and that jurisdiction had been exercised and a judgment rendered which determined the rights of the parties thereto. An appeal to the circuit court was the remedy provided by law for the review of the justice judgment, where, upon a trial in the circuit court, the cause would have been heard *de novo*. There was neither necessity nor authority to bring a new suit to obtain this *de novo* trial, and the judgment of the circuit court, from which

this appeal comes, must be reversed; and, as the cause of action upon which the judgment was rendered was concluded by the judgment of the justice court, the suit will be dismissed. It is so ordered.

FEE *v.* TAYLOR.

4-2960

Opinion delivered April 10, 1933.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

Golden & Golden and *Williamson & Williamson,* for appellee.

KIRBY, J. This appeal comes from a judgment against appellants, stockholders in the Bank of Dermott, insolvent, for $200 each in three cases brought by the Bank Commissioner to enforce payment of the double assessment upon bank stock owned by appellants, the cases being consolidated for a hearing in the circuit court.

The insolvency of the bank was alleged, and that it was taken over by the Bank Commissioner for liquida-

tion, who, after ascertaining the necessity therefor, levied a hundred per cent. assessment against the stockholders of said bank. That the assessment was duly levied against each of the defendants in this action, and notice thereof given to them as provided by law. That each defendant was at the time the holder and owner of stock in the bank of the par value of $200. That due demand had been made upon each of the defendants for the payment of their respective assessments, and each had failed and refused to pay any part thereof.

Each defendant answered, denying every material allegation of the complaint, and alleged that the proceedings of the Bank Commissioner were by collusion and fraud, and the approval of the sale of the assets was with a view to liquidate the assets of the bank without the supervision of the Bank Commissioner and without any remedy to the defendants, the plan being carried out according to the orders of the chancery court. That the proceedings in the chancery court were not instituted with a *bona fide* purpose of liquidating the bank, "but for the collusive purpose of enabling certain stockholders of Dermott State Bank to liquidate the assets of Bank of Dermott to the detriment of the defendant." That defendant had had no day in court and no opportunity to protect himself against unlawful and improper liquidation of the assets of the bank, and, if required to pay the assessment, would be deprived of his property without due process of law.

The testimony of the assistant bank commissioner, who had also had to take over the Exchange Bank & Trust Company for liquidation, the concern to which the assets, etc., of the failed Bank of Dermott were sold, showed that the assets of the Bank of Dermott, including the stock assessments, would fall short and lack by some $16,000 of being sufficient to pay all the liabilities of the Bank of Dermott that were assumed by the Exchange Bank & Trust Company.

These suits were brought by the Bank Commissioner to enforce the collection of the double stock assessment against the appellants as stockholders of the failed bank, which was in liquidation by the Bank Commissioner, and

there is no allegation that the assets of the bank, including the assessments of stock even, were sufficient to pay its liabilities. The testimony showed that all the assets were insufficient to pay all the liabilities of said Bank of Dermott assumed by the Exchange Bank & Trust Company, which also failed and went into liquidation.

This court has already held that the necessity for the levy and call of stock assessments is conclusive as to the necessity for the call and the amount to be assessed in an action to enforce that liability against the stockholders. In *White* v. *Taylor, ante* p. 1, a case where, on the suit for his assessment, the stockholder insisted upon a transfer of his cause to equity that he might show that the old bank was not really insolvent, and that, if certain of its property wrongfully transferred to others could be recovered, it was sufficient to pay all the liability of the bank without any stock assessments, the court said:

"But, however this may be, this action is not the proper one to try the question of fraud or insolvency. Necessity for the levy and call of the stockholder's assessment by the Bank Commissioner was discussed at length in *Davis* v. *Moore,* 130 Ark. 128, 197 S. W. 295, where the court held that the action of the Bank Commissioner in making the assessment of liability of individual stockholders is conclusive in an action to inforce that liability. It was also said in *Poch* v. *Taylor,* 186 Ark. 618, 54 S. W. (2d) 994: '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 language of the section of the statute relating to assessments was copied from the National Banking Act, which had been construed by the United States Supreme Court prior to the enactment of our statute, and such construction was necessarily adopted with it. The Supreme Court of the United States said in *Casey* v. *Galli,* 94 U. S. 680, 24 L. ed. 307, that the comptroller's order that each stockholder should pay to the receiver the par of his stock cannot be controverted in a suit against

the stockholder, saying: 'It is conclusive upon him and makes it his duty to pay. What may be done or intended with respect to other stockholders is immaterial in his case.' The appellant could not question in the suit for the collection of the assessment either the necessity therefor or the right of the Bank Commissioner to levy same, and the chancery court could have no jurisdiction of this cause therefore."

It was also said there relative to the question of such stockholder's assessment being assignable:

"We see no reason why the Bank Commissioner, after the assessment of the stockholder's liability had been made, could not transfer and assign the claims therefor the same as he could any of the other assets of the bank in final settlement of its affairs, and certainly the purchaser of such assets of the bank, including the stockholders' assessments already made, would have the right to use the name of the Bank Commissioner in inforcing the liability, if necessary. *Waldron* v. *Alling,* 73 App. Div. 86, 78 N. Y. Supp. 251."

The stockholder cannot question in a suit for the collection of the assessment either the necessity therefor or the right of the Bank Commissioner to levy same, and the court did not err in so holding, and it being shown that the assets of the failed bank, of which appellants were stockholders, were insufficient, even including the stockholders' assessments, to pay the liabilities of the insolvent institution, and appellants could have no cause of action, in any event, to recover any part of their stock assessments that might not have been required to pay all the liabilities of the insolvent bank, there being none even if they had been entitled to a portion of their stock assessments remaining over after the liquidation of the bank and the payment of all its liabilities, since none was left over.

The assessment of which the stockholders had due notice as the statute requires, did not violate the due process clause of the Federal Constitution. The liability was incurred by the stockholder, upon his acquiring the stock, as provided by the statute, and "the remedy of the stockholders for an unnecessary or an excessive

call is in the chancery court, which supervises the proceedings of the State Bank Commissioner and allow claims and makes final distribution of the assets." *Aber* v. *Maxwell, supra.*

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

BENTON *v.* THOMPSON.

4-2961

Opinion delivered April 10, 1933.

Trimble, Trimble & McCrary, for appellant.

John R. Thompson, for appellee.

MEHAFFY, J. John R. Thompson, as a resident, citizen and taxpayer of Lonoke County, Arkansas, brought this suit for the use and benefit of Lonoke County.

R. O. Benton, the appellant, is the regularly elected, qualified and acting sheriff of Lonoke County, Arkansas.

It was alleged in the complaint that the appellant was justly indebted to the county of Lonoke in the sum of $6,300, the same being occasioned as follows:

Act 173 of the Special Acts of the General Assembly of the State of Arkansas for the year 1919 fixed the salary of the sheriff of Lonoke County at the sum of $4,000 per year, and required that out of said sum the sheriff of said county should pay all his deputy hire; that this act is the law at this time, and has been such at all times mentioned in the complaint; that in the year 1927 the sheriff of Lonoke County drew from the county $5,200, and a like sum for the years of 1928, 1929, and 1930 as his salary and to pay deputy hire, which was $2,200 more than was allowed him under the act above mentioned; that the sheriff based his right to draw this money upon act 90 of the Acts of 1927, which only affected Lonoke County and its officers, and was unconstitutional and void; that the appellant was, at the expiration of 1930, indebted to the general fund of Lonoke County in the sum of $4,800; that in the year 1931 the appellant drew from the county general fund the sum of $5,200 as his salary and to pay deputy hire, which was $1,200 more than he was entitled to under the act of 1919; and for the first quarter of 1932 appellant drew $1,250 for his salary and deputy hire, which was $300 more than he was entitled to under the law; that appellant had rendered his accounts and settled with the county court at each regular session, and his settlements were approved and confirmed; that the settlements were made under act 90 of 1927, which was void, and the settlements were approved by the court through error as to the law.

Appellant filed a demurrer stating first that the complaint does not state facts sufficient to constitute a cause of action, and, second, that the court has no jurisdiction of the subject-matter.

The court sustained the demurrer to the amounts collected by the sheriff to the date of March 16, 1931, but overruled the demurrer as to the amounts sued for which were collected since March 16, 1931. The court dismissed appellee's complaint as to all amounts collected prior to March 26, 1931, and entered judgment against appellant for $1,500, the amount due since March

16, 1931. Each party prayed an appeal to this court, which was granted.

It is the contention of the appellant that the circuit court had no jurisdiction because under the Constitution and statutes the county court had exclusive original jurisdiction.

Article 7, § 28, of the Constitution reads as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes; and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided."

Section 2279 of Crawford & Moses' Digest also defines the jurisdiction of the county courts.

If this suit involved a matter relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, or if it related to the necessary internal improvements, then the county court would have exclusive original jurisdiction.

In the case of *State, use of Izard County* v. *Hinkle,* 37 Ark. 539, it was held that to treat the orders of allowance by the county court as null and void would be going a length which this court has never sanctioned, and that there was no necessity for it because of the other remedies provided, that is, appeal to the circuit court from the judgment of allowance, quashing the judgment on certiorari, and the power of the county court to call in outstanding warrants, or opening the allowance or order in chancery for fraud, or mistake.

But the court in the Hinkle case said there was further trouble; that the complaint alleged the allowance of the claim and ordered warrants to be issued, but that it did not allege that any of these warrants were paid by the treasurer, or that the appellee obtained any money upon them.

In the instant case it is alleged that the appellant drew the sums of money mentioned as received in violation of law. The allegation is that he received the money, and this is a suit to collect the money wrongfully received, and does not come within the jurisdiction of the county court wherein it is given original exclusive jurisdiction in certain matters. None of the matters mentioned in § 28 of article 7 of the Constitution are involved in this suit, and the exclusive jurisdiction is not by the Constitution vested in the county court in matters of this kind.

Section 11 of article 7 of the Constitution provides:

"The circuit court shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution."

The Hinkle case, *supra,* involved the settlements of the sheriff, and involved county taxes. This suit does not involve any subject mentioned in the constitutional provision giving county courts exclusive original jurisdiction.

In the case of *Carroll County* v. *State,* 95 Ark. 194, 128 S. W. 1042, the court said, after quoting the constitutional provision with reference to jurisdiction of county courts: "The subject-matter of this action is not embraced in the jurisdiction of county courts as thus defined by the Constitution. The sum sued for is not taxes; nor is the action brought to enforce a settlement by a revenue officer of the taxes in his hands. * * * If the sum sued for had ever been county taxes, it ceased to be such when it was paid into the county treasury, as a debt would cease to be a debt when it is paid. It is a sum due for money loaned, accrued interest, is a demand in favor of the county, and is not due for taxes."

In the instant case it is simply a suit for a debt due the county. There is no claim that there was any mistake or fraud in the sheriff's settlement.

Act 173 of the Acts of 1919 is a valid law. It is local, applying to Lonoke County only, but it was enacted prior to the adoption of the constitutional provision prohibiting local legislation by the Legislature.

Act 90 of the Acts of 1927 was void because it was a local act, amending act 173 of 1919, and was passed after the adoption of the amendment to the Constitution prohibiting local legislation.

This court has held that, while the Legislature may repeal a local act, or may repeal a portion of it, it cannot amend a local act. The Act of 1927 was therefore void. *Cannon* v. *May,* 183 Ark. 107, 35 S. W. (2d) 70.

County courts, like probate courts, have only such special and limited jurisdiction as is conferred upon them by the Constitution and statutes and can only exercise the powers expressly granted or necessarily incident thereto. *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39; *Moss* v. *Moose,* 184 Ark. 798, 44 S. W. (2d) 825; *Huff* v. *Hot Springs Savings Trust & Guaranty Company,* 185 Ark. 20, 45 S. W. (2d) 508.

Having reached the conclusion that the act of 1927 is void, appellant was entitled to receive fees under act 173 of 1919, and any fees received by him in excess of the fees allowed by said act were in violation of law.

The appellee prosecutes a cross-appeal.

A majority of the court is of the opinion, with which the writer does not agree, that act 218 of the Acts of 1931, being a general act, relieves the sheriff of Lonoke County from paying back money wrongfully received up to the date of the passage of said act.

It follows from what we have said that the judgment must be affirmed, both on appeal and cross-appeal. It is so ordered.

Justices Smith, McHaney and Butler, dissent.

Jordan *v.* Winooski Savings Bank.

4-2969

Opinion delivered April 10, 1933.

Claude M. Cruce and *A. L. Rotenberry,* for appellant.

S. Lasker Ehrman and *John M. Lofton, Jr.,* for appellee.

MEHAFFY, J. The appellant filed complaint in the St. Francis Chancery Court alleging that the appellee, Winooski Savings Bank, was a nonresident, and owned certain lands which were described in the complaint; that on or about December 15, 1931, said bank, for a valuable and good consideration, executed and delivered to appellant a certain oil and gas lease upon the lands described, and that appellant is entitled to all of the benefits, rights, title and interest accruing under said oil and gas lease; that Grover T. Owens, agent of the bank, called appellant into his office and prevailed upon him to turn over said lease for the purpose of examination, and refused to return said contract to appellant; that said lease had not been recorded, and that, unless restrained, the appellees would destroy, or put beyond the control or possession of appellant, the lease contract; that the appellees now hold said contract, and that they should be required to deposit the same in the registry of the court, pending final disposition of the cause. Appellant stated further that he had expended and would expend the sum of $500 as attorney's fees and necessary court costs incident to the trial, and that the same was occasioned by the wilful and malicious acts of the appellee bank and its attorneys and agents.

Appellant filed as Exhibit A the lease contract, which was an ordinary oil and gas lease. The lease is quite lengthy, and it would serve no useful purpose to copy it here.

The appellees filed answer, admitting that the Winooski Savings Bank was the owner of the lands described, but denied that the bank executed and delivered to the appellant the oil and gas lease, and denied that Grover Owens called the appellant to his office and under pretext of examining said lease, prevailed upon plaintiff to turn over said lease, and denied the other material allegations in the complaint.

The answer alleged that appellant represented to the attorneys for the bank that he was associated with financial interests who proposed to make an immediate and thorough test for oil and gas, and they could not spend the money incident thereto unless they were assured that the acreage surrounding the said proposed well should be blocked up in its entirety; that, if he and his associates could secure a lease on the lands described, they would be justified in making an exhaustive test; that they had $10,000 available with which to begin drilling operations; that when appellant agreed that, if the bank would execute the lease, he and his associates would enter into an agreement whereby the said lease should be placed in escrow in the Bankers' Trust Company in Little Rock, Arkansas, pending commercial production of gas and oil, and with the further agreement that, if appellant and his associates should abandon drilling operations for a period in excess of 120 days, the escrow agent should deliver the lease to the lessor for destruction; that the bank refused to enter into the lease unless this agreement was made, and the lease placed in escrow; that appellant agreed with the bank that it should execute a lease on those terms, and that the lease should be held in escrow under the conditions set forth. Appellees further stated in their answer that, acting on the representation of appellant, it executed an oil and gas lease on the lands described, and mailed it to Owens & Ehrman; that an escrow agreement was prepared by Owens & Ehrman, and submitted to the appellant, who stated that he desired the approval thereof by his associates before executing the same; appellant stated that, unless he could secure the lease for exhibition to adjacent landowners, he would be unable to secure the acreage de-

sired; that appellant said, if they would permit him to have custody of said lease, he would exhibit the same to the adjacent landowners, secure their leases, and return the lease executed by the bank; that the lease was never delivered to plaintiff. They further stated in the answer that the appellant and his associates were not in position to make the test they claimed, and did not have $10,000 cash; that the appellant had not complied with the conditions and representations under which the lease contract was executed.

The case was heard by the court on the pleadings with their exhibits and oral testimony, and the court dismissed the complaint for want of equity, and adjudged costs against the appellant. The case is here on appeal.

The appellant testified that on April 12, 1932, Mr. Owens called him, stating he would like to have a conference with him the next day, and they met at Owens' office. The question arose as to the rental on the lease, and appellant told Owens that he had paid the rental to Mr. Bricker, and exhibited a receipt from Bricker; that Owens asked him to let him see the lease, and he handed it to him, and Owens refused to return it; that he paid Mr. Bricker $10 and Mr. Bricker gave him a receipt. He testified that he did not admit anything about an escrow agreement; that he made no admissions at all; that he took a copy of this lease and showed it to persons, inclosing the acreage contract. Appellant testified that nothing was said about an escrow agreement or any other conditions or agreements; that he did not have the lease recorded because Mr. Bricker asked him not to do so at that time, but the main reason he did not have it recorded was that other people would come in and see the lease on record and would make an effort to block the lease. He testified that he did not know that Mr. Bricker was not a member of the firm of Owens & Ehrman, and did not make any inquiry about the matter, but that Mr. Bricker said he represented the Winooski Savings Bank; that he did not know whether he represented the firm or the bank; that he was not present when the escrow agreement was dictated, and nothing was ever said to him about any escrow agreement. The lease was turned over

to him according to agreement; he told Mr. Bricker that other associates and himself had $10,000 to drill the well.

Bricker testified that the appellant came to him about the lease and that he told appellant that everything about the sale of real estate or interest therein would have to be referred to the bank; that the instructions from the bank were that we could not give a lease unless we knew that actual continuous activity toward commercial production of oil and gas could be had; the lease was to be placed in escrow; that he had this agreement with appellant. When the lease came from the bank, witness called appellant, who came to his office, and at that time witness asked him to execute the escrow agreement. Appellant said he wanted the lease to show adjoining landowners; witness told him at that time that the lease was supposed to be placed in escrow, and that he could not deliver it to him, but that appellant prevailed upon him to deliver it to appellant for the purpose of exhibition only; that appellant did not bring the lease back; the lease was never delivered to him, but was loaned to him; escrow agreement was never executed; appellant was to sign that when he brought the lease back; witness was present when Owens asked appellant for the custody of the lease, and appellant handed it to him; the escrow agreement was dictated the same day that witness handed appellant the lease; he said he would sign it when he brought the lease back.

Several letters were introduced, and the escrow agreement which was never signed by appellant.

Grover T. Owens testified that he talked with the appellant and that appellant explained to him that he had agreed with Bricker that there was to be executed an escrow agreement, and that the lease was to be delivered to the Bankers' Trust Company and held in escrow; that he refused to deliver the lease back to appellant.

Receipt for $10, covering rental on the lease, signed by Bricker, was introduced.

It is conceded that the testimony with reference to the delivery of the lease to the appellant is in conflict, but it is contended that the testimony introduced by appellees is incompetent, first, because the lease itself is

complete, and bears no conditions or provisions whatever relating to any other conditions or provisions outside of those expressed in the lease itself, and it was duly executed by the bank; second, that appellant has complied on his part with all the conditions of the lease, and holds documentary evidence signed by the agent of appellees.

The rule is well established that oral testimony cannot be admitted for the purpose of varying or contradicting the terms of a written contract, but, according to the appellees' testimony in this case, this lease was not to be effective until the escrow agreement was signed, and the lease itself was to be deposited in escrow with the Bankers' Trust Company. If this testimony was true, then there was no contract made, because the escrow agreement was never signed, and the lease was not deposited.

The testimony of appellees was clearly admissible, not as contradicting a written contract, but to show that no contract was ever made. There was no evidence introduced or offered by appellee that in any way varied or contradicted the terms of the written contract. The effect of their testimony is that the lease was to be deposited in escrow, and that it never was delivered, but loaned to appellant for the purpose of exhibiting it to others, and, as to whether a contract was made or not was a question of fact to be determined by the chancellor. *New Home Sewing Machine Co.* v. *Westmoreland,* 183 Ark. 769, 38 S. W. (2d) 314. The rule that parol evidence is not allowed to contradict or vary a written instrument, is only applied where the parol evidence tends to vary or contradict the language used in the instrument. *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. (2d) 308.

The contention here on the part of the appellees, and the evidence introduced by them, is that the lease was never delivered, and not that any of the terms of the lease were other than stated in the lease. The evidence does not tend to vary or contradict the terms of the lease. It is contended, however, by the appellant, that he complied with the terms of the lease and paid Bricker $10 in compliance with the terms of the lease, and that Bricker gave him a receipt for the money. Bricker testi-

fied that he gave the appellant the receipt, but that appellant did not pay him the $10, that he never paid him anything.

The appellant introduced a copy of the lease which he relies on. One of the provisions of the lease reads as follows: "If no well be commenced on said land on or before the 15th day of February, 1932, this lease shall terminate as to both parties, unless the lessee, on or before that date, shall pay or tender to the lessor, or to the lessor's credit in the Bankers' Trust Company of Little Rock, Arkansas, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of ten ($10) dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well, for twelve months from said date."

There is no evidence in the record tending to show that Bricker was authorized to receive the rental, but the contract relied on by appellant expressly states that it must either be paid to the lessor, or to the lessor's credit in the Bankers' Trust Company. Appellant does not claim that either was done. There is no evidence that Bricker was the agent of the bank to receive the money, or for any other purpose. The only testimony offered by the appellant as to Bricker's agency is that Bricker said he represented the bank.

It is well established that you can neither prove agency nor the extent of an agent's authority by his declarations or actions, and his written statements or admissions are as objectionable as his oral ones, and his letters, telegrams and other writings cannot be used as evidence of his agency. His actions and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence. *American Southern Trust Co.* v. *McKee,* 173 Ark. 147, 293 S. W. 50.

Whether the lease was delivered, and whether there was to be an escrow agreement deposited with the lease in the Bankers' Trust Company, and all other questions involved in this suit, are questions of fact. The chancellor found in favor of the appellees on the facts, and the

findings of the chancellor are not against the preponderance of the evidence.

The decree is therefore affirmed.

DEQUEEN & EASTERN RAILROAD COMPANY *v.* DYE.

4-2897

Opinion delivered April 10, 1933.

Abe Collins, Lake, Lake & Carlton and *John S. Kirkpatrick,* for appellant.

S. P. Jones, Franklin Jones, B. E. Isbell and *Percy Woodard,* for appellee.

BUTLER, J. The appellee is an experienced brakeman and was in the employ of the appellant railroad

company on the 30th day of April, 1931, when he was injured while engaged in setting a brake on one of appellant's railway cars. He brought suit to recover damages for the injury, and for his cause of action alleged a violation of the National Safety Appliance Law in that the appellant failed to equip the car with efficient hand brakes, and that the defective condition of the brake furnished caused him to fall and sustain the injury.

The trial of the case resulted in a verdict and judgment in favor of the appellee, from which the appellant has prosecuted this appeal.

From the testimony of witnesses on behalf of the appellee, the braking equipment may be described as follows: "The brake wheel is on the top of the staff, and the staff runs down to below the sill or bottom of the car. The connection between the staff and the mechanism underneath the car that sets the brake is a chain anchored to the brake rod. The brake rod is connected by a system of levers to the brake shoes that press against the wheels to set the brake. The chain is fastened to the brake rod. The chain extends from the brake rod to the staff and is connected there usually with a bolt through the staff with a nut on it. With the brake released the normal position between the brake staff and brake rod with the proper brakes hooked up in proper shape would be slightly loose."

The manner in which the accident occurred and the situation was detailed by the appellee as follows: "The brake was on the opposite end of the car from the end on which I got on the car, which was moving when I got to the top of the car. We had not got to the place where we were going to stop the car. I got on the running board, which is right in the center of the top of the car and is made of wood boards about two feet wide. I went north on the roof of the car on the running board as the car moved. The car was about 40 feet long. The hand brake on this car was a platform brake. There was a platform at the end of the car. The brake wheel is about a foot and one-half above the top of the car. The platform is about two feet below the roof of the

car and is about two inches thick by eight inches wide and two feet long. It extends out eight inches from the end of the car. It was a metal platform with a rim around it. The brake shaft comes up through the platform, and the brakeman stands on this platform to set the brake, facing, in this instance, the north end of the car. The brake staff is three to five inches from the end of the car all the way up. The brake wheel looks pretty much like an automobile steering wheel and is fastened on top of the staff. The movement of the wheel moves the staff, and the staff turns the brake chain. The rule is that the brake wheel is to be turned to the right, and this sets the brake. There is a dog, ratchet wheel on the brake platform, that works on a pedal. You move that with the toe after you set the brake. This ratchet wheel is fastened to the brake staff. It requires about all the power a man has got to set the brake. The brake wheel is about 18 inches in diameter. The brake is set by using both hands and revolving the wheel. You first wind it to the right, far enough to take up the slack, until you feel a resistance, and then you begin to set the brake which requires you to put all the power you've got behind it." Continuing, the appellee stated that they were handling the cars on this occasion in the usual manner, and he began the operation for setting the brake in the customary way when a car was moving, and "I set up this brake to where it was tight; then reached around and got a new hold and come on it as hard as I could. I was still standing with my face south to the end of the car and toward the brake wheel I was handling, and my back was the way we were going. My hands were right opposite each other across the wheel, across the end of the car, in front of me, and I come around with it there with all my might for the purpose of swinging to the left with all my power. This would give the brake wheel a right-hand turn. When I did this, I don't know what happened; it come loose. The wheel come plumb loose. The chain gave way down there some way or other, the wheel turned loose to the right all of a sudden and turned me loose. My weight was thrown to the left,

and, when that resistance ceased, my body went through the air and hit the ground.'' In describing the weather conditions appellee said: ''It came some kind of a little spring mist there, it wasn't raining at the time.''

The applicable portion of the statute alleged to have been violated provides that ''it shall be unlawful for any common carrier subject to the provisions of this chapter to haul or permit to be hauled or used on its line any car subject to the provisions of this chapter not equipped with appliances herein provided for, to-wit: All cars must be equipped with secure sill steps and efficient hand brakes.''

The evidence upon which the appellee relied as a basis for his recovery and to show a violation of the Safety Appliance Act was given by several witnesses who had been brakemen and who were experienced in application of brakes, but who had no experience in the building of cars or in the selection and assembly of their equipment. Their testimony may be thus summarized: In the operation of a safe and efficient brake, there would be required from one-half of a turn of the brake wheel to one and one-half turns thereof to set the brake, and where it required 2½ turns of the brake wheel to set it, the operation was inefficient and unsafe. There were five witnesses who testified for the appellee, two of whom stated that, where a brake was in normal working order and properly hooked, one-half round or one round of the wheel would set the brake, while three other witnesses stated that a brake in this condition would require from one to one and a half rounds to set it. All these witnesses stated that, if a brake chain is so long that it takes two and a half or more rounds of the brake wheel to set it, the brake would not be in good serviceable condition.

Immediately after the happening of the injury to the appellee, the conductor of the train and a witness for him, ascended to the top of the car from which the appellee had fallen and set the brake. To perform this operation it required not less than two and a half turns of the brake wheel. All of the testimony, both on behalf

of the appellee and the appellant, gave this as about the number of turns required to set this particular brake.

The car from which appellee was thrown was No. 92305 Pere Marquette, and was one of a series of five hundred cars which had been manufactured by the Pressed Steel Construction Company of Pittsburg, Pa., for, and delivered to, the Pere Marquette Railway Company. The deliveries of this series of cars were made during the months of August and September of 1930, the car in question having been finally inspected and received by the railroad company on September 22, 1931, so that on the date of the accident to appellee it had been in use about seven months. The evidence is undisputed that these cars were made identically like a model or sample car which had been constructed and equipped under the supervision of the mechanical engineer and officers of the railway company and designed to comply with the National Safety Appliance Act and the rules of the Interstate Commerce Commission. It was also undisputed that, as the cars were constructed the parts were carefully inspected, and before they were turned over to the railroad company they were carefully gone over and measured, and the brake equipment was examined for the purpose of meeting the requirements of the Safety Act and rules. The length of the brake chain on this particular car and on all the other cars was the same, being 39¾ inches in length. On the final tests all cars should require about two and a quarter turns of the brake wheel to set the brake. These cars were immediately put in service and routed over the different lines of railway throughout the United States.

Testimony was given by several witnesses on behalf of the appellant who were experienced in designing and building cars and in the designing of equipment placed upon them. All testified without contradiction that the brake equipment on the car involved conformed to the best manufacturing standards, and this was the standard type of brake designed and used by the American Railway Association; that at least seventy per cent. of the box cars in service using a hand brake of the

type of the one in question would require as many as two and a half revolutions of the wheel in order to set the brake; that the Federal agents charged with the duty of making inspections under the Safety Appliance Act and enforcing the rules of the Interstate Commerce Commission with reference thereto were continuously through the country checking car equipment, whether new or old, and there had never been any prosecution or complaint based on the taking as many as two and a half turns of the brake wheel to set the brakes.

It is undisputed also that the car from which appellee had fallen was examined within an hour after the accident, and it was found to be in good condition. No loose or defective connections or any worn or defective parts and no part of the hand brake equipment out of adjustment was found. A test was made at the time of the efficiency of the hand brake and the number of revolutions of the wheel required to set it up, and no defect was found and the brakes used were in good order. An examination of the car was made at the time of the trial, and the braking equipment was found to be in the same condition as when inspected within an hour after the accident and the brake chain was found to be 39¾ inches long, the same as when taken from the factory. There was no dispute in any of the testimony except as to the opinions of the witnesses regarding the number of turns required for setting an efficient brake. Some of the witnesses for the appellee gave no reason for the conclusion that a brake requiring two and a half turns to set would be inefficient, but some thought this number of turns would cause the brake chain, in winding around the brake staff, to wind on itself and slip, but there was also testimony which is not disputed that this would sometimes happen on brakes requiring not more than one or one and a half turns to set.

An experienced brakeman testified for the appellee to the effect that there are various types of brakes. Some might prefer one type and some another; that many times, while he was engaged in braking, a link of the chain would wrap and slip off on the brake staff, and it could

not be known when this would happen. Continuing, he said: "When one is engaged in braking, he would not know when that would happen. When I got ready to set a brake, it is my idea to take a good hold. I would not know but what there might be a wrapping of the link below. You cannot tell; that has happened to me several times on all types of cars; to avoid that I concluded it should not take over a lap and one-half."

We are not advised by any evidence in the case as to what the result would be when a brake wheel had been turned sufficiently to tighten the brake preparatory to setting it and then being suddenly released—whether this would cause a revolution of the wheel backward sufficient to entirely unwind the chain from the brake staff or not. One witness, a lady who was nearby when the accident occurred, and who appears to be disinterested, stated that the brakeman was on top of the car walking along and had not reached the brake at all when from some cause unknown to the witness he slipped or stumbled and fell from the car. This testimony, together with the fact that it appears that no part of the brake chain was wrapped around the staff and that it took the full amount of turns—namely, two and a half to set the brake, indicates that the brakeman was not in fact engaged in the operation of setting the brake when he fell from the car; but, as the jury has ignored this testimony, so must we and determine from the facts, without considering this, what, if any, would be the liability of the appellant.

The appellant contends, in the first place, that the number of turns of a brake wheel required to set a brake is an engineering or mechanical question for the engineers and officers of the companies which built and designed and own the car in question. Next, the appellant contends that the alleged cause of the accident was one of the usual and ordinary risks incident to the employment.

Lastly, appellant contends that no justifiable inference of negligence against the appellant can be reasonably drawn from the evidence.

On the second contention made, reliance is had on the evidence which, it is claimed, shows that on all types of brakes it is not an unusual thing for a brake chain to wrap upon the staff in such manner that it will slip from that part of the chain upon which it is superimposed and fall on the brake staff causing a wabbling or jerking motion of the braking apparatus; and, on the last contention, it is insisted that the opinion of the appellee to the effect that "the brake chain gave way down there" can be nothing more than a conclusion or conjecture on his part, for he did not, and could not, see any part of the brake mechanism below the platform, and there was no evidence from any witness that the chain had in fact wrapped itself and slipped upon the brake staff. Appellant argues that, as the brake platform was made of metal only eight inches in width and so narrow that the employee had but little better than one-half of his feet on it and it was a damp morning, it is as reasonable to conclude that the platform was wet and slippery, and that this condition, together with the force used in setting the brake, caused the appellee to slip and fall as to conclude that the accident was caused by the brake chain wrapping on itself and slipping. Appellant also argues that under the circumstances and proof it is as reasonable to conclude that the appellee was mistaken in his belief that he had brought the brake to full tension before applying his utmost strength, and that he might have applied more force than was reasonably necessary under the circumstances; that he should have anticipated an unusual movement of the brake wheel, and that his hands might have slipped, as he failed to testify to the degree of strength with which he grasped the brake wheel before making the final effort. It is the contention of the appellee that the evidence leaves the cause of the happening of the accident uncertain, and in that state that it might be said that more than one cause might have produced the injury, for one of which the employer was responsible and for the other it was not, and that, for the jury to determine what was the actual cause of the accident, it would be necessary for it to indulge in speculation.

We pretermit an examination of these contentions, for an examination of the first question raised leads us to the conclusion that the position of the appellant on that is well taken. It was alleged and admitted that at the time of the accident the appellant was engaged, and the appellee was working, in interstate commerce. Therefore, the proposition presented must be determined in accordance with the rules announced by the Federal courts. It has been held in a number of cases decided by the Supreme Court of the United States, reference to which is made in appellant's brief, that by the several acts of Congress it took possession of the field of employers' liability to employees in interstate commerce by railroad, and all State laws on that subject were superseded, and that the rights and obligations of employers and employees depend upon those acts and the applicable principles of common law as interpreted by the Federal courts. This principle is recognized by both the appellant and the appellee, and the latter, to refute the contention of the appellant on the first point raised, relies upon the decisions of the Federal courts which he contends make the efficiency of the brake, and whether or not it was in violation of the Safety Appliance Act, questions for the jury, where there is testimony that a brake requiring more than one and a half turns to set is not a proper and efficient brake, and where it is shown that it did require more—to-wit, as much as two and a half turns—to set the particular brake, is sufficient evidence to submit to the jury the question of its efficiency. The cases cited are as follows: *C. R. I. & P. Ry. Co.* v. *Brown,* 229 U. S. 317, 33 S. Ct. 840; *Minneapolis & St. L. Ry. Co.* v. *Gotschall,* 244 U. S. 66, 37 S. Ct. 598; *L. & N. Ry. Co.* v. *Layton,* 243 U. S. 618, 37 S. Ct. 456; and *San Antonio & A. P. Ry. Co.* v. *Wagner,* 241 U. S. 476, 36 S. Ct. 626.

An examination of those cases discloses that they all deal with cases where injuries resulted from the failure of automatic car couplers to properly function. Automatic car couplers required by the Safety Appliance Act have been defined to be such as would have sufficient lateral motion to permit trains to round curves, with adjustable knuckles which can be opened and closed and ad-

justed, so that at all times they may make contact and fasten automatically by impact, and the standard prescribed by the act for such equipment is that there must be "couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the cars." This standard was made to apply in all cases whether or not the cars brought together are of the same kind, make or type. *San Antonio & A. P. Ry. Co.* v. *Wagner, supra.*

In *C. R. I. & P. Ry. Co.* v. *Brown, supra,* the injury sued for happened to a brakeman while he was endeavoring to make coupling between cars. The facts were that, while he was attempting to make the coupling, he was walking by the side of the train, as was proper for him to do; that from this position he could perform the operation if the couplers were in good condition. He made several efforts which failed to open the coupler, making it necessary for him to reach between the cars in order to raise the coupler pin so that connection might be made, and that in so doing he was injured. The court held that under the standard fixed by the act the failure of the coupler to function was sufficient to justify the inference that the law had been violated, and that the injury was the proximate result thereof, and that on this evidence it was properly submitted to the jury.

So, in *Louisville & N. Ry. Co.* v. *Layton, supra,* the court held that it was a plain violation of the act where cars were not equipped with automatic couplers which would couple by impact, and when there was evidence to show that they did not couple this was sufficient to warrant the jury in the finding that the act had been violated.

In *Minn. & St. L. Ry. Co.* v. *Gotschall, supra,* the injury was occasioned by a brakeman being thrown from a moving train as the result of couplers coming open while the train was in motion, causing an automatic setting of the emergency brakes and a sudden jerk. It was there held that it was proper for the jury under an instruction of the court to infer negligence on the part of the company from the single fact that the coupler failed to perform its function.

These cases, we think, have no application to the case at bar, for the reason that the act fixes no standard by which efficient brakes may be measured, such as was done in that part of the act relating to automatic couplers. The only requirement of the Safety Appliance Act with relation to hand brakes is that they must be efficient, and there is nothing in the act or the decisions of the courts from which it may be legitimately inferred that railway companies are insurers of the safety of their brakemen while engaged in the operation of such brakes or that any given number of turns of the brake wheel is necessary.

The Federal Boiler Inspection Act of February 17, 1911, as later amended, was passed for the same purpose as was the Safety Appliance Act, namely, to promote the safety of employees. These two acts are to be read and applied with the Federal Employers' Liability Act under which a defendant is liable for any negligence chargeable to it which caused or contributed to cause the injury to the employee, who will not be held guilty of contributory negligence or to have assumed the risk of his employment if a violation of the acts contributed to the cause of the injury. Under the provisions of both the Boiler Inspection Act and the Safety Appliance Act an absolute duty is imposed without regard to the exercise of ordinary care to comply with their provisions. Companies engaged in interstate commerce are not permitted to substitute some other appliance for that named in the act, but are held to a literal compliance with its terms.

The question, then, is, has the appellant company in the case at bar complied with the requirement of the statute by furnishing an efficient brake? It is to be observed that the car and its brake equipment were manufactured according to a well-recognized and generally approved standard, and that at least seventy per cent. of the cars in operation are equipped with brakes requiring as much as two and a half turns to set. This particular car was one of a series of five hundred, identical in manufacture and equipment, received during the months of August and September, 1930, and immediately placed in service and routed to various destinations throughout the United

States. The agents of the Federal government clothed with the duty of inspecting cars for defective equipment have made no complaint of any car of this series, or of any other car having a braking equipment requiring two and a half turns to set. These cars and their equipment were manufactured with the Safety Appliance Act and the rules of the Interstate Commerce Commission in mind, and were built and equipped so as to comply with the same. It is also to be remembered that immediately after the accident in question an examination of the car disclosed no worn or broken parts, no loose connections or other imperfections, and there were no structural defects. The question therefore of the efficiency of the equipment is a mechanical one. Since there are a number of mechanical questions arising in the determination of the proper construction of cars and their braking equipment, and, as there are various types of brakes, each of which has its particular advocates—some preferring one and some another—and as inventions are frequently occurring and many devices provided to accomplish a like purpose, it is not proper for courts to lay down rules which will operate to restrict carriers in their choice of mechanical means by which their operations may be conducted. Nor should such matters be left to the varying opinions and verdicts of juries.

In the case of *Baltimore & O. Ry. Co.* v. *Groeger,* 266 U. S. 521, 45 S. Ct. 169, an accident resulted from an explosion of a locomotive boiler, and the court submitted two issues to the jury for its decision—whether the explosion was caused in whole or in part from an unsafe condition in the crown sheet of the boiler which defendant permitted, and whether defendant's failure to have a fusible plug in the crown sheet violated the Boiler Inspection Act. On appeal the court held that the first issue was properly submitted to the jury, but that the trial court erred in its submission of the second. In passing on this question, the court noticed the requirements of the Boiler Inspection Act to the effect that use of any locomotive engine propelled by steam power was forbidden "unless the boiler * * * and appurtenances

thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb." Continuing, the court said: "Fusible plugs are made of soft metal, which will melt at relatively low temperature. They may be, and sometimes are, inserted into and used as part of the crown sheet; and are so shaped and placed that the end of the plug inside the boiler extends slightly above the surface of the metal surrounding it. It is intended that, if the water on the crown sheet shall be too low, the fire will melt out the plug before greater damage or explosion results, and allow the steam to escape from the boiler into the firebox and so relieve the pressure and check or extinguish the fire." The court there quoted from Rule No. 14 of the Interstate Commerce Commission as follows: "If boilers are equipped with fusible plugs, they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection," and, continuing, the court further said: "This does not purport to require fusible plugs to be used. There was none in the crown sheet in question. * * * It is a well-established rule that the master is not bound to furnish the latest or best tools or appliances for the use of his servants. That rule is applicable here, and we hold that defendant was not liable for failure to furnish the best mechanical contrivances and inventions or to discard appliances upon discovery of later improvements, provided the boiler was in proper condition and safe to operate, as required by the statute. The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs. This, however, does not relieve the defendant of the duty to have and keep its boilers safe for use as required by the act. *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 128, 38 S. Ct. 230. The use of fusible plugs has been known for a long time. The record does not contain a complete showing of the extent of

their use; but it appears that the Erie Railroad uses them, and that for some years defendant used them; that defendant has now about 2,700 locomotives, and does not have fusible plugs in any of them; and it was shown that they are not used by the New York Central, the Chicago, Burlington & Quincy, the Illinois Central, or the Nickel Plate. * * * It appears that, among practical men experienced in such matters, there is a difference of opinion as to the usefulness of such plugs. If the question whether the standard of duty fixed by the act required defendant to have a fusible plug in the crown sheet of the boiler were one for the determination of a jury, we think there was evidence which would sustain a verdict in the affirmative or in the negative. But we think the question was not for the jury. *So. Pac. Co.* v. *Seley,* 152 U. S. 145, 150, 14 S. Ct. 530; *Tuttle* v. *Milwaukee Ry. Co.,* 122 U. S. 189, 194, 7 S. Ct. 1166; *Randall* v. *Baltimore & Ohio R. R. Co.,* 109 U. S. 478, 483, 3 S. Ct. 322; *Kilpatrick* v. *Choctaw, O. & G. R. Co.,* 121 Fed. 11; *Richards* v. *Rough,* 53 Mich. 212, 216, 18 N. W. 785. And see *So. Pac. Co.* v. *Berkshire,* 254 U. S. 415, 417, 41 S. Ct. 162."

In the case of *Fredericks* v. *Erie Rd. Co.,* decided by the C. C. of A., Second Circuit of the State of New York, and reported in 36 Fed. (2d) at page 716, suit was brought for an injury to an employee while endeavoring to operate an appliance called a "petcock." After having passed on several questions, the court said: "The plaintiff also claimed that the engine was defective because of the unsafe location of the drain cock, and the defendant requested the court to charge 'that the jury can not find the engine defective on account of the location of the cock.' Instead of complying with this request, the court left the question of safe location to the jury, with some general remarks to the effect that it should not consider purely mechanical arrangement, but should determine whether the appliance was safe to operate, and proper and safe for the service in which it was to be used. When, as in this case, the evidence was overwhelming that the drain cock was located in the only place that it could be put and work properly, and that such location was of necessity uniformly used on lifting injectors by rail-

roads in the territory where the plaintiff was hurt, it was error to permit the jury to call into play its own ideas as to a safe and proper location, and allow it to find the engine defective because the drain cock was not placed, perhaps, where the jury thought it should have been put."

There were several ex-brakemen and conductors testifying for appellee, who differed among themselves as to the number of turns of a brake wheel when it is properly functioning, and from the opinion held by the mechanical engineers and those whose duty it was to make a study of the equipment and operations of brakes. According to the judgment of these persons, a brake requiring more than one and a half turns was inefficient and in bad order. On the other hand, several witnesses skilled in the construction of braking equipment and familiar with their operation, stated that it was their opinion that brakes requiring not more than one and a half turns were not as well adapted to perform the functions for which they were designed as those having from two to three turns and these witnesses gave various reasons for their opinions.

It will therefore be seen that there is a difference of opinion among practical men as to the particular type of brake most efficient which brings this case within the rule announced in the case of *Baltimore & O. Ry. Co.* v. *Groeger,* and in *Fredericks* v. *Erie Ry. Co., supra.* As a result of our views, it follows that the trial court erred in not directing a verdict for the defendant at its request. The judgment of the trial court will therefore be reversed, and, as the case appears to have been fully developed, it will here be dismissed. It is so ordered.

PROBST *v.* YOUNG.

4-2982

Opinion delivered April 17, 1933.

W. F. Reeves, for appellant.

JOHNSON, C. J., (after stating the facts). We think the trial court erred in giving appellee, Gus Young, one year additional time in which to cut and remove the tim-

bers from the lands in controversy. The release of the timber rights from the Wilber mortgage made on October 31, 1912, and the timber deed from Dodd to the Redus Lumber Company of date November 2, 1912, and the quitclaim deed executed by Dodd to the appellee, Young, in 1915, when construed together, had the same effect as if Dodd had reserved in himself the timber rights in the first instance and had executed a separate timber deed thereto.

This court has held: "The exception of timber (in a deed) is the same in effect as a reservation, and the effect would have been the same if there had been an absolute conveyance of the land to appellee without any exception or reservation, and then a reconveyance of the timber." *Ozan-Graysonia Lumber Company* v. *Swearingen,* 168 Ark. 595, 271 S. W. 6.

The Green release of October 31, 1912, and the quitclaim deed from Dodd to Young of February 27, 1915, had the effect of a conveyance of all the timber rights of Dodd in and to the lands described in said deed with no limitation on the time of removal of such timber.

This court has frequently held that a deed to standing merchantable timber which specifies no time for its removal conveys a terminable estate in the timber, which ends when a reasonable time for the removal of such timber has expired. *Fletcher* v. *Lyon,* 93 Ark. 5, 123 S. W. 801; *Earl* v. *Harris,* 99 Ark. 112, 137 S. W. 806.

When the conveyances in the instant case are read in the light of "a reasonable time to remove," the then pertinent question for determination is whether or not that time had expired prior to the filing of this suit. The Redus Lumber Company deed expired on November 2, 1917, therefore it became the duty of the appellee to make immediate arrangements for the removal of the timbers from said lands within a reasonable time thereafter. Appellee permitted almost fifteen years to elapse prior to the bringing of this suit, and made no preparation for the removal of the timbers from said lands. There was no testimony presented in this record as to the accessibility or inaccessibility of the timber to market, neither did appellee attempt to show that he had used any diligence

whatever in cutting or removing the timber. We think that a delay of fifteen years, under the circumstances in this case, is unreasonable.

This court held in *Dunn* v. *Forrester,* 181 Ark. 696, 27 S. W. (2d) 1005, "The grantee waited over twenty years before beginning to cut and remove the timber. Such a length of time was unreasonable. It does not make any difference that it would not have been profitable to have begun operations sooner. While no hard and fast rule should be laid down, and each case must depend upon its own particular facts, we are of the opinion that 20 years were too long to wait in the present case." This language has application to the facts in this case. The actual severance of the timber rights from the fee simple title occurred on November 2, 1912, almost twenty years before the decree was entered in this case. The Redus Lumber Company did not remove the timber within the five years given it, and, when the time for removal given to the Redus Lumber Company is added to the time which appellee Young has permitted to expire, the two periods aggregate approximately twenty years. This length of time is unreasonable under the facts and circumstances in this case. No additional time should have been given appellee in which to cut and remove the timbers from this land, but, on the contrary, the chancellor should have quieted and confirmed appellants' title and canceled the outstanding quitclaim deed held by appellee, Young.

For the error indicated, the decree of the Marion Chancery Court is reversed, and the cause remanded with directions that a decree be entered in conformity with law and not inconsistent with this opinion.

JOHNSON *v.* POINSETT LUMBER & MANUFACTURING COMPANY.

4-2911

Opinion delivered April 17, 1933.

[redacted]

C. T. Carpenter, for appellant.

Lamb & Adams, for appellee.

JOHNSON, C. J., (after stating the facts). It is apparent from the allegations of the complaint that the only cause of action alleged or relied upon by appellants was

based upon the doctrine of "discovered peril," or that appellees, after discovering the perilous position of appellant, "carelessly, negligently, wilfully and wantonly drove said car against her," thereby inflicting the injuries complained of.

The court, without objections by appellants, submitted to the jury only the question of "discovered peril" by giving to the jury instructions 1, 2, 3, 5 and 6. The fact is appellants acquiesced in the court submitting this issue only, as evidenced by the court's statement to the jury as follows: "Plaintiff is only requesting that the issue of discovered peril be submitted to the jury." To which appellants did not object, but, on the contrary, tacitly acquiesced.

Appellants complained in the trial court, and now complain, that the court erred in giving to the jury instruction No. 7, which told the jury as a matter of law that appellant Georgia Ann Johnson's presence on the railroad track at the time of the injury was contributory negligence on her part, and by telling the jury in instruction No. 8 that her presence on the track at the time and place of the injury made her a trespasser as a matter of law.

It was immaterial whether or not appellant, Georgia Ann Johnson, was a trespasser. It was also immaterial whether or not she was guilty of contributory negligence in being in the place she was at the time of the injury. The only question which should have been submitted by the trial court was the one of "discovered peril." We do not approve of the instruction of the trial court in telling the jury as a matter of law that appellant, Georgia Ann Johnson, was a trespasser. Neither do we approve of the form of the instruction telling the jury that she was guilty of contributory negligence in being at the place she was at the time of the injury, because those were not issues in the case and should not have been given to the jury. On the other hand, we cannot see how the jury was influenced by those instructions. The jury was told, in effect, that, regardless of contributory negligence and regardless of whether or not appellant was a trespasser, yet she should recover if appellee, Burns, discovered her peril in time to avoid the injury.

This court, in *St. L., I. M. & S. Ry. Co.* v. *Cabiness,* 113 Ark. 599, 168 S. W. 1116, held: "However, the instruction could not, in any view of the case, have operated to defendant's prejudice, for the reason that there was no controversy about the efficiency of the lookout. * * * In that state of the proof no prejudice could possibly have resulted, even if the language of the instruction was erroneous."

In a long line of decisions this court has held: "Where the rights of the appellant were not prejudiced by the giving of an erroneous instruction, the case should not be reversed." *Lee Line Steamers* v. *Craig,* 111 Ark. 550, 164 S. W. 274; *Patterson* v. *Fowler,* 22 Ark. 396; *Hellems* v. *State,* 22 Ark. 207; *St. L., I. M. & S. Ry. Co.* v. *Phelps,* 46 Ark. 485; *Ark. Lbr. & Contractors' Supply Co.* v. *Benson,* 92 Ark. 392, 123 S. W. 367.

We cannot agree with counsel for appellants that there is any conflict in the instructions given by the trial court.

Lastly, it is contended on behalf of appellants that the trial court erred in giving to the jury the last half of instruction No. 8, which told the jury that "discovered peril began, if at all, when it became apparent to Burns that appellant, Georgia Ann Johnson, was not only upon the track between the rails, but that she would remain there."

There was no error in giving this instruction. Certainly appellant, Georgia Ann Johnson, would not have been injured if she had remained outside the rails. It was an admitted fact in the lawsuit that Burns was driving a small motor car, and there was no contention in the trial court that appellant would have been in any danger had she remained outside the rails. We think the uncontradicted testimony in this case shows that, had appellant remained outside the rails, she would have been in no danger.

Trial courts should be commended for narrowing down the issues for the jury's consideration, instead of condemning them for an honest effort to do so.

No prejudicial error appearing, the judgment is affirmed.

MEHAFFY, J., (dissenting). I do not agree with the majority in affirming this case.

The Poinsett Lumber & Manufacturing Company operated a railroad for the purpose of hauling logs. The public used the railroad track, where appellant was injured, as a highway. The track was straight for at least a quarter of a mile. Appellee's employee, who was driving the car, testified that he first saw her a quarter of a mile ahead walking on the outside of the track; that when he got within 175 or 200 feet of Mrs. Johnson she stepped between the rails; that he thought she intended to cross the track; but he testified also that she started down the track, so that, according to his testimony, she was walking in front of the car when she was from 175 to 200 feet ahead of him. There is no testimony either by the employee who was operating the car, or any other person, that she looked back or did anything to indicate that she knew the car was approaching. The employee operating the car also testified that he was going twenty-five miles an hour, and that going fifteen miles an hour he could stop the car within 75 or 100 feet.

Ellis Renfrow testified that he lived at Singer Camp No. 1 and operated one of the motor cars; that if the rails were dry, he could stop the car when traveling 25 miles an hour in 60 to 90 seconds.

Joe Patillo testified that, if the brakes were in good condition, he thought he could stop the car going 15 or 20 miles an hour in 15 or 20 feet; that it would take 2 or 3 feet further to stop a car running 20 miles an hour than it would one running 15, and possibly five feet further running 25 miles an hour.

The evidence showed that at the place where appellant was injured the track was straight, and showed that school children and the public used this track just as appellant was using it at the time she was injured. One witness said: "There was a beaten path in the center of the track. People going to church and children going to school from that direction used the railroad track. This fact was known to everybody in that community."

Fred Henning, who had formerly lived at Camp No. 1, testified that the road south of the camp was straight for about one mile; that people going in that direction used the railroad track; that there was a beaten path in the center of the track.

Mrs. Franey Hamilton testified that she saw the accident; that Mrs. Johnson was going down the track and did not look back. She saw the car approaching her 40 yards before it struck her. The car was going about 20 miles an hour, and did not seem to slow up a bit.

The court, at the request of the appellee, gave the following instructions:

"Instruction 7. The court instructs you that under the evidence in this case plaintiff, Georgia Ann Johnson, was guilty of contributory negligence in walking upon the track, that is, such want of ordinary care on her part for her own safety contributing to her injuries, and your verdict will therefore be for the defendant, unless you further find from the evidence that after Burns discovered that she was in peril he failed to exercise ordinary care to avoid injuring her."

"Instruction 8. In this case 'discovered peril' began, if at all, when it became apparent to Burns that plaintiff, Georgia Ann Johnson, was not only upon the track between the rails, but that she would remain there, and that she would be struck by the motor car unless it was stopped. That is, gentlemen, that the plaintiff was a trespasser in walking upon the railroad track, and if, being a trespasser at that time and place she would be guilty of contributory negligence by being there, the railroad company having the exclusive right to the use of its track."

I think the learned trial judge should not have given instructions 7 and 8 copied above. This was a logging railroad, and the place where appellant was injured was constantly used by the public as a footpath, and everybody, including the employees of the railroad company, knew it. This being true, the question whether appellant was guilty of contributory negligence was a question of fact for the jury.

In instruction 8 the court told the jury that discovered peril began, if at all, when it became apparent to Burns that Georgia Ann Johnson was not only upon the tracks between the rails, but that she would remain there, and that she would be struck unless the car stopped.

That might be true if there was anything about her appearance or behavior to indicate that she was aware of the approach of the car. But, if there was nothing about her conduct to indicate that she knew of the approach of the car, it was the duty of the driver to immediately take precautions to prevent her injury.

When the operator of an engine or car sees one walking in front of the car with her back to the car, and apparently oblivious to its approach, he cannot presume that she will get off the track. If she knew of the approach of the car or there was anything in her conduct to indicate that she knew the car was approaching, the driver of the car would have a right to presume that she would step off the track.

The jury should have been told, in connection with instruction No. 8, that, if the driver of the car discovered the appellant on the track between the rails, apparently unconscious of the approach of the car, he must immediately exercise whatever care was apparently necessary to avoid striking her. If she was on the track in front of the moving car, she was in danger, and the doctrine of discovered peril means that where the danger of inflicting an injury is discovered by the person inflicting it in time to prevent the injury by the exercise of proper care, he will be liable for the injury if he does not exercise reasonable care, though the injury would not have occurred but for the previous negligence of the person injured. *Furst-Edwards & Co.* v. *St. L. Sw. Ry. Co.*, (Tex. Civ. App.) 146 S. W. 1024; *Chesapeake & Ohio Ry. Co.* v. *Corbin's Admr.*, 110 Va. 700, 67 S. E. 179; *Mo. Pac. Ry. Co.* v. *Skipper*, 174 Ark. 1083, 298 S. W. 849.

This court said: "In this case the evidence tended to prove that the engineer saw the plaintiff walking so near the track that her situation was perilous; her back

was towards the train, and a bonnet was over her head, so that it was apparent that she was oblivious to her danger. This was apparent to the engineer at a distance when he could by ordinary effort have stopped the train before striking plaintiff.

"But the defendant is further liable because its engineer saw the plaintiff ahead and so near the track that she would be struck by the passing train; and that she gave no evidence that she was aware of the approach of the train; and after thus discovering her perilous situation the defendant negligently failed to give any warning signal of the danger." *St. Louis S. W. Ry. Co.* v. *Thompson,* 89 Ark. 496, 117 S. W. 541.

"The most obvious suggestion of prudence and social duty requires that the engineer who is driving the train shall give warning signals to a trespasser, whom he sees on the track in front of the train with his back to it, in sufficient time to enable him, after hearing the signals, to quit the track in safety; and this is so, although the trespasser suddenly and unnecessarily assumes a place in dangerous proximity to the track." Vol. 2, Thompson on Negligence, § 1741.

When one discovers a person on the track with his back to the approaching car, and there is nothing to indicate that the person is aware of the approach of the car, it is the duty of the driver of the car to give extra alarms, and, if the alarms are not heeded, then to check the speed or stop the car. *St. Louis, I. M. & So. Ry. Co.* v. *Evans,* 74 Ark. 407, 86 S. W. 426.

The evidence in this case shows that the driver discovered the pedestrian in front of the car with her back to him, apparently oblivious to the approach of the car, and it does not show that he took any precaution at all until too late to avoid the injury. If one can operate a car or a train running directly toward the person on the track, when such person gives no indication that the approach of the car has been observed, and, without giving any alarm, strikes such pedestrian, then the doctrine of discovered peril would be meaningless.

One's peril is discovered when he is seen walking in front of the train and apparently oblivious to its approach, and the driver should not wait until it becomes apparent that the pedestrian was not going to get off the track. It might not become apparent to the driver until he struck the person.

It was not proper to tell the jury that her peril was not discovered, if at all, until it became apparent to Burns that she would be struck by the motor unless it was stopped. Her peril was discovered when she was seen in a situation of danger of which she was ignorant.

I think also that the clause in the instruction, "if at all," might have been interpreted by the jury as an expression of doubt by the court as to whether her peril was discovered or not.

There are two instructions numbered 8 in the abstract, and the second one tells the jury that Mrs. Johnson was a trespasser. Under the evidence in this case she was a licensee, and the jury should not have been told that she was a trespasser. To be sure, this case was tried on the theory of discovered peril, and there would be no difference in the liability of the appellee under that theory, whether she was a licensee or trespasser, but telling the jury that she was a trespasser was equivalent to telling them that she was a wrongdoer, because every trespasser is a wrongdoer, but a licensee is not necessarily a wrongdoer. The court should not have told the jury that she was a trespasser.

I think the court should not have told the jury when appellant's peril was discovered. That was a question of fact for the jury. The jury should have been told what constitutes discovered peril, and then the jury should decide whether, and when, her peril was discovered.

I therefore think that the case should be reversed.

I am authorized to say that Mr. Justice HUMPHREYS and Mr. Justice KIRBY agree with me.

UNION COMPRESS & WAREHOUSE COMPANY *v.* SHAW.

4-2823

Opinion delivered January 23, 1933.

Gentry & Gentry, for appellant.

John P. Vesey, for appellee.

KIRBY, J. This appeal comes from a judgment for damages for personal injuries to appellee, an employee of appellant company.

Appellee was injured on March 4, 1931, while working for the appellant company in its warehouse at Hope, Arkansas, by a bale of cotton falling on his foot and leg, breaking it. It was alleged the injury was caused by the negligence of a fellow employee while appellee was trucking cotton from the warehouse into a freight car to be loaded therein. It was the duty of the employee in the car to help unload the bale of cotton from the truck, steady and set it up on end in the car. When he unloaded the bale and started back with the truck, the other employee failed to steady or hold it up and negligently allowed it to fall on his leg, breaking it, before he could get in the clear with the truck.

The appellant concedes that the evidence is sufficient to justify submitting the issue to the jury, which found

a verdict for damages against the company. They relied on the release executed on the 9th day of April, 1931, by the appellee in consideration of the payment by the company of the hospital bill, the doctor's bill incurred by the appellee on account of the injury and the payment to him of the sum of $20; it being contended by appellant that the release is binding upon the appellee, and no showing was made at the trial sufficient to avoid it, and that the court should have given appellant's peremptory instruction, and that the court erred in giving plaintiff's requested instruction No. 1, and says in its brief: "On these two propositions alone we base our right to a reversal of the judgment of the trial court."

Appellee admitted that he executed the release, but said that he could neither read nor write (except he could write his name), and that the release was not read or explained to him; that he did not understand it was final anyway, and that when he got back to his home and his wife read the check and explained the effect of it, he refused to carry out the agreement and had never cashed the check. On the day the release was executed Mr. Kyler, the superintendent of the compress company, went down in his car taking the insurance adjuster with him, to the home of appellee, where he found him sitting on the edge of the bed. He was still using a crutch, and his foot was swollen and bound up. They took him out on a stretcher, put him in the car and carried him to the compress offices where in the presence of Mr. Kyler, the manager, and Mr. Franklin, the immediate superintendent of appellee in his work, the release was executed. It was not read over to appellee before he signed it, but the witnesses stated that it was explained to him. The adjuster, Mr. McIntosh, asked him how the injury occurred, and appellee explained it to him, and was advised by McIntosh, after he had made his statement, "that he did not think there was any liability on the part of the compress." McIntosh asked him how much money the compress company had paid him and how much they had expended: "that, after McIntosh advised him that he did not believe there was any liability, he told Shaw

that they wanted to do what was right and said that they would pay the doctor bill, the hospital bill and give him $15 if he would sign a release; the appellee stated that this sum looked mighty small, and finally Mr. McIntosh offered him $20 and to pay all the bills if he would agree to release the compress, and "the negro said that this sum looked mighty little but, if that was all they would pay, he guessed it would be all he would get." McIntosh then made out the release, and it was explained to appellee, and, when it was finally explained to him, McIntosh gave him his fountain pen and told him where to sign; then Mr. Franklin and Mr. McIntosh signed as witnesses to his signature, and McIntosh took Shaw home in his car. McIntosh gave him a draft for $20 after he had signed the release. Mr. Kyler stated further that the release was not read to Shaw, but was fully explained to him; that he did not know whether or not it was told him that the doctor said he would be well in 8 or 10 days, that he might have said as much, but he did not remember it. Said neither the check nor the release was read to appellee.

The instruction No. 1, objected to, reads as follows:

"If you find from a preponderance of the evidence in this case that the plaintiff was injured while in the employ of the defendant, and while in the exercise of due care for his own safety, and that said injury was the direct result of the negligence of another employee of the defendant, and if you also find from a preponderance of the evidence that the plaintiff, at the time he signed the release introduced in evidence, did not know what he was signing, then and in that event you shall find for the plaintiff." This court has concluded that the trial court erred in giving this instruction.

Appellee admitted the execution of the release, but said he could neither read nor write. Said it was not read to him or explained and the burden of proof was upon him to show, of course, that it was executed or procured in such a manner as would release him from its binding effect.

The undisputed testimony shows that neither the release nor the check was read to appellee before he signed it, and that he did not know what was written in the check until he got home and his wife read it to him, and that he then refused to cash the check and never had done so. Appellee testified that he did not know what he had signed, but he did recognize the signature on the release exhibited in evidence as having been made by him. Said the reason he signed the release was that his leg pained him so he was sick and wanted to get back home and get to bed.

It has been held that one cannot avoid the effect of a contract of release by stating that he did not read it when he signed it, or know what it contained. *Texas Co.* v. *Williams,* 178 Ark. 1110, 13 S. W. (2d) 309.

In 23 R. C. L., par. 17, page 387, it is said: "But one who has signed a written release, without being induced thereto through any fraud or deception, cannot avoid its effect on the ground that at the time he signed the paper he did not read it or know its contents."

Although it is true that appellee could not read, it was shown that the effect of the release was explained to him, but, although he testified to no single act of the representatives of the company who were present when the release was procured that would avoid it, it was also shown that, upon his explanation of the occurrence causing the injury, the claim agent told him that there was no liability upon the part of the compress company for the injury, and that they would give him so much for a release under the circumstances, desiring to treat him fairly. This statement was not disagreed to by either of the representatives of the compress company, and evidently induced the appellee to execute the release which he would not otherwise have done; and under the circumstances, although he is not allowed to avoid the effect of the release on account of not having it read to him, if he was induced to sign it by the deception, whether it was intentionally fraudulent or not, practiced by the claim agent in making the statement that there was no liability on the part of the company for payment of

damages for the injury suffered by him, such would not be the case. No objection was made to this statement by his superiors—bosses—and he executed the release under these conditions and repudiated the contract immediately upon being informed by his wife of the contents of the check.

The instruction No. 1 was not an accurate statement of the law under the circumstances, and the majority has determined that it was erroneous, and that the cause must be reversed on account of its prejudicial effect. For this error the judgment is reversed, and the cause remanded for a new trial.

FIELD *v.* GAZETTE PUBLISHING COMPANY.

4-2834

Opinion delivered March 27, 1933.

Horace Chamberlin, for appellant.

Cockrill & Armistead and *Owens & Ehrman,* for appellee.

JOHNSON, C. J., (after stating the facts). From the above statement of facts it will be seen that the trial

court made application of the three-year statute of limitations in bar of appellant's alleged right of recovery. (Crawford & Moses' Dig., § 7148).

It is conceded on behalf of appellant that, if the trial court was correct in instructing the jury that, "if you find that the plaintiff contracted the malady of which he complains previous to June 10, 1926, then you will find for the defendant," this case should be affirmed.

It is the contention of appellant that the three-year statute of limitations was tolled or held in abeyance until appellant, or his physicians, determined the specific malady from which he was suffering and that this information was not obtained until sometime in 1928.

Volume 17 R. C. L., entitled, "Limitation of Actions," § 30, page 765, in part, reads as follows:

"*Negligence Actions.* In applying these general principles in negligence actions it has been held that the statute as to actions for personal injuries begins to run at the time the injuries are sustained although their results may not be then fully developed."

In Wood on Limitation of Causes, vol. 2, page 844, the author announces the rule as follows:

"In actions from injuries resulting from the negligence or unskillfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained. The gist of the action is the negligence or breach of duty and not the consequent injury resulting therefrom."

As we view the situation, the great weight of American authority is to the effect that the cause of action arises and the statute of limitations begins to run from the date of the negligent act and not from the time the full extent of the injury may be ascertained. *Cappusi* v. *Barone,* 266 Mass. 578, 165 N. E. 653.

The court has reached the conclusion that the lower court made correct application of the three-year statute of limitations and therefore did not commit error in giving the instructions complained of.

As we understand this record, appellant does not contend that the appellee fraudulently concealed any facts

ERRATA

187 ARKANSAS REPORTS at page 256

Detach at perforation, moisten the back, and paste over the third full paragraph on page 256 of *Field v. Gazette Pub. Co.:*

Volume 17 R. C. L., entitled, "Limitation of Actions, " § 130, page 765, in part, reads as follows:

with reference to his injuries, and he does not contend that the appellee had knowledge of facts or information other than those well known to appellant.

The trial court submitted to the jury the question as to whether or not appellant suffered any injury after June 10, 1926, by or through the negligent act of the appellee, and the jury, by its verdict, has found against him on this issue. The verdict of the jury necessarily found that appellant's injury was inflicted prior to June 10, 1926.

It is the conclusion of this court that the trial court was correct in declaring that appellant could not recover for any injury suffered prior to June 10, 1926, and that the jury has found from the testimony that he suffered no injury at the hands of the appellee after June 10, 1926.

Therefore the judgment should be affirmed.

BUTLER, J., disqualified and not participating.

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

4-2894

Opinion delivered April 3, 1933.

William M. Hall and *Hill, Fitzhugh & Brizzolara,* for appellant.

George F. Youmans, George W. Dodd, Joseph R. Brown, James B. McDonough, Robt. M. Zeppenfeld, for appellee.

Daily & Woods, for R. C. Frambers.

C. R. Barry, intervener, *pro se.*

SMITH, J. Thomas W. Edmondson died testate at his home in Fort Smith on October 4, 1925. He left no children, but was survived by his widow. The will, which was a very carefully prepared instrument, was probated October 7, 1925. The testator devised his entire estate to John H. Vaughan, in trust for the following uses and purposes.

The testator declared that "it is my will and I hereby direct and I hereby charge my entire estate, both real and personal, with the proper care and attention and expenses of my dearly beloved wife, Margaret Agnes Edmondson, during her lifetime, she being at present time in delicate health, and not in proper condition to look after her own affairs;" and the trustee was authorized and directed "to use whatever portion of my estate, whether real or personal, as may be necessary, for the proper care and maintenance of my dearly beloved wife during her lifetime."

A number of bequests were made payable in money, the direction being given to the trustee "that, if there is

not sufficient funds in my personal estate to pay the above bequests, as above set forth, that upon the death of my dearly beloved wife that, my real estate be disposed of for the purpose of paying my said bequests that have not been paid out of my personal estate."

In the paragraph next following, the testator directed his trustee "* * * to hold my entire real estate intact until after the death of my dearly beloved wife," but the trustee was directed to sell any unimproved lands the testator might own at his death and, if necessary, to hold the proceeds of such sale for the proper care and maintenance of his wife, but the use of so much of this money was authorized as was necessary to keep his improved property in proper repair.

The testator directed that, after the death of his wife, the trustee should then sell whatever real estate may be necessary, and, if the personal bequests had not been paid, to pay them. Following this direction, it is recited that "I hereby bequeath the rest, residue and remainder of my estate to the pastor of the Catholic Church of the Immaculate Conception of Fort Smith, Arkansas, to be used, however, for the purpose of going towards the erection of a school for Catholic young men, provided such a school is located in Fort Smith, Arkansas, within ten years after my death." The will further provided that, if the school were not located and in operation within the time limited, "* * * the rest, residue and remainder of my estate is hereby bequeathed to the pastor of the Church of the Immaculate Conception of Fort Smith, Arkansas, to be used by said pastor and the trustees of said church for such pressing needs as the church may have at that time."

The paragraph next succeeding directed the trustee to deliver to the testator's wife "all of our household furniture and household goods; all of our books and music, piano now in our home, to be used by my wife during her lifetime as she may desire."

The will then provided for the selection of a trustee in succession in the event of the death of the trustee named, or his refusal to act.

The will concluded with the following provision for the compensation of the trustee: "I hereby direct that the said trustee shall be allowed, as compensation for looking after my estate and for seeing that my dearly beloved wife is properly taken care of during her lifetime, the sum of ten per cent. of the income of said estate, providing that, if said amount is not sufficient, the probate judge of the Fort Smith District of Sebastian County, Arkansas, may make an allowance of such amount as may be sufficient to compensate my said trustee for executing this trust."

Vaughan was appointed executor of the estate by the probate court on October 11, 1925, and immediately took charge of the property in that capacity, and on October 22, 1925, he was appointed guardian of Mrs. Edmondson, the testator's widow, on the ground that she was physically incapable of managing her own affairs. A subsequent order of the probate court adjudged Mrs. Edmondson to be an insane person. Mrs. Edmondson lived in St. Louis, Missouri, at the time this order was made for the purpose of obtaining treatment which her physical condition required.

Vaughan took charge of all the assets, a bakery being a part thereof, which he operated for ten months and then sold. Vaughan died in September, 1926, and his wife succeeded him as executor and as guardian, and filed in the probate court a report of her husband's administration of the estate. This settlement was approved and confirmed. Mrs. Vaughan filed a report of her subsequent administration, but this report has not been finally acted upon by the probate court.

Mrs. Vaughan, as executrix and trustee of the will of Thomas W. Edmondson, deceased, brought suit in equity to construe the will and to terminate the trust, and it became necessary for Mrs. Edmondson to file a petition for mandamus in this court to compel the then chancellor to allow her to file an answer and cross-complaint and to file a motion to set aside the appointment of a guardian *ad litem* for herself as an insane person. A writ of mandamus was awarded by this court, and it was directed that Mrs. Edmondson be allowed to appear

through attorneys of her own selection for the purpose of litigating the issues there raised. *Edmondson* v. *Bourland,* 179 Ark. 975, 18 S. W. (2d) 1020. Thereafter the various questions were litigated which we are asked to decide upon the present appeal.

It appears that Vaughan advised Mrs. Edmondson that she was required to elect whether she would accept the provisions of the will in lieu of her dower, and advised her further to make the election, and, pursuant to this advice, Mrs. Edmondson elected, in the time and manner required by law, to have dower assigned to her. It is insisted that this was the first of many frauds committed by Vaughan, in that no election was required, and that Mrs. Edmondson had the right to accept the benefits of the will in addition to her dower.

We think no fraud was practiced upon Mrs. Edmondson by Vaughan in advising her that she was required to elect whether she would accept the provisions of the will for her support, or would renounce its provisions and have dower assigned her.

It was said, in the case of *Gathright* v. *Gathright,* 175 Ark. 1130, 1 S. W. (2d) 809, that: "Under the common law the testator will not be presumed to have intended a devise in his will to be a substitute for dower unless the claim of dower would be inconsistent with the will, or so repugnant to its provisions as to disturb and defeat the will. In other words, at common law it is held that, where the testator's intention was not apparent upon the will, the devise would be presumed to be in addition to dower." The case of *Kollar* v. *Noble,* 184 Ark. 297, 42 S. W. (2d) 408, is to the same effect.

We are of the opinion, however, that the intention of the testator is manifest that the provision for his wife was in lieu of dower, and also that the assignment of dower would conflict with his purpose in making the will.

In addition to his life insurance, the testator made ample provision for the support of his wife, who was a confirmed invalid when the will was made. He provided that, if necessary, the entire income of his estate should be devoted to her care, and that, if necessary, the corpus of the estate might also be used, but it is apparent that

he did not contemplate that this contingency would arise. He had the purpose of establishing a school in the city of his residence for young men of his religious faith, and, after paying certain bequests and caring for his wife, he wanted the portion of his estate then remaining to be devoted to the school which he desired to be established. The testator's purpose was manifest, if his wife's necessities did not otherwise require, to hold the entire estate intact until after her death, selling, if necessary, the unimproved property first. Direction was given to keep the improved property in repair—all of it—and the idea that the will was to operate as to only half of the estate appears to be repugnant to the intention of the testator, who had directed that all of his estate, both real and personal, be disposed of, managed and controlled by the trustee named, and it is generally held that the creation of a trust which contemplates possession and control by a trustee of all the lands owned by the testator is inconsistent with the claim of dower.

There was no fraud in procuring the election which Mrs. Edmondson made. It is true that she had been adjudged incompetent by the probate court, but she alleges that she is now and has at all times been sane, and the court found, in the decree from which this appeal comes, that Mrs. Edmondson was sane and had been sane during all the time this litigation was pending. No finding was made as to her previous condition. Mrs. Edmondson was a witness in her own behalf, and her testimony makes it clear that she was never insane, although afflicted with arthritis, which disease rendered her physically helpless. There was a necessity for her to elect, as the language of the will refutes the idea that she might enjoy its benefits and have dower in addition.

We are of the opinion also that Mrs. Edmondson was sane when she made her election not to take under the will, and is bound thereby, although there had been entered by the probate court an order adjudging her insane. She alleges the fact that she has been sane at all times, and we think the testimony shows this allegation to be true. It was held, in the case of *Eagle* v. *Peterson,* 136 Ark. 72, 206 S. W. 55, to quote a headnote, that "an ad-

judication of lunacy is not conclusive but *prima facie* evidence only, and a person who deals with the supposed insane person may show that at the time the contract was made he had sufficient mental capacity to make it."

The question is raised by Father Horan, the Catholic priest named as the residuary legatee in the will, that the order assigning dower was void, for the reason that proper parties were not before the court to support this order in that behalf, and that the property assigned as dower was grossly in excess of the value to which the widow was entitled.

The testator was survived by no children, and the estate disposed of by his will was a new acquisition, and not ancestral. Father Horan was the residuary legatee. The petition for the assignment of dower was first filed in the probate court of Sebastian County, but when it appeared that a part of the lands were in another county this proceeding was dismissed and suit was brought in the Sebastian Chancery Court for the same purpose. This suit was brought by Mrs. Vaughan, as guardian, and no process was served upon Father Horan, who had no notice of the proceeding until long after the commissioners appointed to assign dower had discharged that duty by assigning to Mrs. Edmondson one-half of the lands and the report had been approved and confirmed by the chancery court. There were no appearances in the chancery court except by Mrs. Vaughan, as guardian of Mrs. Edmondson, and by Mrs. Vaughan, as trustee under the will.

It is insisted that, as Mrs. Vaughan appeared as trustee, all interests were properly represented; but we do not think so. The residuary legatee was a necessary party, and he had no notice of the pendency of the proceeding. *Cunningham* v. *Dellmon,* 151 Ark. 409, 237 S. W. 450. He would therefore be entitled to vacate the decree assigning dower if prejudiced thereby and to be heard upon that question, but it does not appear that any substantial prejudice has resulted from this failure, and the decree will not be reversed on that account. Very competent men were appointed as commissioners, who appear, from their report, to have made the assignment of dower in a most exact and careful manner and after a minute

appraisement of the value of all the lands, as well as of all personal property. There is a difference of opinion as to the values, but it must be remembered that, having renounced the will, Mrs. Edmondson was entitled to homestead, as well as to dower, and that, although she took her homestead in addition to her dower, she was entitled to have the value of the homestead included in determining the value of the estate out of which the dower would be assigned. In other words, she was entitled to one-half of the whole estate as dower, and her homestead in addition. It was said, in the case of *Horton* v. *Hilliard*, 58 Ark. 293, 24 S. W. 493, that "in allotting dower it is not proper to deduct the homestead and assign the dower out of the remainder of the estate. The widow is entitled to dower in the whole estate." See also *Stull* v. *Graham*, 60 Ark. 461, 31 S. W. 46; Ex parte *Grooms*, 102 Ark. 322, 143 S. W. 1063; *Martin* v. *Conner*, 115 Ark. 359, 171 S. W. 125; *Jameson* v. *Jameson*, 117 Ark. 142, 173 S. W. 851.

Mr. Vaughan lived less than a year after he had qualified as executor of the estate, and he therefore made no settlement of his administration. His wife, who qualified as his successor, did, however, make a report of his administration, and this report was approved and confirmed by the probate court. Mrs. Vaughan later filed a report of her own subsequent administration, but this report has never been approved and is now pending in the probate court with many exceptions thereto.

Mrs. Edmondson, as the widow of the testator, and Father Horan, as his residuary legatee, filed pleadings in which they seek to falsify and surcharge the approved settlement of Mr. Vaughan's administration and the unapproved report of Mrs. Vaughan's administration, and a vast amount of testimony was taken upon the issues thus raised. The items in controversy were so numerous that the court appointed a master to state both accounts, and elaborate reports were made by the master. According to the master's findings and report, the liability of the estate of John H. Vaughan and his surety on account of his administration was fixed at $1,954.25. Many exceptions were filed to this report, and, upon the hearing thereof, the court fixed the liability of Vaughan and his

surety at the sum of $8,228.68, but in an amended finding and decree that amount was increased to $8,722.13.

The court undertook also to adjudge the liability of Mrs. Vaughan as executrix in succession on account of her own administration, and made a tentative finding upon the subject, but, before finally adjudging the sum due on this account from Mrs. Vaughan and her surety, the court concluded that it was without jurisdiction to enter a final judgment, for the reason that Mrs. Vaughan's administration had not been closed in the probate court and her own settlement had not been acted upon by that court and was still pending there for final action, and one of the most important questions in the case is whether the court committed error in this respect.

Opposing counsel have cited numerous cases in which this court has considered the circumstances under which and the purposes for which chancery courts will review the settlements of guardians, executors and administrators. These we do not review, as the law of the case appears to be well settled. The case which announced the principle which we think should be applied here is that of *Reinhardt* v. *Gartrell,* 33 Ark. 727. Mr. Justice EAKIN there said: "The courts of chancery have no power to take such cases out of the probate courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake, or impending irremediable mischief, is universal; extending over suitors in all courts, and over the decrees in those courts, obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced. Hence any frauds in the settlements of administrators or executors may be corrected. When that is done, if there be still a necessity for continued proceedings in the course of administration, such proceeding should go on in the probate court, upon the basis of the reformed settlement. The object of chancery intervention having been accomplished, the jurisdiction in equity should cease with the necessity. Otherwise the courts of chancery might make themselves courts of probate, in violation of the spirit and intention of the Constitution. If, however, there be no continuing necessity

for a further course of administration; if the assets be collected in, and the debts be all ascertained, and nothing remains but to fix the liabilities of administrators, executors and their sureties, and the rights of creditors, legatees and distributees, and to make adjustment on equitable principles, all that business comes within the more facile and effective operation of the remedial processes peculiar to equity practice. This makes no conflict of jurisdictions, and it is most proper, in such cases, for the chancery court to retain the cause for completion."

The instant case appears to be one in which there is no continuing necessity for a further course of administration, the assets have all been collected, the debts have been ascertained and paid, and nothing remains but to fix the liability of the guardians and executors and to distribute the assets to the persons entitled thereto. We therefore hold that the chancery court, having assumed jurisdiction, should have falsified and surcharged all accounts in their entirety, and should have entered a final decree on such findings without remanding the cause to the probate court for action on the settlements which have not been passed upon. *Adams* v. *Shell,* 182 Ark. 959, 33 S. W. (2d) 1107; *Beckett* v. *Whittington,* 92 Ark. 230, 122 S. W. 633; *Brice* v. *Taylor,* 51 Ark. 75, 9 S. W. 854; *Hankins* v. *Layne,* 48 Ark. 544, 3 S. W. 821; *Sorrels* v. *Trantham,* 48 Ark. 386, 3 S. W. 198.

We do not pass upon the unadjusted accounts pending in the probate court, for the reason that the court below has not done so. It may be necessary to hear additional testimony in the chancery court in doing this, as many items are involved and many charges of fraud are made.

We will, however, consider the settlement which was passed upon and approved by the probate court, and surcharged and falsified in the chancery court, but we will discuss only those findings in which we do not agree with the chancellor.

The first of these items is that of the commissions allowed Mr. Vaughan, the contention being made that these should have been computed upon the net income of

the estate only, and the case of *James* v. *Echols,* 183 Ark. 826, 39 S. W. (2d) 290, is cited to support that contention.

In that case an active trust was created, and it was directed that twenty per cent. of the income from the estate should be paid to the trustee for its services in administering the trust, and the trustee made a claim of twenty per cent. of the gross income for services, and the compensation claimed was allowed by the chancery court. In reversing that decree we held that, where a trustee accepts a trust created by a will, and qualifies and enters upon the discharge of the duties of trustee, he accepts the trust upon the condition named in the will, and is entitled to no other or greater compensation than the will allows, and that a direction that a certain per cent. of the income be paid for such services would be construed to mean the named per cent. of the net income, and not of the gross income.

This case was decided after the probate court had approved the claim for Mr. Vaughan's compensation, and there is no averment and no testimony that this allowance was obtained by any misrepresentation or deception practiced upon the court.

It was said, in the decision of a similar question, in the case of *Mock* v. *Pleasants,* 34 Ark. 63, that "mere illegal allowances to an administrator, not obtained by misrepresentation or deception upon the court, are no grounds for impeaching or setting aside a settlement in equity. The proper remedy is by appeal to the circuit court."

In the instant case the will does direct that the compensation be fixed at "the sum of ten per cent. of the income of said estate," which, on the authority of *James* v. *Echols, supra,* we must construe to mean the net—and not the gross—income, but this is not the only provision on that subject. The will further provides that, if in the opinion of the judge of the probate court the compensation allowed is not sufficient, the court "may make allowance of such amount as may be sufficient to compensate my said trustee for executing this trust." The court was therefore given a discretion in the matter of compensation, and it does not appear that any fraud was

practiced upon the court in the exercise of this discretion, and the judgment in this respect is therefore final and should not be disturbed.

For the same reason, we think the order and judgment of the probate court allowing expenses incurred by Vaughan in operating the bakery should not be disturbed. The testimony is conflicting as to whether the bakery was operated at a loss, and as to the extent of such loss, if any. It is also insisted that Vaughan operated the bakery as trustee, and not as executor, and we are cited to the case of *First National Bank of Fort Smith* v. *Thompson,* 124 Ark. 161, 186 S. W. 826, and other cases, holding that, where a party acting in two capacities receives money in the wrong capacity, the payment is in law referable to the capacity in which he is authorized to act. It is insisted that, as Vaughan should have operated the bakery as trustee, no charge should be made against him as executor. It is apparent, however, that Vaughan was not acting in the capacity of trustee, but in that of executor, and the probate court evidently proceeded upon the assumption that Vaughan would not assume to act as trustee until he had completed his duties as executor. At any rate, Vaughan included the bakery and its equipment, much of which was of a perishable nature, in his inventory as executor, all of which he later sold, and he was charged with the proceeds of the sale. The probate court, no doubt, considered the nature and extent of Vaughan's labor in regard to the bakery and the results he was accomplishing in its management in fixing his compensation in this behalf, and, as no showing was made that fraud was practiced in procuring the orders of the probate court in regard to the bakery, we think they should not be disturbed.

At § 2559 of the chapter on Executors and Administrators in 24 C. J. 1066, it is said: "Where the same person is both executor and trustee under a will the sureties on his bond as executor are not liable for property held by him in the capacity of trustee, unless they are made so by express statute. It has been held, however, that where an executor, who is also named as trustee in the will, assumes the duties of trustee in the capacity of

executor, his sureties cannot question the capacity in which he was acting, and that, if the executor fails to qualify as trustee, and deals with the trust estate as executor, the sureties on his administration bond are responsible for his acts."

Here Vaughan ran the bakery, and later sold it, under the orders of the probate court as executor, and we think the probate court had the power to fix his compensation and expenses, which were allowed in the sum of $799, and the judgment of the probate court in this respect will be approved.

The probate court allowed Vaughan credit for $731.06 for repairs to various buildings owned by Edmondson at the time of his death. The testimony shows that the buildings were in bad condition and required repair, and the will directed that repairs be made; indeed, the testimony is to the effect that the principal part of the expense was incurred in completing contracts which Edmondson had himself made, and the testimony shows that the money was actually expended for which credit was claimed. There is testimony that the charges were excessive, but the testimony is not conclusive of that fact, and there appears to have been no fraud in procuring the probate court to allow this credit. The judgment of the probate court in this respect should therefore be approved.

The action of the chancery court in falsifying and surcharging the accounts in other respects will be affirmed. We do not discuss these items, as it would unduly protract this opinion to do so. These items which we do not discuss relate either to money with which the executor was not charged but should have been, or to credits which, upon their face, there was no authority to allow.

There is a cross-appeal from the fees allowed the master and the guardian *ad litem* and to Mrs. Vaughan's attorney as executrix, but we think no error was committed in these respects, and the fees allowed do not appear to be unreasonable.

The decree of the court below will therefore be reversed, and the cause will be remanded, with directions to approve the settlement of Vaughan's administration

in respect to his commissions and his salary and expenses in the operation of the bakery and for the repairs made as allowed in the probate court. The decree in other respects in regard to the settlement will be affirmed.

The court will also proceed, without remanding the cause to the probate court, to adjudge and settle the accounts of Mrs. Vaughan's own administration.

NATIONAL LUMBER & CREOSOTING COMPANY *v.* MULLINS.

4-2951

Opinion delivered April 3, 1933.

James D. Head, for appellant.

Danaher & Danaher, for appellee.

MEHAFFY, J. The appellee, J. F. Mullins, a contractor, entered into a contract with the Highway Com-

mission for the construction of certain bridges on the State highway in Lafayette and Columbia counties. He, as principal, and the Consolidated Indemnity & Insurance Company as surety, entered into a bond as provided by act 368 of the Acts of the General Assembly of 1929, conditioned as prescribed by said act. The appellant furnished material of the value of $5,739.26. This suit was brought in the Jefferson Chancery Court against the contractor and the surety company for this amount.

Mullins filed answer, denying the indebtedness and denying that final estimate had been made, and alleging that, under the terms of the contract, he was not to pay for the material until he had received payment from the Highway Department, and that no such payment had been received. He further alleged that it was a general and uniform custom well known to the appellant, and was a part of the contract, that the purchase price of material would not become due until the contractor had collected from the Highway Department.

The surety company answered denying liability, and alleging that the claim was barred because suit was not begun until more than six months after the completion of the work; that it was not liable on the bond because the Commission had breached the contract by failing to pay Mullins, thereby preventing him from paying appellant. The surety company also alleged that the contractor was not to pay for material until he received payment from the Highway Department, and that this payment had not been made, and that therefore there was nothing due to appellant. It also denied all the material allegations in the complaint.

The Highway Department answered, alleging that final voucher had been issued and turned over to the bonding company; that it had not been paid and was still in the hands of the bonding company; the voucher issued and turned over to the surety company was for $6,486.11.

The question for our consideration is whether, under the contract, the amount owing to appellant was due in thirty days after it was furnished, or whether it was due after the Highway Department had paid the con-

tractor. The following, which was rendered to Mullins, the contractor, was introduced in evidence:

"May 22, 1931
"Diet. 5/21/31

"Quotation
"No. T-57

"Subject: Inquiry treated lumber and piling for Arkansas Highway Project 1133, for delivery Waldo, Lewisville, Buckner and Stamps, Arkansas.

"Mr. J. F. Mullins,
"Pine Bluff, Ark.

"Dear sir:

"To confirm 'phone conversation of today, we quote below f. o. b. cars above points—terms thirty days net, subject to your acceptance within thirty days—the following yellow pine piling, and yellow pine and west coast fir lumber—all treated in accordance with Arkansas State Highway specifications:

"12 SYP Piles	26′	
"22	28′	
"24	30′	$.31½ B. Ft.
"68	32′	
"24	34′	

"Approx. 70,000 B. Ft. treated Fir & YP lbr., framed, $62.50 MFBM.

"If you should take over this project, we sincerely trust that our quotation will enable you to favor us with your order. However, if the award goes to another, will appreciate your advising us as to the contractor's name and address.

"CC-WW Snodgrass
"F. J. Williams

"Very truly yours,
"National Lumber & Creosoting Co.
"By:"

This quotation bears the following notation in pen and ink:

"Pine Bluff 6/6/31
W.L.M.

"Saw Mr. J. F. Mullins this morning, and he is giving us this order, and is having correct list made at Little Rock and mail order in to us Monday or Tuesday.

"F. J. W."

Mullins, the contractor, testified that he talked to Mr. Williams, the representative of appellant, and that nothing was said about the payment, and in fact nothing was discussed but the price, nothing was said in their conversation about when it was to be paid. Mullins also testified that on another job he had had a conversation with a different agent of appellant, and told the agent that he had always bought his material to be paid for as he received his money, and that the agent said that this was satisfactory; that he, Mullins, expected to pay when he received his money as the work progressed; that he had received no money, but merely warrants.

We do not set out the entire testimony of Mullins, but he testified positively that in this contract there was nothing said about custom or anything else except the price. There was some evidence about the contractor not being able to pay until he received money from the State.

M. K. Orr testified that the custom had been that the money had to come from the job to pay for the material, and that all companies understood that; that when estimates were paid the contractor paid the materialman; that this had been the custom.

Mr. Schnable also testified to the custom, his evidence being substantially the same as that of Orr and Mullins.

F. J. Williams, representative of appellant, testified that it had never been appellant's custom to furnish materials and wait until the contractor was paid; that their contracts always had been made payable at times definite and certain.

Orr, being recalled, testified that, although the quotation carried a 30-day clause in it, the understanding was that the money was to come out of the job. He also testified that the State first fell behind in its payments in October or November.

Mullins, being recalled, testified that, in the conversation discussing the buying of these materials, there

was no discussion as to what dates or when payments should be made; that was not discussed in the last order, but it was in the first order; that that conversation related, not only to that job, but to future jobs, and that in this contract there was nothing definite about the time of payment; the conversation was merely about prices, and that was all that was discussed. There was some correspondence between the parties, but it is unnecessary to set it out here.

The appellant introduced the contractor's bond and warrant for the final estimate which had been given to the surety company, and introduced copy of the statement of May 22, 1931, showing that the terms were 30 days net. The evidence also shows that Mullins said that if the price was satisfactory he would give the appellant the job.

It is not contended by the appellees that anything was ever said about when the material should be paid for. Mullins does testify that at some other time he bought some material from an agent named Brown, and discussed the custom, and that it was understood that that applied to future contracts as well as the one made with Brown. He does not say when this contract with Brown was made, and, so far as the record is concerned, it may have been years before.

After the evidence was introduced, the court found that appellees were indebted to the appellant in the sum of $5,739.26 with interest at the rate of 6 per cent. per annum from 30 days after the several dates of the itemized statements, but the court found that under the contract the indebtedness was to be paid out of the amount due from the State of Arkansas, which had not been paid. The court also found that the voucher for the last estimate, $6,486.11, was issued and delivered to the appellee surety company.

The court rendered judgment in favor of the appellant for the amount sued for, but provided in the decree that no execution should issue on the judgment; that the surety company should assign the voucher to the clerk of the court, who was appointed receiver, to hold the voucher or any other evidence of indebtedness issued

by the State in lieu thereof, and, when the amount has been paid, the receiver should then pay the plaintiff, and if the amount collected by the receiver was not sufficient to pay the plaintiff, then plaintiff should have judgment for the deficiency against the contractor and surety company.

The National Lumber & Creosoting Company prosecutes an appeal to reverse that part of the decree which holds that the appellant was to be paid out of the amount due from the State, and that no execution should issue upon the judgment, and that part that appointed the clerk receiver, and directed him to pay appellant when he collected on said warrant. Appellant insists that it was entitled to a judgment against the contractor and surety company, and entitled to have execution on said judgment.

The only question for our consideration is whether the cause of action accrued within thirty days after the material was furnished, as stated in the letter or quotation of May 22, 1931, or whether appellant was bound by the custom, and the amount was not due and collectable from the contractor until the State had paid the contractor.

The appellees insist that the amount was not due when suit was brought, and also insist that the claim was barred by the statute of limitations, and the court stated that the amount was due within thirty days, as stated in the quotation, and gave a judgment for interest from that date. If the appellee's theory is correct, the suit could not have been maintained at the time it was brought, because no cause of action would have accrued until the State paid the contractor; and, if the theory of the appellees was true, the bond would have been worthless. There would have been no reason to give the bond, and no liability thereon. If the amount was not due until the State paid, and the State did not pay within the time limited by the statute to bring suit against the contractor and his surety, there would have been no reason to give the bond at all.

The rule that parties to a contract are bound by custom or usage is based on the assumption that the parties contracted with reference to the custom. In the instant case the only statement ever made between the parties with reference to the time when the claim became due was the statement in the written memorandum that it was due in 30 days, and in order to be binding a custom must be reasonable. There is not only no evidence in this case tending to show that anything was said about the custom when the contract was made, but the custom contended for by the appellee would be unreasonable because it would make it impossible for the material furnisher to recover on the bond.

A custom applicable to trade or business is not binding on the parties if there is either notice or contractual stipulation that the transaction is without regard to the custom. Evidence of usage or custom is not admissible to vary or contradict the terms of a plain, unambiguous contract. Where the writing states that the claim will be due at a certain time, and no objection is made to this, and nothing said about custom or usage, the claim will become due at the time mentioned in the written instrument.

Appellees contend that the custom became part of the contract, and that all the authorities sustain this proposition, and cites note 28 in 17 C. J. 501. There are several notes on this page, but they are all to the effect that the evidence of custom can neither contradict, destroy, nor modify what is otherwise plain. They are, however, all to the effect that the evidence of custom is admissible in the absence of express stipulations, and where the contract is silent, but it is not admissible to contradict or vary the terms, but only for the purpose of explaining and supplying details. Appellee also calls attention to 17 C. J. 453, and 503. On page 453 it is stated: "Further, a loose and variable practice will not be allowed to control the rights of the parties, nor will an alleged usage, which leaves some material element to the discretion of the individual. But it is not essential that the custom be used by everybody and at all times.

A usage or custom of trade to which no limit is assigned to its extent is bad and therefore will not be given effect by the courts."

It is stated on page 503, cited by appellees, that evidence on the question of terms, quantity, and price is admissible, but the text there clearly shows that it is admissible for explaining ambiguous terms, and is never admissible to contradict the terms of a written contract.

Appellees also call attention to the case of *Robinson* v. *United States,* 13 Wall. 363, but the opinion in that case says: "Parties who contract on a subject-matter concerning which known usages prevail by implication incorporate them into their agreements if nothing is said to the contrary."

But, if anything is stated to the contrary, the rule does not apply. The case of *Alexander* v. *Williams-Echols Dry Goods Co.,* 161 Ark. 368, 256 S. W. 55, announces the same rule, that is, that the usage is incorporated into the agreement if nothing is said to the contrary.

It is next contended that this contract was verbal. It is wholly immaterial, we think, whether it is regarded as a written or oral contract. The important question is the intention of the parties, and that is to be arrived at by a consideration of the entire contract. The contract expressly provides that the material shall be paid for within 30 days, and this is not contradicted anywhere.

This court has many times decided that evidence of custom and usage is admissible where the contract is silent and ambiguous. On the other hand, this court has always held that usage and custom cannot be invoked to defeat the express terms of a written contract. The usage and custom is applicable only where the contract is silent or its terms ambiguous. *Batton* v. *Jones,* 167 Ark. 478, 268 S. W. 857; *Southern Coal Co.* v. *Searcy Transfer Co.,* 152 Ark. 471, 238 S. W. 624; *Ft. Smith Bldg. & Loan Ass'n* v. *Little,* 181 Ark. 1055, 29 S. W. (2d) 291.

We think the evidence in this case is insufficient to establish the fact that this contract was made with reference to the usage and custom testified about.

That part of the judgment of the lower court directing the receiver to hold the voucher or any other evidence of indebtedness issued by the State in lieu thereof, and when the amount has been paid, the receiver should then pay the same to appellant, is affirmed.

There is no dispute about the amount of the indebtedness, and the lower court entered judgment for $5,739.26. The decree of the court, however, holding that execution should not issue and that payment was not to be made until the State paid the contractor, is reversed, and judgment entered here for the amount sued for.

ÆTNA LIFE INSURANCE COMPANY *v.* DEWBERRY.

4-2966

Opinion delivered April 10, 1933.

Owens & Ehrman, for appellant.

John E. Miller, C. E. Yingling and *Rowland H. Lindsey,* for appellee.

HUMPHREYS, J. This is an appeal to this court from a judgment recovered in the circuit court of White County on total disability clauses in two indemnity insurance policies issued by appellant to appellee. The two disability clauses provided for payment in case the disability occurred before the insured attained the age of sixty years, and payments to begin upon receipt of proof of the disability.

The undisputed proof reflects that the disability complained of occurred before the appellee attained the age of sixty years, and that appellant was notified of such disability on or about June 1, 1931. The jury was instructed that, if it found appellee became permanently disabled within the meaning of the disability clauses, it should return a verdict for the monthly amount agreed to be paid from the date of the disability, together with the amount of premiums paid after the disability occurred. According to the record before us, a dispute existed in the testimony as to whether appellee became totally and permanently disabled from disease on or about June 1, 1931, and the jury found this disputed question of fact against appellant, and it is bound by the finding, unless the court erred in submitting the question on incorrect instructions or in refusing to give correct instructions requested by appellant.

Appellant contends for a reversal of the judgment because the court erred in giving instructions Nos. 1 and 2, requested by appellee, which are as follows:

"1. You are instructed that total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business. And so in this case, if you believe from a preponderance of the evidence that the plaintiff is dis-

abled by disease to such an extent as to wholly disable or prevent him from the doing of all the substantial and material acts necessary to be done in the prosecution or carrying on of his business, that of farming, and that such disability is permanent and total, then your verdict will be for the plaintiff."

"2. You are instructed that, if you find from a preponderance of the testimony in this case that the plaintiff, as the result of disease, is wholly disabled and prevented from doing any and every kind of work pertaining to his occupation, or within the scope of his ability, and that such disability is permanent, then your verdict will be for the plaintiff."

The argument is made that the two instructions are in conflict in defining total and permanent disability. It is true that different language is employed in defining total and permanent disability in the respective instructions but with the same meaning in both. This court has used varying language in defining these clauses in the several cases brought before it for determinination, but always with the same meaning. Instruction No. 1, as given, was based upon the cases of *Ætna Life Insurance Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, and *Ætna Life Insurance Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310, while instruction No. 2 was based upon the language defining total disability in the case of *Industrial Mutual Indemnity Company* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457. Both definitions, however, were to the same effect. The instructions complained of were not in conflict.

Appellant also argues that instructions Nos. 1 and 2 close with the words, "then your verdict will be for the plaintiff," and that both are inherently wrong because they ignore some of the vital issues in the case, to-wit: the issue as to whether the total and permanent disability occurred before appellee attained the age of sixty years and the date on which the disability occurred, and the issue of whether appellee made the proof of loss. These alleged issues were established by undisputed testimony, and it was unnecessary to embrace them in the instructions, even though each instruction closed with the words quoted above. The jury needed no instruction concern-

ing them as a guide. It is only where issues are in dispute that instructions should be given to guide the jury. Each instruction embraced the only issue involved, so it was no error to instruct the jury to find for the plaintiff if they should determine the issue involved in favor of the plaintiff.

Appellant also contends for a reversal of the judgment because the court erred in refusing to give its requested instructions Nos. 11 and 12. Requested instruction No. 11 told the jury, in effect, that, if they believed appellee was a malingerer, he could not recover. There was no evidence introduced tending to show that appellee was a malingerer, so the instruction was abstract and properly refused. Instruction No. 12 told the jury, in effect, that, if appellee, during the period he claimed to be disabled, engaged in any business or performed any work for compensation, he could not recover. This request was properly refused because abstract. We find no evidence in the record tending to show that appellee engaged in any business or performed any work for compensation after June 1, 1931.

Lastly, appellant contends for a reversal of the judgment because, after the jury returned its verdict, it was sent back for further deliberation in order to make its verdict complete and definite. Before sending them back, the court reread the instructions to the jury. There was no error in doing this, but appellant contends that the verdict which was returned was formulated in accordance with a memorandum, found by the jury in the jury room upon its return for further deliberation, which had been prepared by one of the attorneys for appellee, and that this memorandum influenced the jury in returning the verdict. The similarity between the memorandum and the verdict was striking. Some of the exact language of the memorandum appeared in the verdict as returned. The attorney for appellee admitted that the memorandum was in his handwriting, but stated that he had prepared it for use in the trial of the cause and did not know how it reached the jury room unless it was taken into the jury room by some one when he dropped his papers out of his brief case. One of the attorneys for appellant

admitted in the course of the trial that, if appellee was entitled to recover anything, he was entitled to recover the monthly payments provided in the policies from June 1, 1931, to the date of the trial. According to the second verdict, this is the amount that was recovered in addition to the premiums which were paid after that date, and this is all that was shown by the memorandum, so we cannot see how any harm or prejudice resulted to appellant on account of the memorandum.

No error appearing, the judgment is affirmed.

McCarley *v.* Carter.

4-2972

Opinion delivered April 10, 1933.

H. G. Wade, for appellant.

Thos. W. Hardy and *R. H. Little,* for appellee.

McHaney, J. This suit was instituted by appellant and two of the heirs of J. B. Barnes, deceased, against the other heirs of said Barnes to partition 147 acres of land

owned by him in his lifetime, and which descended on his death about 15 years ago to his widow for life and then to the heirs in fee. Ola Carter, wife of Will Carter, was one of said heirs, and on March 7, 1928, she executed a will to her husband, Will Carter, conveying "all interest I now own or might own at the time of my death in the following described lands," then describing the same lands sought to be partitioned. The will as probated then contained this clause: "I do this, not forgetting my child, Martha Francis." The will was signed by her and properly witnessed. Thereafter Ola Carter died on August 14, 1928, leaving surviving her one child, a daughter named Martha Francis as her sole heir at law, and her husband, Will Carter. The widow of J. B. Barnes died February 14, 1932, which terminated the life estate in the lands sought to be partitioned. The will of Ola Carter above mentioned was not offered for probate until February 4, 1930, although in the possession of Will Carter from the date of the death of his wife, Ola, on August 14, 1928, but on February 4, 1930, it was admitted to probate. On the same date, February 4, 1930, Will Carter executed and delivered to appellant his warranty deed to an undivided one-seventh interest in said lands for a consideration recited in the deed of $10, but actually $300 as testified to by appellant and Carter. The trial court found that Will Carter acquired no interest in the land under the will of his wife for the reason that the clause therein that, "I do this not forgetting my child Martha Francis" was not in the will of Ola Carter at the time of her death, but was a forgery and a fraud practiced on the probate court in procuring its judgment, and that as to said child Ola Carter died intestate, not having been mentioned in her will; and that appellant acquired no title to said land by reason of the deed to him by Carter. Decree was accordingly entered striking from the will the above mentioned clause and canceling the deed from Carter to appellant, and dismissing his complaint for want of equity. Partition was ordered on the complaint of another plaintiff and commissioners were appointed for this purpose. They were directed to divide the land among the heirs, having due

regard to quantity and quality, make their report to the court, and added that, "The commissioners will not designate the tract to be given to any particular tenant in common." There is here both an appeal and a cross appeal by appellees from the order last quoted.

Appellant demurred to the answer of Martha Francis Carter, by her guardian *ad litem*, alleging that the clause in the will mentioning her was a forgery, and that therefore appellant acquired no title to the land. The court overruled the demurrer, and this is assigned as error. It is argued that the defense to the action involved a collateral attack on the judgment of the probate court, and that the chancery court was without jurisdiction to annul the judgment of the probate court, except for fraud practiced upon the court in the procurement of the judgment. We think a sufficient answer to this proposition is that it was not sought to set aside the will as a whole or to annul the judgment of the court admitting it to probate. It is admitted that a valid will was executed by Ola Carter. Only one clause or sentence in the will is attacked. A will may be valid in part and invalid in part. *Hyatt* v. *Wroten,* 184 Ark. 847, 43 S. W. (2d) 726. Courts of equity have jurisdiction of partition suits, and necessarily must determine what interest or share each claimant has, if any, in and to the property sought to be partitioned. *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. (2d) 14. The fact that a will has been admitted to probate does not preclude inquiry by another court, having jurisdiction of the subject-matter and the parties, into the rights of the parties under the will. This view of the matter makes it unnecessary to determine whether a fraud was practiced on the probate court. The decree of the court struck out the clause in the will: "I do this not forgetting my child, Martha Francis," and left the will valid in all other respects. The court properly overruled the demurrer.

It is next argued that the court erred in holding that the above clause in the will was a forgery, that is, that the evidence is insufficient to support the court's finding in this regard. We cannot agree with appellant, nor do we review the evidence in detail. The lawyer who drew

the will refused to testify that it was or was not in the will when he prepared it. Another lawyer testified positively that Carter brought the will to him after the death of Mrs. Carter to obtain advice as to his rights under it, and that clause was not in the will at that time. The clause shows to have been typewritten over an erasure and is not in line with that part immediately preceding it, being a little lower. The time it was kept and not probated after the death of Mrs. Carter is another circumstance to be considered. We think the preponderance of the evidence supports the court's finding of forgery.

It is also insisted that the court erred in canceling the deed from Carter to appellant, for the reason that under act 149 of 1925, p. 441, if Ola Carter died intestate, her husband was entitled to a life estate in one-third of her real property. That act so provides, but Ola Carter did not die intestate. She left a valid will. The fact that it was ineffectual to convey the land mentioned does not destroy the will. She died intestate as to her child Martha Francis, but not as to any one else.

Nor can we sustain appellant in his contention that he is an innocent purchaser. This court held in *Bird* v. *Jones,* 37 Ark. 195, that one purchasing land from a person who obtained his title by forgery cannot be treated as an innocent purchaser.

The court should have directed the commissioners to assign to each heir his respective share or interest in said land. Section 8104, Crawford & Moses' Digest.

Affirmed on appeal and reversed and remanded with directions to direct the commissioners to assign each heir his respective interest on cross appeal.

SMITH, J., concurs; KIRBY, J., dissents.

WHITTED *v.* STATE.

Crim. 3833

Opinion delivered April 10, 1933.

A. M. Bradford and *S. S. Hargraves,* for appellant.

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

McHaney, J. Appellants were indicted charged with robbery of the Rice Growers' Bank, of Wheatley, Arkansas, and in a separate indictment were charged with burglary in that, on the same day they were charged with the robbery, "a certain house there situated and being used and possessed by the Rice Growers' Bank, a corporation, feloniously did break and enter, with the felonious and burglarious intent then and there to commit the crime of robbery," etc. They were tried and acquitted of the crime of robbery. Later they were put on trial under the indictment for burglary, whereupon they filed a plea of former acquittal on the charge of robbery in bar of the action. The State demurred to the plea, which was sustained by the court, and they went to trial on a plea of not guilty, were convicted and sentenced to two years in the penitentiary.

The only question presented by this appeal is one of law, whether the plea of former acquittal, or former jeopardy, should have been sustained.

Under § 3016, Crawford & Moses' Digest, the offenses of robbery and burglary may be charged in one indictment, and the pleader in this case might have drawn one indictment of two counts so charging appellants. Burglary is defined by act 67, Acts 1927, p. 69, § 2, as follows: "Burglary is the unlawful entering a house, tenement, railway car or other building, boat, vessel or water craft with the intent to commit a felony." Whereas "robbery is the felonious and violent taking of any

goods, money or other valuable thing from the person of another by force or intimidation; the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender." Section 2410, Crawford & Moses' Digest. It will be seen from these definitions that the offenses are entirely distinct and separate. A person might be guilty of robbing a bank without being guilty of burglary, and also he might unlawfully enter a bank building with the intent to rob the bank, and still not be guilty of robbery. The rule is thus stated in 16 C. J. 272: "On the other hand, there are many adjudications to the effect that, if two offenses grow out of the same transaction, and such offenses are severable and distinct, a prosecution for one will not bar a prosecution for the other. Thus a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or a conviction under either statute does not exempt defendant from prosecution and punishment under the other." Our own case of *Fox* v. *State,* 50 Ark. 528, 8 S. W. 836, is cited to support the text. In that case the court held that a plea of an acquittal on a charge of robbing one Everidge was a bar to a prosecution on another indictment for the false imprisonment of Everidge, for the reason that both indictments referred to the same assault on Everidge, and, having been acquitted of robbery, he could not be convicted of false imprisonment, which is a species of aggravated assault without again being tried for the simple assault of which he was acquitted, and which was embraced in the charge of robbery. In that case, Judge COCKRILL, speaking for the court, said: "Where one unlawful act operates on several objects, there may be several offenses committed and so several prosecutions for the same criminal transaction, and an acquittal or conviction for one such offense will not bar a prosecution for the other"—citing cases. "But where there is but one object, and each offense charged is a degree or an essential ingredient of the other, as in this case, there can be but one prosecution." Also in 16 C. J. 273, it is said: "Among other illustrations, in the following cases a conviction or an acquittal

of the crime first enumerated was held no bar to a prosecution for that coupled with it, although both were involved in the same transaction; robbery and burglary in the same transaction; burglary and receiving stolen goods; embezzlement and false pretenses." See also *Copenhave* v. *State,* 15 Ga. 264; *People* v. *Snyder,* 74 Cal. App. 138, 239 Pac. 705; *People* v. *Brain,* 75 Cal. App. 109, 241 Pac. 913.

This court has many times held that a plea of former acquittal will be denied unless it affirmatively appears that the charge in the case where the plea is interposed is the same offense as that for which the defendant has already been acquitted. *State* v. *Blahut,* 48 Ark. 34, 2 S. W. 190; *Evans* v. *State,* 54 Ark. 227, 15 S. W. 360; *Turner* v. *State,* 130 Ark. 48, 196 S. W. 477. Since, as we have already seen, the offenses charged against appellants were separate and distinct offenses, defined by separate and distinct statutes, and not dependent upon the same evidence to support conviction, the plea of former acquittal is not good, and was properly denied.

Affirmed.

FUTRALL *v.* BOWEN.

4-2946

Opinion delivered April 17, 1933.

Harry T. Wooldridge, for appellant.

Coleman & Gantt, for appellee.

SMITH, J. Robert Bowen, who is a farmer and operates a gin at Altheimer, purchased a Ford car from F. G. Smart Motor Company, of Pine Bluff, and executed a note for $270, with interest at 8 per cent., covering the amount of purchase money unpaid in cash. The note

was transferred by the motor company to the National Bank of Arkansas in Pine Bluff, which later became insolvent and was placed in the hands of a receiver, who sent Bowen a notice just before the maturity of the note that there would be due $279.95 for principal and interest on November 1, 1930, the maturity date. Immediately upon receipt of this notice, Bowen drew a check on the Bank of Altheimer, at Altheimer, for the amount stated in the notice, and made notation on the check, reading: "Bal. note Ford auto." Bowen sent this check, not to the bank holding the note, but to the motor company, and Miss Boston, its cashier, presented the check to the bank in payment of the note which Bowen had made and the motor company had indorsed. The check was presented to Frank Boone, who was the receiver's assistant. Boone discovered that the check had not been drawn for a sufficient amount, and so advised Miss Boston. His testimony as to the circumstances under which the check was delivered was as follows: "A. Miss Boston, as I said before, brought the check up there, and I told her it was lacking $10 being enough to pay the note, and that I would have to have the additional $10. That I couldn't use the check because it marked to indicate that it was payment in full of the note. At that time I told her, I ask her if she rather, or if she wanted me to write to Mr. Bowen or if she would, and as I remember she said she would get another $10 and bring it to me. Relying on that, I just put the check away and waited for the $10 and forgot all about it, to tell the truth."

Thereafter Miss Boston dictated a letter dated November 3, 1930, reading as follows: "We are in receipt of your check in the amount of $279.95 to cover note due November 1st amounting to $270 and $9.95 to apply on the interest.

"The bank advised us this morning that they made a mistake of $10 in figuring the interest on this note, as it should have been $19.95 instead of $9.95.

"Please let us have your check for $10 by return mail and we will forward you your canceled note."

Miss Boston had quit the service of the motor company and was residing in Texas at the time of the trial

and did not testify, but Miss Cox, who was employed as a stenographer by the motor company, testified that the letter was dictated by Miss Boston to her, and by her typewritten, and that she mailed the letter to Bowen.

The $10 was never paid, and the bank made no attempt to cash the check, but retained possession of it, and on November 17, 1930, the bank upon which it was drawn failed to open its doors.

Bowen testified that he received the notice during the ginning season, and that he was employed about his gin from 4 A. M. until late at night, and that he stopped work upon receipt of the notice only long enough to write a check, which he pinned to the notice and mailed both to the motor company without writing a letter. He did not know any mistake had been made in calculating the interest. At no time for two months prior to the closing of the bank on which the check was drawn was his deposit less than $940, and the check would have been paid upon demand. This bank remained open through Saturday, November 15, but failed to open on Monday, November 17. When asked if he had any recollection of having received the letter set out above from the motor company, Bowen answered, "No, sir, not that I know of," and when asked, "Are you prepared to say that you did not receive the letter?" answered, "No, sir; I wouldn't say positively I did not. I don't know anything about it." Witness assumed that his note had been paid, and he did not have any notice from the receiver of the National Bank of Arkansas that there was any balance due on the note, and he testified further that "I never dreamed that the check had not gone through until the Bank of Altheimer closed," and a representative of the National Bank had been to see him about paying the note.

It was shown that Bowen had on deposit in the Bank of Altheimer at the time it closed its doors the sum of $1,234.33, but it was shown also that he was indebted to that bank in the sum of $6,000, evidenced by two notes for $3,000 each, and this deposit was credited upon one of the notes when the bank closed. Bowen testified that he had negotiated a settlement of his liability to the Altheimer bank, which was unaffected by the unpaid check, this

settlement resulting from the conclusion of the liquidating agent for the Altheimer bank that it was more advantageous to the bank than a suit would be, which would force Bowen into bankruptcy, and that he was therefore damaged to the extent of the face of the check.

It was the opinion of the trial court, in which a majority of this court concurs, that the receiver of the National Bank should have collected the check in due course, and that, had any diligence been employed in this respect, the check would have been paid before the bank upon which it was drawn had closed its doors.

It is provided by § 7952, Crawford & Moses' Digest, that "a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

We had occasion to consider, in the recent case of *Federal Land Bank of St. Louis* v. *Goodman,* 173 Ark. 489, 292 S. W. 659, what was a reasonable time for presentation of a check for payment, and, upon the authority of that case, and under the rule there announced, the check in the instant case was held for more than a reasonable time, indeed, it was never presented, and the delay resulted in the failure to collect it and thereby to pay the note in satisfaction of which it had been drawn.

The majority are of the opinion that the court below, sitting, by consent, as a jury, was warranted in drawing the inference from the testimony in the case that there was no direction to the National Bank, given either by the motor company, and certainly not by Bowen, to hold the check until the additional $10 had been paid, and that the bank should have collected the check in the usual course, and that the neglect of its receiver had resulted in the failure to make the collection which should have been made.

The writer and Mr. Justice McHaney do not concur in that view.

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

SOUTHERN LUMBER COMPANY *v.* AXLEY.

4-2956

Opinion delivered April 17, 1933.

Aubert Martin and *Williamson & Williamson,* for appellant.

Clary & Ball, D. L. Purkins and *J. R. Wilson,* for appellee.

HUMPHREYS, J. This is a second appearance of this case in the Supreme Court. It was brought up the first time on writ of certiorari for the purpose of testing the validity of the findings, orders and decree rendered in a slander suit by the chancery court of Bradley County, wherein O. O. Axley was the plaintiff and the Southern Lumber Company was defendant. The suit was originally brought in the circuit court of Bradley County by O. O. Axley against the Southern Lumber Company to recover damages for slander, to which an answer and cross-complaint were filed, incorporating a motion to transfer the cause to the chancery court, which was done, over the objection and exception of the plaintiff, O. O. Axley. After the cause was transferred, the plaintiff filed a motion to remand same, which was overruled over his objection and exception, and, over his exception, he was forced to try the case, which resulted in a dismissal of the complaint as well as the cross-complaint.

In the certiorari proceeding, under the style of *Axley* v. *Hammock,* 185 Ark. 939, 50 S. W. (2d) 608, it was ruled that the suit was improperly transferred to the chancery court, and that the findings, orders and decree rendered

and entered therein were void because the chancery court had no jurisdiction over the subject-matter involved. Accordingly, the findings, orders and decree of the chancery court were reversed, and the chancery court was directed to remand the cause to the circuit court.

Upon the remand of the cause, the appellant herein requested the chancery court, in remanding the cause to the circuit court, to enjoin appellee herein from proceeding with his slander suit because the chancery court in the course of the proceedings therein found that he had estopped himself from doing so by a settlement of the cause of action. The chancery court properly denied appellant's request for a mandatory injunction for the reason that, under the ruling of this court, the chancery court acquired no jurisdiction over the subject-matter of the action by reason of the alleged defenses interposed thereto in its cross-complaint. All of the findings and orders of the chancery court, as well as the decree, were nullities because chancery courts have no jurisdiction of slander suits and defenses thereto in this State. Circuit courts alone have jurisdiction in this State to try actions for slander and all defenses thereto.

For the reasons aforesaid, this appeal of the Southern Lumber Company is dismissed and all the orders, findings and determinations of the Bradley County Chancery Court, had and done in this case, are hereby quashed and vacated.

HOUSTON OIL COMPANY OF TEXAS *v.* MCGUIRE.

4-2926

Opinion delivered April 17, 1933.

Gaughan, Sifford, Godwin & Gaughan and *Powell, Smead & Knox,* for appellant.

J. S. McKnight, Walter L. Pope and *Pace & Davis,* for appellee.

KIRBY, J. Appellee, in his own behalf and as administrator of the estate of his deceased wife, sued the appellant oil company and its agent, Joe McDonald, to recover damages for the death of his wife, resulting from an alleged explosion of a highly inflammable and explosive fluid consisting of a mixture of coal oil and gasoline, it being alleged that the mixture had been bought as and for use as coal oil, as appellants knew, and that, instead of delivering coal oil, they wrongfully and negligently delivered from the wrong container gasoline, and sold same to appellee as and for coal oil.

It was further alleged that the appellant, Houston Oil Company, carelessly and negligently furnished to Joe McDonald, its agent, for sale to the public as and for use as kerosene said gaseous fluid, which was highly inflammable and ignitable at a temperature below 140 degrees Fahrenheit, knowing it was not suitable for use for heating and illuminating purposes.

That on the 4th of December, 1931, the deceased attempted to use said fluid as and for kerosene in starting the fire under a wash kettle or pot in the yard, as was the custom, and, starting to pour some of said fluid on the kindling and wood under said kettle, the can of fluid ignited and exploded, scattering its contents over the person of deceased, setting her clothing on fire and horribly

burning her body upon her face, neck, arms, waist and legs to such an extent that she died from the effects thereof on the 16th day of December, 1931, and from which, during the period of time that she lived after said explosion, she suffered the most excruciating and severest physical pain and mental anguish.

The answer denied the material allegations of the complaint and pleaded contributory negligence of the deceased as a defense.

The court instructed the jury, amending one of appellants' requested instructions over its objection, and the jury returned a verdict assessing the damages at $2,000 for the plaintiff individually and at $5,000 as administrator of the estate, and from this judgment, this appeal is prosecuted.

It is insisted on appeal that the court erred in refusing to direct a verdict in favor of appellants, that appellee's wife was guilty of contributory negligence as a matter of law, and also that the court erred in admitting testimony relative to the custom of building fires with kerosene or coal oil, and by modifying appellants' requested instruction No. 2 by adding the clause thereto: "if you further find that in so doing she was not exercising ordinary care for her own safety."

It appears from the testimony that Noah McGuire, who lived in Calhoun County a short distance from Bearden, across the line in Ouachita County, undertook to buy 5 gallons of kerosene from the Houston Oil Company through its agent, Joe McDonald, driver of the tank wagon. Handing his five-gallon can to McDonald to be filled with kerosene, McGuire went away, leaving his can with McDonald, and, returning shortly, paid McDonald 45 cents for the oil, being the regular standard price for kerosene. McGuire took the oil home and had used very little of it on December 4th. He put some of it in a stove in the potato house, but was not able to say that the container was empty when he put the newly purchased oil in. He also put some in an oil lamp, which contained a small amount of oil, and he noticed that there was a peculiarity about the way the wick of the lamp burned when he raised the globe, the blaze would run up high, and he would have

to turn the wick down for about a half minute and then turn it back up gradually after putting on the globe.

On December 4, while McGuire was away in the woods at work, Mrs. McGuire undertook to build a fire under the wash boiler in the back yard, and the can of oil exploded, with disastrous results to her. The explosion was heard by persons half a mile away, who thought it was from dynamite being used on the highway; and those who appeared on the scene soon afterwards could not tell much about the occurrence.

Mrs. Palman said the explosion threw Mrs. McGuire 10 feet away from the kettle, where she saw some of the remains of her burned clothing. McGuire went out to the kettle after he reached home and picked up the oil can about 12 to 16 feet away from the kettle and the bottom had been blown out of the can. Oil had been splashed all over a pile of oak heater wood about 20 feet from the wash pot and had burned over the pile of wood. The pot was turned over on its side, and there was nothing left around it but a few splinters and a small pile of chips underneath.

Some of the fluid had been drawn out of the can by Mr. McGuire into a bottle and carried to the woods for oiling saws. This bottle was corked with a bunch of pine needles and the oil sprinkled through on the saws prior to the explosion, and the common test of putting a small quantity on paper and then touching a lighted match to it disclosed that it was much more volatile and inflammable than kerosene, which was subjected to the same test at the same time.

A flash test and a chemical test were both made by Dr. Rose, chemist, and proved that the fluid was gasoline. The explosion itself seems to confirm this finding, as otherwise the fluid should not have exploded in the open air on a cold day, according to Rose's statement.

Dr. Rose, who made the analysis of the sample of the fluid, testified upon a question embracing the allegations of the answer and the other proof relative to the explosion that, if the fluid had been kerosene or coal oil of the grade permitted to be sold by the statute, it would not have ignited and exploded under such circumstances. It

should not have exploded unless the temperature of the kerosene had been raised to the igniting point, which would have taken some time and heat would have had to have been applied to the can; and that, even if the kindling surrounding the wash pot was burning, his answer would not be changed.

Joe McDonald, one of the defendants, denied that he drew the fluid from the wrong faucet, either at the station or out of his tank wagon; stated there were three faucets for delivering the products sold, oil, gasoline, etc., and that he himself unlocked the kerosene tank when it was delivered into the tank wagon.

Jelly Warren, whose duty it was to deliver the oil from the storage tanks of the oil company at their depot, did not testify.

The test of the fluid as analyzed by Dr. Rose showed it contained 96 per cent. of gasoline and ignited at a temperature of 88 degrees, when the statute (§ 5903, Crawford & Moses' Digest, as amended by act 77 of 1923) provides that, if the fluid ignites at a temperature of less than 140 degrees, it shall not be offered for sale for illuminating and heating purposes.

The manager of the oil company and some of its chemists testified about the details of making the test for determining when petroleum oil meets the required standard for gasoline and kerosene, and also about the location and capacity of this storage tank from which sales and deliveries are made. Said that if the fluid, as analyzed by Dr. Rose, contained 96 per cent. gasoline, it would be very dangerous to use in a potato house stove or lamps, and he doubted if it would burn in kerosene lighting equipment without causing a fire; said the company knew what was put into the tanks to be delivered, but that no test was made after it was put into the tank wagon of McDonald. That the company should know about the ingredients of every liquid that went into its storage tanks; said the fluid could have been tested at every point except on delivery at the tank trucks and the wrong fluid might have been delivered.

No witness who could have known testified that the fluid put into the tank wagon as coal oil came from the

kerosene storage tank. No one saw McDonald draw it from that tank, and the can could have been filled with gasoline by McDonald by opening the wrong faucet or it could have resulted from a mistake in loading the gasoline tank. The fluid delivered to McGuire was not kerosene, but about 96 per cent. gasoline, flashed in a test at a temperature of 88 degrees and on a cold day in the open air exploded, causing the death of appellee's wife. It certainly was not kerosene of the grade required by the statute for heating purposes, and it makes no difference where the mistake was made, since it was made by appellant or its agents, whether in loading the tank truck or in filling the oil can; and the testimony is sufficient to show the delivery of the gasoline to appellee, and no error was committed in refusing to direct a verdict.

There was no eyewitness to the explosion of the gasoline and the burning of Mrs. McGuire on account of it, and the law presumes that a person injured is free from fault in the absence of such eyewitness or evidence to the contrary. *Dallemand* v. *Sallfeldt,* 175 Ill. 310, 48 L. R. A. 753, 67 Am. St. Rep. 214, 51 N. E. 645; *Salyers* v. *Monroe,* 104 Iowa 74, 73 N. W. 606; *Atchison, T. & S. F. R. Co.* v. *Aderhold,* 58 Kan. 208, 49 Pac. 83; *Mynning* v. *Detroit, L. & N. R. Co.,* 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; *Texas & P. R. Co.* v. *Gentry,* 163 U. S. 353, 16 S. Ct. 1104, 41 L. ed. 186; *Chicago B. & Q. R. Co.* v. *Gunderson,* 174 Ill. 495, 51 N. E. 708.

The burden was upon the appellants to establish contributory negligence upon the part of deceased, and it has failed to discharge the burden. In the case of *Ellis* v. *Republic Oil Co.,* 133 Iowa 11, 110 N. W. 20, a case wherein the facts are similar to the case at bar, it is said, with reference to contributory negligence:

"It is said, however, that there was not sufficient showing of absence of contributory negligence on part of the deceased. To this contention it may first be said that there is no living witness of the explosion or of the circumstances under which the unfortunate girl met her death, and the administrator of her estate is in this action entitled to the presumption of due care on her part arising from the common instinct of self-preservation which

naturally leads a normal person to avoid danger." Citing cases.

It was further said there:

"In the absence of any showing or suggestion that she was not in any manner responsible for the character of the contents of the oil can, or that any reason existed to excite her suspicion that the can was not filled with standard kerosene, there is certainly no showing on which we can say as a matter of law that she was guilty of contributory negligence. The use of kerosene in kindling fires is too common and too well known for us to say that a person using reasonable care may not employ that agency without being chargeable with negligence."

No error was committed in admitting testimony relative to the custom of making fires with kerosene, that being such a matter of common knowledge that the court could have taken it into account without any such testimony in any event. *Waters-Pierce Pet. Co.* v. *Deselms,* 212 U. S. 157, 29 S. Ct. 270; *Kentucky Independent Oil Co.* v. *Schnitzler,* 208 Ky. 507, 271 S. W. 570, 39 A. L. R. 979.

Neither did the court err in modifying defendants' requested instruction No. 2 by adding the words complained of, making it read: "You are instructed that, if you believe from the testimony in this case that Mary McGuire had built a fire under and around a wash pot in her yard, which fire had died down until only some coals or hot embers remained surrounding the pot, and that she undertook to rekindle the fire, placing some kindling wood under and around the pot, and that in starting the fire she took the can of fluid in controversy and poured the contents thereof on said kindling wood, coals and hot embers, and that while doing so the coals and kindling suddenly burst into flames which ignited the fluid in the can, resulting in the injury and death complained of, *and if you further find that in so doing she was not exercising ordinary care for her own safety,* then you are told that the said Mary McGuire was guilty of contributory negligence, and plaintiffs cannot recover, and your verdict should be for defendants."

The circumstances of this case are unlike those in the case of *Magnolia Pet. Co.* v. *Bell,* 186 Ark. 723, 55 S. W. (2d) 782, and the injured woman could not be charged with being guilty of contributory negligence as a matter of law, and no error was committed in modifying the instruction by the addition to it leaving the question to the jury.

Upon the whole case, the doctrine found in *Pierce Oil Corporation* v. *Taylor,* 147 Ark. 100, 227 S. W. 420, and *Pierce Oil Corp.* v. *Taylor,* 264 Fed. 829, justifies the finding that the appellants sold the dangerous fluid as and for kerosene or coal oil because of which, in the customary use of it, the explosion occurred causing the damage, notwithstanding that some of the facts are proved partially by circumstantial evidence and legitimate inferences. See also *Waters-Pierce Pet. Co.* v. *Deselms, supra.*

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

AMERICAN BONDING COMPANY *v.* BOARD OF STREET IMPROVEMENT DISTRICT NO. 82.

4-2977

Opinion delivered April 17, 1933.

Horace Chamberlin, for appellant.

Murphy & Wood, for appellee.

MEHAFFY, J. Street Improvement Districts Nos. 82 and 89 of Hot Springs, Arkansas, were duly organized in 1926.

In 1927 act 182 was passed, which was an act requiring all improvement districts in this State to require depositories of the funds of such improvement districts to give surety bonds for the full amount deposited. After the passage of this act, the Community Bank & Trust Company of Hot Springs, Arkansas, was designated as the depository of the funds of the districts. J. O. Langley was president of the Community Bank & Trust Company, and was collector of both districts.

In 1927 the directors of each district applied to the Community Bank & Trust Company for a depository bond, and bonds were executed by the bank with the Home Accident Insurance Company as surety. These bonds continued in force until the insolvency of the Home Accident Insurance Company in 1930. In December, 1930, application was made to the American Bonding Company of Baltimore, and on December 15, 1930, the Community Bank & Trust Company entered into a bond, as required by statute, with the American Bonding Company of Baltimore as surety. Bond was made to each district. Each of the bonds provided, among other things, that "the condition of the obligation is such that, if the

above bounden principal shall in due course pay, on legal demand made during the term of this bond all sums of money which the principal shall be legally bound to pay, then this obligation shall be void; otherwise of full force and effect."

This is a statutory bond, and the statute is read into the bond. The statute provides that the bond shall be conditioned for the apt and full and complete payment of all funds so deposited, together with the interest thereon.

J. O. Langley, who was president of the Community Bank & Trust Company and collector for each district, also made a bond with the American Bonding Company of Baltimore as surety.

The Community Bank & Trust Company, on November 30, 1931, became insolvent and closed its doors. At that time it had on deposit to the credit of Street Improvement District No. 82 the sum of $294.98, and to the credit of J. O. Langley, as collector of Street Improvement District No. 82, $946.88. Street Improvement District No. 89 had on deposit to its credit $402.11, and J. O. Langley, as collector of Street Improvement District No. 89, the sum of $2,040.25.

Each of the districts made demand upon the American Bonding Company for the payment of the amounts deposited to their credit, and also for the amounts deposited by J. O. Langley as collector for each of said districts. The American Bonding Company admitted liability for the amounts deposited in the names of the districts, and offered to pay these sums in settlement of its liability under its bonds. The districts refused to accept these amounts, and demanded that the bonding company also pay the amounts in the name of J. O. Langley as collector of the districts. After the demand was made by the districts, the Bank Commissioner paid a dividend to all depositors, and dividends were paid by the Bank Commissioner on these four accounts. Both districts brought suit in the Garland Circuit Court against the appellant and the Bank Commissioner.

District 82 did not bring a suit on its collector's bond, and, when the dividends were paid, both districts

had Langley to assign his accounts in the bank to them, and the dividends due Mr. Langley were paid to the districts. After suit was brought, the bonding company placed the amounts that were on deposit in the names of the districts with the clerk of the Garland Circuit Court.

The appellant filed answer in each case and tendered the payments above mentioned, but contended that it was not liable for the amounts to the credit of the collector, and in District No. 82 pleaded the collector's bond, which covers the exemption as to liability shown in said bond. It also alleged that it was not liable to either district for the collector's deposits because they were his funds; that he was indebted to the district, and the bank indebted to him. After these pleas were filed by the appellant, the complaints were amended, making Langley a party defendant, and alleging that he had no interest in the funds which he had on deposit as collector of the districts. Langley entered his appearance, filed answer, in which he alleged that he had deposited the money as an officer of the districts, and that he has no interest in the accounts, and that the funds belonged to the several districts. The undisputed evidence showed that the funds deposited by Langley as collector belonged to the districts, and that Langley had no interest in them.

The cases were consolidated and tried together, and the court, sitting as a jury by agreement, found that the funds to the credit of J. O. Langley as collector belonged to the districts, and that he had no interest in said accounts, except that he received and deposited said moneys as collector of the respective districts.

Judgment was entered against the bonding company for all four amounts with interest, less 28 per cent. which had been paid by the Bank Commissioner. The case is here on appeal.

The evidence in the case was an agreed statement of facts; the bonds and the testimony of Judge Wood and E. E. Steigler we do not deem necessary to set out in detail. The only question for our consideration is whether the bonds given by the depository as principal and the American Bonding Company as surety covered the deposits in the name of J. O. Langley as collector of the districts.

Bonds are to be construed like other contracts, and it is the duty of the court, if it can do so, to ascertain the intention of the parties. In arriving at the intention of the parties, where a statutory bond is given, it is proper to examine, not only the bond itself, but the statute under which it is given, and all the facts and circumstances connected with the making of the bond. *Ætna Casualty & Surety Co.* v. *State,* 174 Ark. 988, 298 S. W. 501.

The bonds in this case recite: "Whereas the said Community Bank & Trust Company has been designated as a depository of funds of Street Improvement District No. 82, now therefore the condition of the above obligation is such that, if the above bounden principal shall in due course pay on legal demand made during the term of this bond all sums which the principal shall be legally bound to pay, etc."

The bond given to District 89 is the same as that given for District 82. The statute under which the bonds were given states: "All other improvement districts of this State, both rural and urban, having in their charge the moneys and funds of such districts shall before depositing same in any bank, trust company, savings association, or with any other person or company, require of such depository a good and sufficient bond signed by some surety company authorized to do business in the State of Arkansas, conditioned for the apt and full and complete payment of all funds so deposited, together with the interest thereon."

It will be seen from an examination of the statute that it includes all moneys and funds of the district which the depository has in its charge. There can be no question but what the bank had in its charge the moneys deposited by the collector of the district, as the money of the district, and, reading the statute into the bond, the surety undertook to pay all funds so deposited, etc. That necessarily means all the funds in charge of the depository bank belonging to the districts deposited in the name of the collector of the districts. The money might have been deposited by the treasurer, but it would then have been the funds of the districts, and, if deposited in the

name of any officer of the districts in such a manner as to show that they were the funds of the districts, such funds would be covered by the terms of the bond.

The manner in which the funds were deposited in the bank did not in any way affect the rights or obligations of the surety, if they were so deposited as to clearly show that they were the funds belonging to the districts. Another familiar rule of construction is that all the provisions of bonds or other contracts must be construed most strongly against the obligor who prepared the bonds, and in favor of the beneficiary. *Ætna Casualty Co.* v. *State, supra; Consolidated Indemnity & Ins. Co.* v. *State use Craighead County,* 184 Ark. 581, 43 S. W. (2d) 240.

The liability of a surety is measured by his contract, and the liability cannot be extended by implication, but a bond made by a paid surety, as in this case, is construed most strongly against the sureties, but, of course, it must not impose burdens not within the terms of the bond. *Norton* v. *Md. Cas. Co.,* 182 Ark. 609, 32 S. W. (2d) 172; *Consolidated Indemnity & Ins. Co.* v. *State use Craighead County,* 184 Ark. 581, 43 S. W. (2d) 240.

We think that, when the statute is read into the bond, the surety became liable for all moneys deposited in the Community Bank & Trust Company belonging to the respective districts, and, if such moneys belonging to the districts were deposited in the bank, it was not material whether such moneys were deposited in the name of the districts, or the name of the collector, or the name of the treasurer, if they were so deposited as to show that they were the moneys of the districts. What the surety undertook to become liable for was the moneys belonging to these districts, which the principal had in charge.

There is no reason why the surety should not be liable for all the funds that were deposited in the bank belonging to these two districts.

The judgment of the circuit court is affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* KEATON.

4-3037

Opinion delivered April 24, 1933.

[redacted]

Hal L. Norwood, Attorney General, and *Walter L. Pope,* Assistant, for appellant.

Lee & Moore and *Coleman & Riddick,* for appellee.

Marvin B. Norfleet, amicus curiae.

SMITH, J. Appellee brought this suit in the Pulaski Chancery Court against the State Highway Commission to recover the value of certain labor performed and materials furnished in the construction of three bridges on State Highway No. 1, more particularly described as Job No. 1-1059-S, and from a decree in his favor is this appeal.

The contract is similar in all essential respects to the one sued on in the recent case of *Leonard* v. *State ex rel. Attorney General,* 185 Ark. 998, 50 S. W. (2d) 598, and, like the contract there involved, is unenforceable as such, for the reason that it was not let in the manner and form prescribed by law. We said, in the Leonard case, *supra,* that the only question involved in that appeal, and the only question which we decided, was

that of the validity of the contract sued on, and we held that it was not enforceable as a contract, for the reason that the statute had not been complied with in letting it.

In the later case of *Arkansas State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71, suit was brought upon another similar contract to recover *quantum meruit* for the value of labor and materials furnished by the plaintiff in the construction of portions of the State highway system. A writ of prohibition was prayed against the chancellor presiding, upon the ground that his court was without jurisdiction to hear and determine the case. The writ was denied for the reason there stated "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 will be observed that the direction to the court below was not to assess damages for the breach of a contract, for there was no contract enforceable as such, but to determine the value of the work and material of which the Commission had received the benefit.

In the case last cited we reviewed the conflicting views of the members of the court which resulted in a composite opinion authorizing suits against the Highway Commission, and, in that connection, said: "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 of article 5 (of the Constitution) be merely declaratory of the general doctrine that the State may not be sued in her courts unless she has consented thereto." The opinion

then cited the legislative acts under which this authority has been conferred.

At the time of the rendition of the opinion from which we have just quoted, it was a mooted question whether § 17 of act 15 of the Special Session of 1932 was valid legislation as being within the purview of the Governor's call convening the extraordinary session of the General Assembly at which act 15 had been passed. Acts of extraordinary session, 1932, page 34. Without deciding the validity of this section of act 15 we there said: "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." This opinion was delivered on November 28, 1932, and on December 5, 1932, the opinion in the case of *State Note Board* v. *State ex rel. Attorney General,* 186 Ark. 605, 54 S. W. (2d) 696, was delivered in which it was expressly held that § 17 of act 15 was authorized by the proclamation of the Governor convening the extraordinary session of the General Assembly which passed the act. This § 17 recognized that there were outstanding many claims against the Highway Commission which had not been adjudicated or paid, and authorized the State Note Board to issue notes in payment, with the proviso, however, that "* * * 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."

We are aware of no legislation which has repealed § 17, *supra,* either expressly or by necessary implication, although the provisions of that section with respect to the manner of payment of these claims appear to have been changed by the provisions of act 167 of the Acts of

the 1933 Session of the General Assembly, which was approved March 28, 1933, and, having an emergency clause, became a law on that date.

The decree from which this appeal comes was rendered February 21, 1933, and directed the Highway Commission to issue a voucher to the plaintiff for the amount adjudged to be due him. The subsequent act 167 requires a modification of the decree in this respect, as the provisions of that act must be followed.

Section 1 of act 167 reads as follows: "The issuance of Arkansas State Bonds, hereinafter called State bonds, is hereby authorized in a total sum equal to the aggregate of the entire outstanding indebtedness of the State on account of the construction and maintenance of the State Highway system, including all State Highway notes or bonds, toll bridge bonds, revenue bonds, valid outstanding road district bonds on which the State has been paying interest under act No. 11 of the Acts of 1927 and act No. 65 of the Acts of 1929, hereinafter called road district bonds, certificates of indebtedness issued or authorized under act No. 8, approved October 3, 1928, and act No. 85 of 1931, short term notes issued under act No. 15, approved April 14, 1932, all valid claims against the State Highway Commission and all warrants and vouchers issued by the State Highway Commission prior to February 1, 1933, together with the interest on the respective obligations and claims. Such bonds shall be the direct obligation of the State, for the payment of which, principal and interest, the full faith and credit of the State and all its resources are hereby pledged. They shall be dated May 1, 1933, shall be payable in twenty-five years, and shall bear interest at the rate of three per cent. per annum, the interest to be payable semi-annually, and to be evidenced by attached interest coupons."

Section 5 of act 167 reads as follows: "The holder of any State Highway note or bond, toll bridge bond, revenue bond, valid road district bond or short term note issued under act No. 15 may deposit the same with the State Treasurer for exchange for a State bond of equal face value. All other obligations and claims mentioned in § 1 shall be presented to and examined by the State

Refunding Board, and, if allowed, may be presented to the State Treasurer, with the certificate of allowance, and exchanged for a State bond of the face value of the amount allowed by the board."

The claim here sued on, being embraced in the provisions of § 5, *supra,* will be presented to the State Refunding Board, but, as its validity has been approved by a court of competent jurisdiction, prior to the passage of act 167 and that decree is affirmed by us, for the reasons hereinafter stated, the Refunding Board will, as to this particular claim, have only the ministerial duty to perform of certifying the claim for allowance for exchange for a State bond.

We have construed this act 167 because it relates to the manner of enforcing the decree from which this appeal comes, although the Attorney General says in his excellent brief that "The only question involved in this case is whether the State is under a liability to the appellee Keaton for materials furnished and services rendered under an invalid contract, or, what may be more properly termed, no contract at all." The question is otherwise stated in this brief to be whether there is liability for the value of labor performed and materials furnished of which the Highway Commission has had the benefit, which cannot be returned or restored, under the doctrine of *quantum meruit.*

Through the diligence of counsel many cases have been cited and discussed on this subject. We do not review these cases, as the law of the subject appears to have been definitely and frequently decided, and the only difficulty is in the application of settled legal principles to particular facts.

In the instant case it is not contended that there was any fraud or corruption in the attempt of the parties to make a binding contract. Nor is the contract an immoral one; nor was it prohibited by law or public policy; nor was it in excess of the power of the Highway Commission to make. The contention is that the contract was not made in the manner and form provided by law and was therefore void, and, this being true, no enforceable rights can arise out of it.

In the class of contracts first mentioned which are immoral or illegal, or which are prohibited by law or public policy, or which are in excess of the power of the parties to make, it is immaterial whether the contract has been partially or wholly performed, or whether the consideration has passed or not. The courts lend no aid to the enforcement of such contracts. This subject was reviewed somewhat extensively in the case of *Carter* v. *Bradley County Road Imp. Dists. Nos. 1 and 2,* 155 Ark. 288, 246 S. W. 9, where recovery on a *quantum meruit* was denied for the reason that the plaintiff, to establish his case, was compelled to prove and rely on a contract prohibited by law.

The instant case arises out of an attempt on the part of the Highway Commission to contract with the plaintiff for the construction of bridges as a part of the State highway system. The law empowering the commission to make and let the contract was not complied with, and for this reason only the courts will not enforce the agreement of the parties in relation thereto according to its terms. The Highway Commission had the power and was under the duty to have the bridges built. The law conferred this express power upon the Commission. The bridges were built, and the question is whether the value thereof shall be paid.

The case of *Clark* v. *United States,* 95 U. S. 539, was one in which officers of the United States were authorized to enter into contracts upon behalf of the government, but the statute conferring that authority required that such contracts be reduced to writing and be signed by the contracting parties, which statute was there construed to be mandatory and in effect to prohibit and to render unlawful any other mode of making the contract; yet, the government having received the benefits of the contract, it was held, to quote a headnote in that case, that: "Where, however, a parol contract has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a *quantum meruit.*" See also *Pulman Car Co.* v. *Transportation Co.,* 171 U. S. 138, 18 S. Ct. 808; *Marsh* v. *Fulton County,*

10 Wall. 676, 77 U. S. 676; *Louisiana* v. *Wood,* 102 U. S. 294; *City of New York* v. *Davis, Director General of Railroads,* 7 Fed. (2d) 566.

The case of *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891, was one in which the city purchased and installed a machine to be operated in connection with its waterworks system. The opinion in that case recited that: "This contract was not authorized by any ordinance, resolution or order of the city council wherein the yeas and nays were called and recorded, as required by § 5473 of Kirby's Digest, nor was it ratified by any formal action of the city council. The contract was therefore void. *Cutler* v. *Russellville,* 40 Ark. 105." But, immediately following this statement of fact, the court proceeded to say: "A different principle prevails, however, where a contract, which is within the power of the municipality to make, is made without authority, but passes from an executory state, as it was in *Cutler* v. *Russellville, supra,* to an executed one, where the benefit is retained by the municipality. Then it is held that the municipality cannot retain the property which might properly have been purchased for it in proper manner and defeat a recovery for the price thereof, or recover back the price if paid. *Frick* v. *Brinkley,* 61 Ark. 397, 83 S. W. 527; *Springfield Furniture Co.* v. *School Dist.,* 67 Ark. 236, 54 S. W. 217; *Book* v. *Polk,* 81 Ark. 244, 98 S. W. 1049; *Texarkana* v. *Friedell,* 82 Ark. 531, 102 S. W. 374; *School Dist.* v. *Goodwin,* 81 Ark. 143, 98 S. W. 696; *Luxora* v. *Jonesboro, L. C. & E. Rd. Co.,* 83 Ark. 275, 103 S. W. 605." Numerous other cases to the same effect are cited in the brief of counsel for appellee and in the brief filed by *amicus curiae.*

We conclude therefore that, a benefit having been received which cannot be returned, which was derived from an agreement between parties having power to make it, which was neither illegal nor immoral, nor in violation of public policy, but which agreement cannot be enforced according to its terms because not made in manner and form provided by law, a recovery was properly permitted. The decree, modified in the respect hereinabove indicated, must therefore be affirmed, and it is so ordered.

KIRBY, J., dissents.

BANK OF CONWAY *v.* HIEGEL.

4-2967

Opinion delivered April 24, 1933.

R. W. Robins, for appellant.

Clark & Clark, for appellee.

KIRBY, J., (after stating the facts). In *Taylor* v. *First National Bank of De Queen,* 184 Ark. 947, 43 S. W. (2d) 1078, this court held that, where checks received in the ordinary course of business between respective banks, not for collection but for payment which they attempted to effect by charging them to the accounts of the depositors who had drawn them, and by delivery of the draft for the difference between the respective amounts of the checks, the relation of debtor and creditor arose between the two banks and not an agency or trust relationship.

It has been held, where the drawers of an order had funds in the hands of the drawee on its presentation, a waiver by the payee of a cash payment and an acceptance of a bill of exchange instead extinguish the debt, although the exchange proves worthless. *Loth* v. *Mothner,* 53 Ark. 116, 13 S. W. 594. See also *Johnson* v. *First Bank,* 144 Minn. 363, 175 N. W. 612, 9 A. L. R. 960; *Fed-*

eral Reserve Bank v. *Malloy,* 264 U. S. 160, 44 S. Ct. 296, 31 A. L. R. 261; *Missouri Pac. Rd. Co.* v. *Taylor,* 185 Ark. 211, 46 S. W. (2d) 642; vol. 1, Paton's Digest, page 257, § 1566.

From these cases it will be seen that only the relation of debtor and creditor arose between the two banks upon the clearance of checks and giving the bill of exchange in payment of the difference, and not an agency or trust relationship; and, the check being presented to the bank, not for collection, but for payment, the transaction amounted to a payment, so far as the drawers of the check, appellees, were concerned, and they are discharged, the drawer having funds in the bank to its credit, the check in effect having been paid by the drawee upon presentation, it being conclusively presumed that he did not accept something in lieu thereof for which it had not been drawn—could not accept at the drawer's risk a check of the drawee upon some other bank.

No error therefore was committed in the decree of the chancellor, and it is affirmed.

TAYLOR *v.* CRAWFORD.

4-2944

Opinion delivered April 24, 1933.

Bridges, McGaughy & Bridges, for appellant.

E. W. Brockman, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in holding the claims of interveners for liens to be prior claims.

The testimony is virtually undisputed that W. E. Massey and the Merchants' & Planters' Bank & Trust Company furnished the tenants to work the lands rented from the interveners in 1930, and that the interveners did not waive their landlord's liens for rent. That Massey executed a statement in writing, which was delivered to and accepted by the bank, showing the amount of

rents due each respective intervener for rent upon his lands for that year, and that the landlord's lien had not been waived thereon; that the bank, acting with Massey in pursuance of its oral agreement and with full knowledge of the interveners' prior claims, furnished the money with which to make and gather the cotton, and sold the crop off the interveners' lands as alleged and received the proceeds of the sale thereof, agreeing to pay the rents out of such proceeds when collected; that the proceeds of the sales had not been remitted when the bank was declared insolvent, and said proceeds have had a distinctive identity in the hands of said bank, have actually increased its assets and did not result from shifting its liability from one of its creditors to another, and that the interveners at the time were not indebted to the bank.

No error was committed in holding the claims of interveners for landlord's liens for rent as prior claims.

Section 1, act 107 of 1927, in describing the classes of preferred creditors on a bank's insolvency, in part, reads as follows:

"(6) The owner of the proceeds of a collection made by said bank and not remitted by it, or of which remittance has not been paid, when such collection was made otherwise than by honoring a check or other order upon said bank or by a charge against the account of the depositor of said bank, and the said collection has had a distinctive identity in the hands of said bank, has actually increased its cash assets, and has not resulted in merely shifting its liability upon its book from one of its creditors to another or new creditor."

When the bank undertook to and directed the sale and disposition of the cotton grown on interveners' lands and collected the drafts drawn on the purchasers for the sale price and to pay therefrom the rents due and afterwards became insolvent and was taken over by the Bank Commissioner, all money coming into its hands as collections on the rents constituted preferred claims in favor of the landlords. *Home Life Ins. Co.* v. *Taylor,* 186 Ark. 768; *Taylor* v. *Corning Bank & Trust Co.,* 183 Ark. 757, 38 S. W. (2d) 557.

It is true the appellees were not the owners of the cotton which the bank sold, but they had a lien thereon of which the bank had knowledge, and the appellees pursued the proper remedy to impress their liens on the proceeds of the crops raised on their lands which equity will fix on the proceeds in the hands of the bank. *Judge* v. *Curtis,* 72 Ark. 132, 78 S. W. 746; and *Murphy* v. *Myar,* 95 Ark. 32, 128 S. W. 359. In the latter case it was said: "The appellee had a lien on this cotton for the payment of the rent of the land; and, after appellants had, with notice of his rights, purchased the cotton from his tenant, and by sale had wrongfully converted it, the appellee had a right to fix his lien on the proceeds thereof in equity, and in the court to obtain judgment against appellant therefor."

Appellees did not seek to enforce a lien against the property of the bank, but only to fix their statutory lien on the proceeds of the cotton raised on their lands, which cotton the bank took charge of and sold with notice of their lien.

Massey was operating under orders from the bank in making the sales of the cotton and having the collections made by the bank, and, while they were deposited in his account there in his name, he was restricted in his right to check on such account by stipulation that the checks would not be honored except for the payment of the rents on the lands due for that year.

It is true the appellees were not depositors in the bank, but it had full knowledge of the appellees' first lien, undertook with Massey to sell the crops, the bank being allowed to make the collections, and necessarily increased its assets to the amount of appellees' rents, and afterwards closed its doors, ceasing to function, with the amount of appellees' rents still in its possession. The bank recognized that the interveners had a prior claim for the payment of their rents due out of the amounts collected for the cotton sold, upon which they had a lien for payment of the rents, and honored all the checks drawn by Massey in payment of such rents out of such account and proceeds, having agreed to do so before the money was collected by them and placed in the account to Massey's credit.

The bank knew that the proceeds of the sale of the cotton by it and credited to the account of Massey was subject to the payment of his check on such account for the rents of the lands or farms cultivated by him, as the bank also understood to be the case when the credit of the collections was made. The collections from the sale of the cotton had a distinctive identity in the hands of the bank, actually increased its cash assets, not resulting from merely shifting its liability upon its books from one of its creditors to another or to a new creditor, and, under the provisions of the statute and the circumstances of this case, the claims of the interveners, the claim of B. F. Hatley excepted as already stated, were entitled to priority of payment and the chancellor did not err in so holding. The decree is accordingly affirmed.

The B. F. Hatley claim, in the sum of $350, allowed by the chancellor in the sum of $199.07 as a prior claim, was barred by the six months' statute of limitations. The rent note was due November 15, 1930, and the landlord's lien only continued for six months after the rent became due and payable, and, the claim not being filed until March 12, 1932, the lien was long barred and the claim not entitled to payment, and the court erred in not so holding. Section 6889, Crawford & Moses' Digest. *Cocke* v. *Clausen,* 67 Ark. 455, 55 S. W. 846.

The decree as to the Hatley claim is reversed, and said claim dismissed.

[redacted]

MISSOURI PACIFIC RAILROAD COMPANY *v.* RODDEN.

4-2981

Opinion delivered April 24, 1933.

[redacted]

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

J. H. Lookadoo and *Bush & Bush,* for appellee.

MEHAFFY, J. J. H. Rodden, by his next friend, O. B. Rodden, brought this suit in the Clark Circuit Court against the Missouri Pacific Railroad Company. The facts, as testified to by appellee, are substantially as follows:

J. H. Rodden, the appellee, was about 19 years of age, and, prior to the time he alleged he was injured, he was at work at Sparenberg, Texas, and was coming home from there. He was accompanied by Earl Lawley and another boy, from Kentucky. Jack Williams met up with them at Dallas, Texas. They had been catching rides on the highway until they got to Texarkana, Arkansas, about two hours after dark, and went down to the railroad yards. They found a man working on the engines, and asked him what time they could get a train out of there to Prescott, and he told them between one and two o'clock

in the morning of February 29th. He told them where to catch the train up at the road crossing. They thought he was a trainman because he was working in the yards. Between one and two o'clock in the morning they caught a freight train out of Texarkana going to Prescott. The appellee's mother and father are dead, and he had been living with his uncle, O. B. Rodden, who brings this suit as his next friend.

There were about 65 or 70 cars in the freight train. They caught the train at the road crossing where the man working in the yards told them to catch it. They boarded the train on the east or right side. After they had gotten out of Texarkana a mile or two, a brakeman came from the direction of the engine and passed the appellee first. Appellee was on the back end of a car, and Lawley and Williams were on the front end of the next car behind him. The cars on which they were riding were 10 or 12 cars back of the engine. The brakeman passed appellee and then passed the other two boys and went on beyond them about 15 cars. When he came back by these two boys he was motioning to them and talking to them, and they reached in their pockets and handed him something. He then walked up to the car appellee was on and asked him what he was holding. Appellee told him he was broke and was going home; that he was hungry, and asked the brakeman to let him ride to the next stop. According to his testimony, the brakeman cursed him, and appellee told him he could not get off there without killing himself, the train was going so fast. The brakeman again cursed him and told him to get off or he would kill him. Appellee started down the ladder, and the brakeman stepped on his fingers. The brakeman hung his lantern on the door and kicked the appellee in the muscle of his right arm and paralyzed it, then kicked him in the head and chest. Appellee saw he was going to fall any way, and threw his head as far as possible. His foot struck a spike in the cattle guard. His head hit the ground, and about daylight he regained consciousness, and found that his boot was caught in the cattle guard. He pulled his foot out of his boot, and found the flesh clotted up.

The man that forced him off the train had on a hat, blue serge pants, blue jumper, and had a small lantern with a globe that was small at the top and big at the bottom. It had braces around it and protection bars. It was a regular railroad lantern.

Appellee's chest hurt him so that he could hardly get a deep breath without pain; his knee was a little stiff, and there was a skinned place on it.

An automobile came by on highway 67 and the driver carried appellee to the Missouri Pacific Hospital at Texarkana. Appellee told the driver how he was hurt; that he was kicked off a freight train. The man that took him to the doctor explained how it happened. The doctor said appellee was not hurt much. He grabbed appellee's foot, twisted the toes back, took a pair of scissors, went around the gash and cut the flesh, put medicine on it, and wrapped it up, and told appellee it would be all right.

Prior to his injury, appellee was a pastry cook in a restaurant, but he got sick and decided to go home. He has not been able to follow his occupation as a cook since he was injured. He cannot stand on his feet to work as he did before. He has not done anything since he was hurt.

He hitch-hiked his way from Sparenberg to Texarkana, and the reason he did not hitch-hike his way to Prescott was that he was broke and hungry, and wanted to get home and get something to eat. He did not buy a ticket because he did not have enough money. He was within fifty miles of Prescott and wanted to go on home.

The man in the yards that told appellee about the train was oiling an engine. The only member of the train crew that appellee saw when he got on the train was a man who caught the back end of the train, the caboose. Appellee was riding on a refrigerator car. The brakeman weighed from 140 to 170 pounds and was rather heavy-set. Appellee did not notice any badge on the brakeman, but noticed the way he was dressed, and that he was carrying a lantern. Appellee was unable to point out from the train crew which man it was who kicked him off.

The evidence on the part of the appellant contradicted the testimony given by the appellee. The jury returned a verdict in favor of the appellee for $2,000. The case is here on appeal.

The appellant contends that there is no substantial evidence to establish that appellee was ejected from the train by a brakeman.

Appellee testified that he was ejected by a brakeman. When asked how he knew it was a brakeman, he stated that he was dressed in blue overalls, wore a blue jumper, and was walking on top of the train from the front end towards the rear, and then walked back, and that he had a railroad lantern.

The conductor testified that, so far as he knew, there was no one on the train except employees of the railroad company wearing a railroad suit and carrying a lantern.

It is contended that there is no evidence to show that the party who kicked appellee from the train was a brakeman; no evidence that he was performing any duties. The jury had a right to infer that the person dressed as appellee says this person was dressed, carrying a lantern and walking on top of the freight train, doing what brakemen frequently do, was a brakeman.

In the case of *St. L., I. M. & S. R. Co.* v. *Hendricks,* 48 Ark. 177, 2 S. W. 783, the court said: "It is not urged that there was a failure of proof except in this particular, *viz*: That Cost and the other witnesses were not positive that the man whom they alleged was the cause of the injury was one of the company's employees. Upon his examination in chief, the plaintiff testified that the man alluded to was a brakeman on appellant's train, but on cross-examination he stated he did not know that to be a fact. He gave as the reason for his belief, however, that he saw the man on the platform at Cabot with a lantern, deporting himself as an employee; and James Jenkins, his other witness, who rode from Cabot to Little Rock on the train, and corroborated Cost's statement of the accident, testified that the man acted as a brakeman on the train between these points.

"If the jury credited the testimony that the man was for such a length of time aiding the company in operat-

ing its train, it was sufficient to justify the conclusion that he was a regular employee. Indeed, it would be difficult, in the most of these cases, to prove the relation of master and servant except by the fact that the one is known to perform service for the other, or from their course of dealing."

It would be difficult to make any direct proof that relation of master and servant existed between any one of the train crew and the railroad company. It is a matter of common knowledge that persons dressed as the appellee testifies this brakeman was dressed, carrying a lantern and walking on top of a freight train as this man was, is a brakeman, or in the employ of the railroad company.

The rules require the trainmen to prevent trespassers from riding on freight trains, and it is the duty of the trainmen, as the evidence in this case shows, to put such persons off the train. The rules of the company require them to do this.

It is true that the rules require the trainmen to put trespassers off the train when it is not in motion, but putting trespassers off the train is a part of their duty; and, if appellee's testimony is true, that is what this man undertook to do. We think therefore that the evidence was sufficient to submit the question as to whether this man was a brakeman to the jury.

Appellant, however, says that, if appellee had sued any one of the trainmen jointly with the railroad company for the injuries which he sustained, the court would have been compelled to direct a verdict in favor of the individual trainman because there was no evidence introduced upon which a judgment against any one of the trainmen could have been sustained. That is true, because the appellee was unable to say which one of the train crew kicked him off the train, and, in order to get a judgment against any person for a wrong, the evidence must show that that particular person committed the wrong. But the suit is not against the trainman who committed the wrong, but against the railroad company, and there is no question but that the appellant is the railroad company whose employee committed the wrong. A

person might be abused, kicked from the train by any one of the trainmen and be unable to say which one it was when he sees them in court, dressed differently from the way they were at the time of the injury.

It is said that neither of appellee's companions were called to testify. His two companions were on the freight train and were not put off. The evidence shows that Williams was from Kentucky, but does not show where Lawley was from, but they were both on the train, remained on the train when appellee says he was kicked off, and they may or may not know what became of him. At any rate, the evidence is silent as to where they went and whether they knew anything about appellee's injury.

It is next contended that there is no substantial evidence that appellee was ejected from the train by a brakeman within the scope of his employment. Appellant again relies on the Hendricks case, *supra*. The court in that case said on this question: "Whether a particular act was or was not done in the line of the servant's duty is a question to be determined by the jury from the surrounding facts and circumstances." The court further said in that case: "It was the legal right of the company to eject persons attempting to ride on its trains without paying fare, and the legitimate object of the testimony was to show that the right was commonly enforced through the class of employees that ejected the plaintiff. * * * The fact that brakemen commonly performed the duty of ejecting such persons from appellant's freight trains afforded a reasonable presumption or inference that the brakeman who ejected the plaintiff acted in the line of his duty, if the jury chose to believe that he was ejected by a brakeman for the nonpayment of his fare."

Appellant calls attention to and relies on the case of *St. Louis, I. M. & S. R. Co.* v. *Pell,* 89 Ark. 87, 115 S. W. 957. This case expressly approves the doctrine announced in the Hendricks case. If the person who kicked appellee from the train was acting in the course of his employment, the railroad company was liable.

"If he was, the company is liable in damages for any wrongful act of his in the course of his employment

resulting in injury to another, though he exceeded his authority." *Ry. Co.* v. *Hackett,* 58 Ark. 381, 24 S. W. 881.

If, under the rules of the company, it was the duty of the trainmen to eject trespassers from freight trains, and in doing this he exceeded his authority either by putting him off the train while it was in motion, or kicking him off, in either event the railroad company would be liable.

"A servant may do an act expressly forbidden by his employer, and yet, if it be within the scope of his authority, the employer may be liable for a resulting injury. This rule is constantly enforced in cases against railroads, electric light and gas companies, and it applies to private persons who employ servants to transact their business." *St. Louis, I. M. & S. R. Co.* v. *Grant,* 75 Ark. 579, 88 S. W. 580, 1133; *St. Louis, I. M. & S. R. Co.* v. *Robertson,* 103 Ark. 361, 146 S. W. 482; *St. Louis, I. M. & S. R. Co.* v. *Mynott,* 83 Ark. 6, 102 Ark. 380; *St. L. S. W. Ry. Co.* v. *Mitchell,* 100 Ark. 314, 140 S. W. 136; *St. Louis-S. F. R. Co.* v. *Van Zant,* 101 Ark. 586, 142 S. W. 1144; *Chicago, R. I. & P. Ry. Co.* v. *Womble,* 131 Ark. 411, 199 S. W. 81.

Appellant cites the case of *Ill. Central Rd. Co.* v. *Latham,* 72 Miss. 32. That case seems to be not only against the weight of authority, but is in direct conflict with our decisions.

It is contended by appellant that the court erred in refusing to give its requested instructions Nos. 7 and 9. No. 7 reads as follows: "If you find from the evidence that J. H. Rodden was assaulted by one of the defendant's employees while he was riding as a trespasser upon one of the defendant's trains, still if you further find that such employee was acting outside of the scope of his employment and contrary to instructions of his employer when committing said assault, then the defendant is not liable and you should so find."

That instruction is erroneous because it tells the jury, among other things, that, if the employee was acting contrary to his instructions, they must find for the defendant.

No. 4, given at the request of the appellant, covers everything in No. 7 except the statement about being contrary to instructions.

No. 9 reads as follows: "If you find from the evidence that J. H. Rodden was assaulted and ejected from the train by one of the defendant's brakemen, and you further find that said brakeman assaulted the said J. H. Rodden and ejected him from the train because the said J. H. Rodden failed or refused to pay the brakeman to permit him to ride on the train, then your verdict should be for the defendant." No. 9 was correctly refused. If it was the duty of the trainmen to eject trespassers, the fact that the brakeman did this because appellee refused to pay would be immaterial.

It is next contended by appellant that the verdict is excessive. The evidence showed that the spikes stuck in appellee's foot; that his knee and chest were injured; that he is unable to do the work he did before he was injured, and that he still suffers pain. He was earning from $60 to $75 per month before the injury, and is now unable to do the kind of work he formerly did.

The facts above stated, we think, are sufficient to justify the verdict. Whether it was a brakeman who kicked the appellee off the train, and whether he did it while acting within the scope of his authority, are questions of fact, and were properly submitted to the jury.

If there is any substantial evidence to sustain a verdict, this court cannot set it aside, although we might believe that it was contrary to the preponderance of the evidence. We do not pass on the weight of evidence nor the credibility of the witnesses.

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

McRAE *v.* HAMMOND.

4-2984

Opinion delivered April 24, 1933.

Emmet Vaughan, for appellant.

Glen H. Wimmer, for appellee.

McHaney, J. This lawsuit originated in the justice court, where appellant suffered defeat, was appealed to the circuit court with like result, and now it is here and must be affirmed. It arose in the following manner: George Wright Jones leased a sawmill at Des Arc. He had a customer in Memphis who desired to purchase two carloads of pecan lumber. Jones did not have the lumber nor any money with which to buy the logs to make it. Appellee Hammond had the timber and agreed with Jones to furnish the logs at the mill for $16 per thousand feet with the understanding that the labor and cost of the logs were to be first paid out of the sale price of the lumber before Jones was to have anything. Whatever remained over and above the cost of labor and logs was to go to Jones. The lumber was to be inspected and paid for in Des Arc before shipment. One carload was thus handled, but appellee did not get any pay for his logs. The second car was delayed in manufacture by a breakdown in the mill, and the inspector had to return to Memphis, so it was agreed that this car should be shipped subject to destination inspection. Later it was loaded, billed to purchaser, and, while on the siding awaiting transportation, was attached by appellant, a creditor of Jones. Appellee intervened, setting up his rights, and it was agreed that the car be delivered, the proceeds placed in bank pending a determination of the rights of the parties. The amount due appellee for logs exceeds the proceeds of the sale of the second car, and approximately all the proceeds of the first car was required to pay the labor and repair the mill.

Appellant's contention is that the lien of his attachment is superior to appellee's lien for the purchase money of the logs. We cannot agree with this contention. The only equity Jones had in the lumber was the excess over the cost of the logs and the labor for manufacturing them. As we have already stated, there was no excess. The proceeds of the sale, after deducting $50 advanced to Jones by the purchaser, were insufficient to pay appellee for the logs. Appellant's debtor, Jones, therefore had no inter-

est in the second car which could be attached by appellant. The undisputed evidence is that appellee agreed to furnish the logs to manufacture the lumber, and that it was to be inspected by the purchaser and the logs paid for before the lumber left Des Arc. The court should have directed a verdict in appellee's favor, as there was no question of fact to submit to the jury. And it can make no difference that the first car was shipped without paying appellee.

This makes it unnecessary to discuss the errors assigned in the giving and refusing to give certain instructions.

Affirmed.

ARKANSAS TRUST COMPANY *v.* BATES.

4-2959

Opinion delivered May 1, 1933.

Murphy & Wood, for appellant.

Jay M. Rowland, for appellee.

SMITH, J. On April 27, 1926, S. P. Johnson entered into a written contract with Mrs. Georgia A. Bates for the conveyance of two certain lots in the city of Hot Springs. One lot was described as part of lot 27, block 27, fronting 75 feet on Spring Street, and its purchase price was recited to be $3,500, of which $1,750 was to be secured by a lien on the property sold, and the other half of the purchase money was to be secured by a mortgage on a lot on Cottage Street owned by Mrs. Bates. The second lot was described as part of lot 3, block 27, fronting 100 feet on Spring Street, and adjoining lot 2, and the price thereof was recited to be $6,000, of which $1,000 was to be secured by a mortgage on the Cottage Street lot. The contract of sale recited that "the said lien of $5,000 is to be paid at the rate of $1,000 per year until same is fully paid; and the $2,750 mortgage and the $1,750 lien on part of lot 2 is to be paid at the rate of $500 in two years and $500 each year until same is fully paid; or, at the option of the purchaser, may pay all of same on or before five years from date."

Pursuant to this contract, a deed was executed on May 7, 1926, by Johnson to Mrs. Bates, in which the title was warranted to be clear of all incumbrances. At the time of the execution of this deed there was outstanding a lease from Johnson to J. A. Porter covering the west half of lot 2, block 27, "for the term of ten years, to commence the first day of December, 1925, at the monthly rent of thirty dollars per month, payable the first day of

every month." The lease required Porter "to keep houses and place in good repair during the time of the lease."

On September 14, 1927, Johnson conveyed to Mrs. Bates another lot adjoining the two above described, for the consideration of $4,066.50, of which $500 was paid in cash, the balance being secured by a vendors lien on the property sold. This last conveyance was an entirely separate transaction from the first.

Mrs. Bates made no payments on any of these purchase money notes, and on June 9, 1927, a suit was filed to enforce the payment thereof. This suit was brought upon the theory that an annual payment of $350 was due on the $1,750 note, and that an annual payment of $1,000 was due on the $5,000 note. A suit was later brought to foreclose the lien reserved in the second deed, and these suits were consolidated and tried together.

Mrs. Bates was advised of the outstanding lease after entering into the contract of April 27, 1926, but before the delivery of the deed, and knew that Porter was in possession of lot 2, but she was also advised that Porter would surrender possession on demand. However, she took a deed with full covenants of warranty against incumbrances, and it is not seriously questioned that this lease was an incumbrance which constituted a breach of the warranty. It is not admissible to show by parol evidence that a covenant against incumbrances was not intended by the parties to apply to a particular incumbrance, in the absence of fraud or mistake, where no exception to that effect is contained in the deed itself. *Hardage* v. *Durrett,* 110 Ark. 63, 160 S. W. 883, L. R. A. 1916E 211, Ann. Cas. 1915D 862; *Musial* v. *Kudlik,* 87 Conn. 164, 87 Atl. 551, 34 Ann. Cas. 1914D 1172; *Crawford* v. *McDonald,* 84 Ark. 415, 106 S. W. 206.

Upon the delivery of the deed, Mrs. Bates collected rent from Porter for the months of June, July, August and September, 1926, but in August of that year she gave Porter notice to vacate, and, when he refused to do so, she later brought suit to evict him. Porter later assigned his lease to R. A. Moore, and Mrs. Bates continued the effort to evict Moore.

At the time of the delivery of the deed to Mrs. Bates there were seven buildings on lot 2, of cheap construction, which some of the witnesses referred to as "shacks." The other lots were practically unimproved. Porter and Moore, his sublessee, erected five other similar buildings on lot 2. There was testimony to the effect that lot 2, containing the improvements, was more valuable than lot 3, and that the recital of a larger purchase price for lot 3 than for lot 2 was purely arbitrary, and that the real consideration was not $3,500 for the one lot and $6,000 for the other lot, but was $9,500 for the two lots. This testimony was competent, as the plaintiff in a suit for damages for breach of a covenant of warranty may show that the actual consideration was greater than that expressed in the deed, for the purpose of increasing the damages, just as the defendant may show that the consideration was less, for the purpose of reducing the damages, but not for the purpose of defeating the deed or a recovery on the covenant. *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *J. H. Magill Lbr. Co.* v. *Lane-White Lbr. Co.,* 90 Ark. 426, 119 S. W. 822; *Bass* v. *Starnes,* 108 Ark. 357, 158 S. W. 136. But we think this fact unimportant in this case, and we do not stop to inquire whether the testimony sustains this contention or not.

Failing to evict Porter and Moore, Mrs. Bates took possession of one of the buildings which she found vacant, and Moore caused her to be arrested for trespassing. There followed suits for false imprisonment and slander and certain other litigation, the merits of which we find it unnecessary to consider.

After much testimony had been offered, the court below rendered a decree, from which this appeal comes, finding that there had been a breach of the covenant of warranty. It was found also that Mrs. Bates had made no payments of purchase money except those recited in the deeds. The court canceled the lease to Porter, which had been assigned to Moore, for the nonpayment of the rent reserved, and held that Mrs. Bates was then entitled to the immediate possession of all the property, and there is no appeal from this part of the decree. The court found the fact to be that the rental value of the

property covered by the lease was $100 per month, and that Mrs. Bates was entitled also to a credit of $1,000 for attorney's fees, and $55 for costs expended. There appears to be no question as to the amount of purchase money due, with the interest thereon, which the court found and decreed to be $14,858.23 on the date of the rendition of the decree.

The important question of fact in the case is the rental value of the property covered by the lease, which constituted a breach of the covenant of warranty, and we have concluded that the rental value as fixed by the court below is grossly excessive. The property had been rented prior to Porter's lease for $20 per month, and that tenant had refused to renew the lease at the same amount. The rent reserved in the Porter lease was $30 per month, and, while this is not conclusive as to the rental value as against Mrs. Bates, it is evidentiary of the rental value. *Missouri Pacific R. R. Co.* v. *Frost,* 146 Ark. 472, 225 S. W. 645.

As appears from facts already stated, this litigation was pending in the chancery court for several years, and, during the two years immediately preceding the rendition of the final decree, a receiver was in charge of the leased property, and he reported that he had been able to collect during those two years only $7.33, and this he was allowed to retain as compensation for his trouble. It was shown that, while Moore was in possession, there was a demand for this property, and, during what is known as the "season" at Hot Springs, the property had rented for as much as $180 per month. To earn this sum, however, required the entire time and attention of a manager, and the most illuminating testimony on this subject was given by H. H. Hastings, who had been employed in that capacity by Moore. He had kept books on the receipts from the leased property, and stated the expenses, including his own compensation, which were incurred to earn $180 during the "season." These expenses included water, lights and laundry, but did not include repairs, which the tenant was required to make at his own expense. Hastings stated that there was a net profit of $45 per month, and we have concluded that,

for the entire period during which the lease constituted an incumbrance, the rent should be computed at $40 per month.

On behalf of Mrs. Bates, it is insisted that she should be allowed credit for rent, not merely to the date of the rendition of the decree, but to the date of the expiration of the lease, and the case of *Bass* v. *Starnes,* 108 Ark. 357, 158 S. W. 136, is cited in support of that contention. It was there said: "It is true that 'where the incumbrance is an unexpired term or lease, the general rule, at least in the absence of any special circumstance, is that the measure of damages will be the fair rental value of the land to the expiration of the term. The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance, which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use.' *Fritz* v. *Pusey,* 31 Minn. 368, 18 N. W. 94; Rawle on Covenants for Title, (5 ed.) § 91. See also case note 35 L. R. A. (N. S.) 779."

However, this lease had expired, as found by the court below, it being there adjudged that the lease had forfeited on account of the nonpayment of the rent, and the lessee and his assignee have not appealed from that adjudication. No rent can therefore be allowed since the rendition of this decree, its date being October 11, 1932, but credit should be allowed, at $40 per month, from October 1, 1926, to the date of the decree.

The court allowed Mrs. Bates $1,000 for attorney's fees, which we think was excessive. There was much litigation which had its origin in the facts herein stated, but which cannot be taken into account in determining the fee to be allowed her. The law is settled that, under a covenant to warrant and defend title, the covenantee is entitled to recover the costs and necessary expenses incurred in a *bona fide* defense or assertion of the title, including a reasonable attorney's fee. *Beach* v. *Nordman,* 90 Ark. 59, 117 S. W. 785; *Brawley* v. *Copelin,* 106 Ark. 256, 153 S. W. 101; note to *Beutel* v. *American Machine Co.,* 35 L. R. A. (N. S.) 781. But there is no au-

thority for the payment of attorney's fees in collateral litigation. We think a fee of $250 would be fair and reasonable, and the decree will be modified in this respect also.

The case of *O'Bar* v. *Hight*, 169 Ark. 1008, 277 S. W. 533, is not opposed to the view here announced. There damages were claimed in a suit for breach of warranty, these including the fee of an attorney in the sum of $326.50 and the court costs. In a suit to collect these damages, an additional fee of $250 was there asked and allowed. The court allowed both fees, but we held that the allowance of the $250 fee was error. So here Mrs. Bates should have credit only for a reasonable fee in the litigation directly involving the incumbrance upon the title. She will, however, be allowed the item of $55 which was allowed by the court below.

The decree is therefore reversed, and the cause will be remanded with directions to state the account between the parties in accordance with the views here expressed, and for further proceedings not inconsistent with this opinion.

ILLINOIS BANKERS LIFE ASSURANCE COMPANY *v.* WILKEN.

4-2973

Opinion delivered May 1, 1933.

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

J. F. Holtzendorff, Thos. C. Trimble, W. W. McCrary, Jr., and *Thos. C. Trimble, Jr.*, for appellee.

HUMPHREYS, J. Appellee brought suit against appellants in the circuit court of Prairie County, Northern District, to recover on a life insurance policy issued to Thomas G. Guidos on the 3d day of May, 1926, in consideration of the payment of an annual premium of $36.50, which policy contained a paragraph providing that the insured should have a right to deposit with the insurer, in addition to the annual premium required, the sum of $31.70 for the purpose of creating a saving fund which should bear 4 per cent. compound interest per annum and which was credited to the fund at the close of each policy year. It was alleged that Thomas G. Guidos died on September 25, 1931, at which time the policy was in full force and effect.

Defendants filed an answer denying any liability on the policy, alleging that same was forfeited for failure to pay the annual premium on May 3, 1931, or during the thirty-day grace period that expired June 3, 1931.

The cause was submitted to the court, sitting as a jury, upon the pleadings and testimony adduced by the respective parties, which resulted in a judgment against appellants for $2,461.70, $295.40 penalty, together with interest on the total amount at the rate of 6 per cent. per annum from date of judgment until paid, and an attorney's fee of $350, from which is this appeal.

The annual premium on the policy was paid each year from the date thereof until May 3, 1931. The insured failed to pay the premium of $36.50 on that date. There was, however, on that date, to the credit of insured, accumulated savings in the sum of about $140, out of which the annual premium was payable. The insurer failed to apply any part of the savings fund to the payment of the premium. On the 8th day of May, 1931, the insured wrote to the insurer as follows:

"Gentlemen: I want to cash in all of my accumulated savings fund which I can cash in up to date. Please send it as soon as possible."

In answer, the insurer wrote as follows on May 15, 1931:

"We have your letter of May 8, 1931, relative to our above-numbered policy. Your policy has a savings accumulation of $140, which is subject to withdrawal. Have you, however, considered the advisability of leaving this money to the credit of the policy to pay premiums if the need arose? There might be an occasion when you would find it impossible to pay premiums, and in that case the savings fund could be used for that purpose, thus keeping the policy from lapsing and maintaining for you an insurance protection which would otherwise be lost. If you find that you must withdraw this money, you may execute and return the inclosed request for withdrawal of savings form, and we will send you the money. On the reverse side of this form please indicate how you wish to continue your policy in the future."

The insured executed and returned the form for withdrawal and received a check inclosed in the following letter, dated June 4, 1931:

"According to the request for withdrawal of savings form which you returned to this office, we are inclosing herewith our check, No. 12969, for $140, which refunds to you the savings fund accumulation to the credit of your above-mentioned policy. Will you please advise us as to how you wish to continue your policy in the future in accord with the three options set forth in our letter of May 15? We are glad to have been of service to you in this instance and shall be pleased to administer to your insurance needs in the future."

The policy contained a grace period of thirty days, in which the premium might be paid after the due date. It also contained two clauses relative to the application of the accumulated savings fund to the payment of the annual premium as follows:

"(c) Should the insured fail to pay any premium on this policy when due, the savings fund accumulation to the credit of this policy shall, without action on the

part of the insured, be applied to such premium so long as the amount of the savings fund to the credit of the policy shall be sufficient to pay two quarterly premiums."

"(f) There shall be no obligation on the part of the association under provisions (c) or (e) as recited above, except to apply the accumulation to the credit of this policy to the payment of premiums as they fall due and to mail to the insured a receipt for each premium paid thereunder."

The judgment of the trial court was based upon the finding that, under clauses (c) and (f) in the paragraph entitled "savings fund" in the policy, it was the duty of the insurer to pay the annual premium of $36.50 on May 3, 1931, out of the accumulated savings. The appellant contends that, under the clauses, no duty rested upon it to apply any part of the savings fund to the payment of the annual premium until the expiration of the 30-day grace period, which would not be until June 3, 1931. The language of the clauses is too plain to bear such a construction. They plainly state that such duty rests upon the insurer when the premium falls due. There can be no question that the premium became due May 3, 1931. The grace period of 30 days was a privilege extended to the insured to pay the same after maturity. If the intention had been to make the application at the expiration of the 30-day grace period, unambiguous language could have been employed to express such intent. Certainly, it cannot be said that the use of the words "when due" in clause (c) and "as they (premiums) shall fall due" in clause (f) meant some other date than the maturity date. Under clause (c), the insurer obligated itself to make the application on the due date without any action on the part of the insured.

"The rule is that insurance companies cannot declare forfeiture of policies for the nonpayment of premiums when they have sufficient funds in their hands belonging to the insured to pay the premium, and the duty rests upon them to use the funds to pay the premiums and thereby prevent forfeitures." *Security Life Insurance Company* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865. So, even if the contract had not provided for

the application on the due date, the law would have made the application. There was ample in the savings fund to pay the premium on the due date. The subsequent withdrawal of more than the insured was entitled to did not and could not work a forfeiture of the policy. The insured, in the letter of date May 8, 1931, did not ask to withdraw more than he was entitled to. No specific amount was requested. He only requested to withdraw all he could withdraw. The amount thereof was left to the insurer, and the fact that it sent more than it should have sent cannot work a forfeiture of the policy. When it sent the check on June 4, its letter did not contain a statement that the policy had been forfeited by failure to pay the last premium, but, on the contrary, it contained an interrogatory to the insured as to what arrangement he intended to make about the payment of his future premiums. If the policy had then been forfeited by reason of the insured's failure to pay the premium due on May 3, 1931, it would not have propounded such an interrogatory to the insured. Appellant simply made a mistake in overpaying the insured, and cannot take advantage of its mistake to declare a forfeiture of the policy and thereby avoid the payment thereof.

No error appearing, the judgment is affirmed.

SMITH, J., (dissenting). The policy sued on contained a table showing the amount of the savings accumulations at the end of each year it had been kept in force. The insured not only had this information, but he was advised that this value at the time of the correspondence was $140. The premium was due May 3, with thirty days grace. Did the insured write, on May 8th, that he intended to withdraw his savings, less the premium then due but not delinquent? He did not. He stated that he wanted "to cash in all of my accumulated savings fund which I can cash in up to date," and that he wanted this money as soon as possible. Is there any indication that he wished to pay the premium then due and have the balance remaining sent him? The insurer did not so interpret this letter; nor do I.

The reply to this letter told the insured how much he might withdraw, but urged him not to do it. Still urg-

ing the insured to keep the insurance in force, the letter inquired how he would do so if he withdrew his accumulations.

The letter from the insurer failed to persuade the insured not to withdraw his accumulations, and he executed and returned the form for withdrawal, and received a check for the full amount of the accumulations, which was enclosed in a letter advising him that the check "refunds to you the savings fund accumulations to the credit of your above-mentioned policy." Can the insured, or his beneficiary, now be heard to say that he did not know that the plain and unequivocal direction contained in his first letter had been complied with? He had asked for "all of my accumulated savings," had been told what they were, and had been advised not to withdraw them. But he had the right to do this, and he did it, and, having withdrawn and appropriated these savings, he could not expect his premium to be paid with the money thus withdrawn and appropriated.

Now, this policy did contain clause (c), set out in the majority opinion, and it was there provided that, "without action on the part of the insured," the savings fund accumulation should be used to pay premiums. What does this language mean? Plainly that, if the insured did not otherwise direct, the accumulations would be applied to premiums so long as they sufficed to pay them. It certainly did not mean that the accumulations were to be so used when the insured had otherwise directed, that direction being to send him the money, and to do so at once. Certainly, he could not withdraw the money and pay the premiums with it, too, no more than he could eat his pie and have it, too.

The insurer made no mistake. It only paid the insured what he was entitled to withdraw, and had the right to demand, and what he did demand, and did receive.

I therefore dissent, very respectfully, but very earnestly, and am authorized to say that Justice McHaney concurs in this dissent.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* GLASCOCK.

4-2998

Opinion delivered May 1, 1933.

[redacted]

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

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

KIRBY, J., (after stating the facts). It is first insisted that the court erred in not requiring appellees to make a cost bond upon its motion made during the trial. The motion for cost bond, however, is not shown in the record, nor that any exception was saved to the ruling of the court thereon, nor was the failure to require the giving of the cost bond set out in the motion for a new trial; and this objection therefore cannot be considered here.

In addition, the plaintiffs alleged in their complaint that they were residents of the State of Arkansas, and there was no denial thereof. The motion was not made until after the trial had been proceeded with, the jury impaneled, and part of the testimony heard; and the testimony on the point cannot be said on the whole to have established nonresidency anyway.

It is next contended that the court erred in giving appellees' requested instruction No. 1, objected to, which was written in three different paragraphs. No specific objection was made to any of them, but only a general objection was made to the instruction as a whole. At least two of the clauses are correct statements of the

law, and conceding, not deciding, the other incorrect, since the instruction was not wholly wrong, the defect should have been reached by a specific objection and not a general one. No error was committed in giving it. *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507; *St. Louis I. M. & So. Ry. Co.* v. *Barnett,* 65 Ark. 255, 45 S. W. 550.

Appellant's requested instruction No. 2 contained the language that "such employee wilfully by threats or violence or by violence caused said Floyd Glascock to get off the train while it was running, etc.," submitted the same question to the jury as was objected to by appellant in appellees' said instruction No. 1; and, having concurred in the error complained of, if it was error, waived it and cannot now complain here. *St. L., S.-F. Ry. Co.* v. *Vaughan,* 88 Ark. 138, 113 S. W. 1035; *Wisconsin-Arkansas Lumber Co.* v. *Ashley,* 158 Ark. 379, 250 S. W. 874.

The undisputed testimony shows that this appellee, Glascock, and his companions were around the station at Haleyville, intending to ride free on the freight train going out of there. They acquired information from the trainmen about the time it would leave. They had seen the special agent, whose duty it was to protect the train from trespassers or persons who might break into the cars, and he had told them not to get on the train. That they had caught the train; and three witnesses testified that the special agent, by intimidation and fear by threatening to shoot them off the train, forced them to leave it at a dangerous place, and, as a result of the fall therefrom, two of the boys were very severely injured. The special agent knew where the trestle was, and the three boys, one of whom was not forced from the train, saying he could not leave it because of the trestle, notwithstanding which the special agent walked a few steps, threw his flashlight into the eyes of the other boys and forced them to jump from the train while it was moving on the trestle, and the agent knew such to be the case.

It is true he denied that he had gone on top of the train at all or made any threats or had anything to do with ejecting the boys from the train, and two other witnesses corroborated him about his having remained in

the cab of the engine all the way from Haleyville to the next station, but the jury believed the testimony of appellees, and it is ample to sustain the verdict, which is not claimed by the appellant to be excessive.

The injury having occurred within the State of Oklahoma, the laws of that State govern as to the liability, if any, but the remedy to recover damages on account of the injury must be pursued according to the law of this State where the suit was brought. *St. L.-S. F. Ry. Co.* v. *Coy,* 113 Ark. 265, 168 S. W. 1106; *St. L., I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240, 135 S. W. 874.

The Oklahoma courts have held that it is unnecessary to show actual physical violence and assault to sustain an action for wrongful ejection of a trespasser and "that, if by threats and show of force he (the conductor) impels one through fear to jump from the moving train, and injury results, the master will be liable." *Folley* v. *C. R. I. & P. Ry. Co.,* 16 Okla. 32, 84 Pac. 1090; see also 52 C. J. 638-39; *Kansas City F. S. & G. Rd. Co.* v. *Kelley,* 36 Kan. 655, 14 Pac. 173; *Kline* v. *C. P. R. Co.,* 27 Cal. 400, 99 Am. Dec. 282; *Pierce* v. *North Carolina Ry. Co.,* 124 N. C. 83, 32 S. E. 399; *St. Louis-S. W. Ry. Co.* v. *McLaughlin,* 129 Ark. 377, 196 S. W. 460; see also *Missouri Pac. Rd. Co.* v. *Rodden, ante* p. 321.

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

WASSON *v.* CASTETTER.

4-2975

Opinion delivered May 1, 1933.

Archer Wheatley, for appellant.

Horace Sloan, for appellee.

KIRBY, J., (after stating the facts). The only question for determination involved in this appeal is, whether one who has purchased bank stock by giving a note in payment therefor can defeat an assessment thereon eleven years later after having renewed the note twenty-two times and used the dividends thereon for the payment of interest on the note, and further having permitted his name to appear as a stockholder of the bank on the records of the county for eleven years.

The action of the Bank Commissioner under the statute is conclusive as to the necessity for the levy of the stock assessment and cannot be disputed or defended

against by the stockholder of the failed bank. *Davis* v. *Moore,* 130 Ark. 128, 197 S. W. 295; *Aber* v. *Maxwell,* 140 Ark. 203, 215 S. W. 389; *Fee* v. *Taylor, ante* p. 204.

Appellee insists that the sale of stock to him was void, it being made on a credit and not "for money or property actually received or labor done," as required by the Constitution, § 8, art. 12; and that this court has already determined the question in *Taylor* v. *Gordon,* 180 Ark. 753, 22 S. W. (2d) 561, wherein it held that the purchaser of such stock or owner thereof is not subject to liability to the payment of the double stock assessment levied against it by the bank commissioner.

Section 8, article 12, of the Constitution provides: "No private corporation shall issue stocks or bonds, except for money or property actually received or labor done, and all fictitious increase of stock or indebtedness shall be void; nor shall the stock or bonded indebtedness of any private corporation be increased, except in pursuance of general laws, nor until the consent of the persons holding the larger amount in value of stock shall be obtained at a meeting held after notice given for a period of not less than sixty days, in pursuance of law."

The statute, § 702, Crawford & Moses' Digest, authorizing the assessment against stock by the Bank Commissioner, reads:

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

Upon the regular increase of the bank's stock so many shares were sold to appellee for a certain amount, and the stock was issued to him, indorsed and given with

his note to the bank for the amount of the purchase money, the certificates of stock being pinned to the note and held as collateral for its payment. The dividends thereafter upon these certificates of stock were paid to the holders thereof, and the note given in payment of the purchase money was renewed twenty-two times; and appellees were shown as stockholders in the bank upon the records of the county as required by law to be kept. They made no effort to repudiate the validity of the transaction until this suit was brought to collect the stock assessment duly levied against stock of the insolvent bank, of which they were the legal owners as shown upon the books of the bank and the records of the county.

The statute fixes the responsibility of the stockholders in the bank "for all contracts, debts and engagements of such bank to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such stock;" and they appeared as stockholders, the stock standing on the books of the bank in their names, having been indorsed by them and delivered to the bank as collateral security for their notes executed for the purchase of said stock, and also on the county records as such stockholders; and, as between them and the creditors of the bank for whose protection and benefit the statute was made, they are estopped to deny under such circumstances that they were stockholders and are liable to the payment of the assessment as provided by statute. 3 R. C. L. "Banks," § 29, page 399; *Madison* v. *Dent,* 176 U. S. 521, 20 S. Ct. 419; *Aber* v. *Maxwell, supra; Commissioner of Banks* v. *Cosmopolitan Trust Co.,* 253 Mass. 205, 148 N. E. 609, 41 A. L. R. 658.

These cases differ from that of *Taylor* v. *Gordon, supra,* and are not controlled by the decision therein.

From the views herein expressed, it follows that the court erred in overruling the demurrer and dismissing the complaint, and the cause will be reversed and remanded with directions to sustain the demurrer to the answers, and render judgment for the amount of the assessments sued for. It is so ordered.

SMITH *v.* SMITH.

4-2992

Opinion delivered May 1, 1933.

Oscar Barnett, for appellant.

H. B. Means, for appellee.

MEHAFFY, J. The appellant, Stella Smith, and appellee, Filus Smith, were husband and wife, and in the latter part of 1931 appellant filed in the Hot Spring Chancery Court a suit for divorce, alleging that appellee had offered to her such indignities, consisting of rudeness, unmerited reproach, contempt, studied neglect, and open insult, rendering her condition intolerable. She also alleged that appellee wilfully deserted her on June 28, 1930, and that he continues to desert her and abandon her.

In the same complaint appellant alleged that Filus Smith wrongfully and wickedly conspired with J. Millard Smith to deprive her of her rights to enjoy herself as the wife of Filus Smith that appellant and appellee, Filus Smith had acquired certain real estate, and that Filus Smith and his father maliciously, wrongfully and wickedly conspired to defraud her of said lands by allowing same to go on delinquent land list for taxes, and permitting said J. Millard Smith to buy same in at tax sale; that he procured tax deeds for said lands and had

them recorded with the malicious and wicked intent to defraud her and deprive her of its use; that said tax deeds were procured by fraud to prevent her from collecting alimony due from Filus Smith. She also alleged that they had conspired to teach her children to hate her, and that J. Millard Smith wickedly influenced her husband to leave, desert, and abandon her. She prays judgment against J. Millard Smith in the sum of $25,000, and also prays judgment against Filus Smith in the sum of $25,000 and asked judgment against both of them in the sum of $25,000, and asked that the tax deeds be set aside.

Answer was filed by both Filus Smith and his father denying the material allegations of the complaint as to causes for divorce and conspiracy. Filus Smith filed a cross-complaint alleging that appellant wilfully deserted him without reasonable cause for more than the space of one year, and still continues to desert and abandon him, and prays that he be granted a divorce.

The evidence is in conflict, and it would serve no useful purpose to set it out here.

The court entered a decree holding that the allegations of the cross-complaint are fully sustained by the evidence, and granted Filus Smith a divorce, and dismissed the complaint of the appellant.

The court further found that the lands described in the complaint were acquired by Stella Smith and Filus Smith, and that during the litigation between them J. Millard Smith, the father of Filus Smith, through fraud and connivance with Filus Smith, procured tax deeds and placed them on record; that said deeds were procured by fraud with the intent to defeat the title and interest of Stella Smith. The decree set the tax deeds aside and held them for naught, and revested the property in Stella Smith and Filus Smith, clear of any claim of J. Millard Smith.

The court also gave judgment for $163.35 alimony, and $25 attorney's fee, and decreed a lien on the land to pay the same. The custody of the children, Filus and Stella Smith, was awarded to the appellee, Filus Smith.

This appeal is prosecuted to reverse the decree granting divorce and awarding the custody of the children to the father. There is no appeal from the decree setting aside the tax deeds, and revesting title in Stella and Filus Smith.

The appellant first contends that the appellee does not allege the place of marriage, the date of marriage, or the place of separation. The appellant, however, in her complaint alleged the date and place of marriage, and the appellee, Filus Smith, in his answer stated that he admitted all the allegations of the complaint for divorce, except that he deserted appellant on June 20, 1930.

It is next contended by the appellant that there is no proof in the record anywhere that appellant deserted or abandoned appellee, except the statement of appellee himself. It is true that nobody else testifies that she left him on March 2, 1929.

It appears that this is the third time appellant has brought suit for divorce.

Anna Forelines testified that she was 58 years of age, knew Filus Smith and his wife when they lived together. She did not know the date when they separated. She heard appellant say while they were living together that he was good to her, and that they got along but for her terrible temper; that the statements made by appellant in the presence of witness were prior to the last separation.

Amanda Buris stayed with Filus Smith and his wife about two weeks some years ago, and testified that Smith was kind to her, but appellant told her that she did not intend to live with appellee.

Regine Smith testified that they were living at their home, and that appellee came to the home of witnesses and brought his two children. Witness also testified that, as long as they lived together, they lived at the home appellee provided for her.

A number of witnesses testified as to appellee's kindness to appellant.

D. M. Buck, father of the appellant, testified that he was present in June, 1930, and heard Filus Smith tes-

tify, and that his daughter and Filus Smith had not lived together since then.

There were, in addition to testimony of the witnesses, circumstances tending to corroborate the appellee. As already stated, there seems to have been two or three suits for divorce, all of them evidently in Hot Spring County, and the chancellor had had the parties before him in these other suits, and, probably for that reason the attorneys on each side were not as careful in the presentation of testimony as they otherwise might have been.

The manner of separation was purely a question of fact.

Appellant calls attention to the case of *Reed* v. *Reed,* 62 Ark. 611, 37 S. W. 230. It was there held that a husband was not entitled to a divorce on the grounds of desertion by the wife where she separated from him by his consent, and such consent may be expressly given or implied from the words or acts.

There is no evidence in the record tending to show that appellee consented to the separation. He testified: "I did not have any strings on my wife; after I seen she was going, of course I asked her to go fifty-fifty in taking care of the children. I do not know that it was impossible for my wife to live there in the house with my people." He was then asked: "Will you take your wife back?" He declined to answer this question.

We do not think he was under any obligation to answer this question for the reason that there is no evidence that she had offered to go back to him. If she wanted to go back to him, and had made this known to him, it would then have been time for him to determine whether he would take her back, but, as she had not expressed any willingness to return, there was no reason for him to say whether he would or would not take her back.

The court made an order vesting the title to the land described in appellant's complaint in Filus Smith and Stella Smith, and there is no appeal from this part of the decree. The chancellor also gave a lien on the lands for the alimony, cost, and attornev's fee.

This court also made an order requiring the appellee to pay $25 attorney's fee and costs, and this, together with the alimony and costs in the lower court, is adjudged against the appellee, and a lien given on his interest in the lands to secure the payment of these amounts.

The findings of the chancellor are not against the preponderance of the evidence, and the decree is affirmed.

UNION INVESTMENT COMPANY *v.* HUNT.

4-2993

Opinion delivered May 1, 1933.

George C. Lewis, for appellant.

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

MCHANEY, J. Appellee is the owner of the southeast quarter of section 10, township 2 south, range 5 west, Arkansas County, which is included in Big Island Drainage District No. 8. The district was organized under the general drainage district laws known as the alternative drainage district system. M. Beck formerly owned the land above described, but, after his death, which oc-

curred prior to January 1, 1918, his heirs conveyed same to appellee on January 20, 1920, and the latter has been in the actual possession thereof since that time, cultivating it as a rice farm. The 1920 drainage district taxes on this and other lands were not paid and were returned delinquent. Thereafter, on December 4, 1925, said district brought suit in the chancery court to foreclose its lien against the delinquent lands, including the lands in controversy, correctly describing them in the complaint. Notice of the pendency of the suit was given by publication in a newspaper, and on January 5, 1926, decree was returned condemning the land to be sold for the taxes, penalty and cost against it, and thereafter same was sold to the district, the sale confirmed, and a certificate of purchase issued to the district. This certificate was later assigned to appellant, and on April 15, 1931, on the surrender of the certificate to the commissioner in chancery, a deed was executed and delivered to appellant and approved by the court. After appellee's purchase of said land he paid all the drainage taxes accruing against it for 1921 and subsequent years. It is agreed that the 1920 tax, the one for which the sale was made, amounting to $27.40, was not paid, and that there has been no redemption from the commissioner's sale unless the later payments made by appellee and accepted by the district may be held to be a redemption. In the decree condemning said land to sale for the delinquent taxes for the year 1920, this finding is made: "That due and proper service has been had upon all of the owners of the said lands and real estate hereinafter described by means and reason of the publication of a notice of the pendency and purpose of said suit as is required by law, which notice was published for four consecutive weekly issues in the *Stuttgart Arkansawyer,* a newspaper of *bona fide* circulation in the northern district of Arkansas County, therein describing said lands and real estate," etc. Said decree then continues: "Whereupon said cause is submitted to the court upon plaintiff's complaint, the proof of publication of the notice aforesaid," etc.

Appellee brought this action to cancel and set aside the sale of said land for taxes and the deed issued to

appellant by the commissioner making the sale. On a trial of the case on an agreed statement of facts the court found for appellee and entered a decree canceling and setting aside its former decree condemning the above-described land for sale, canceling and holding for naught said sale, and canceling the deed issued to appellant. A lien was declared upon said land in favor of appellant in the sum of $27.40.

In the agreed statement of facts is the following: "It is agreed that the notice attached to the complaint as Exhibit C is a correct copy of a notice appearing in the files of said cause. It is likewise agreed that the record shows that a proof of publication was filed in said cause, and that the copy of proof of publication attached to plaintiff's amended complaint as Exhibit C-2 is a correct copy of the same. It is also agreed that the list of lands named in said proof of publication is the same as that contained in the notice aforesaid, and that the lands here involved are not mentioned nor described in either said notice or said proof of publication."

Several interesting questions are discussed by able counsel for both parties. We find it unnecessary to discuss but one of them. It is undisputed that the notice published in the *Stuttgart Arkansawyer,* proof of publication of which was found among the papers on file in the case, failed to include the above-described land, and it is conceded that this suit is a collateral attack on the decree of the chancery court of January 5, 1926, condemning said land to sale for the unpaid drainage district taxes. It is earnestly insisted by appellant that the finding in said decree that notice had been given for the time and in the manner prescribed by law is conclusive as to the jurisdiction of the court, and that no extrinsic evidence is competent to contradict it on collateral attack. Section 6239, Crawford & Moses' Digest, provides: "In all cases where it appears, from a recital in the records of any such court, that such notice has been given, it shall be evidence of such fact." It has been many times held that in determining whether a domestic judgment, collaterally attacked, is void for want of notice, it must be done by the court on an inspection of the record only.

Boyd v. *Roane,* 49 Ark. 397, 5 S. W. 704; *McDonald* v. *Ft. Smith & W. R. Co.,* 105 Ark. 5, 150 S. W. 135. In the latter case it was said: "In a case seeking to impeach collaterally a domestic judgment, the question as to whether or not process has been served in the manner prescribed by law, upon the parties defendant therein is tried alone by an inspection of the record, and the verity of such record cannot be assailed by parol evidence."

The reason for the rule is that judgments and decrees ought to and do import verity and stability, and, as said in *Boyd* v. *Roane, supra*: "It is generally thought to be better that the doctrine that the record importing absolute verity should work an occasional hardship than that public confidence should be shaken in the stability of judicial proceedings by suffering them to be lightly overturned; and for this reason the weight of authority in the case of a domestic judgment collaterally attacked is that the question of notice or no notice must be tried by the court upon an inspection of the record only."

On the other hand, as has been frequently held, if the record contradicts the finding of service or notice in the decree, the record stultifies itself, and the decree is overcome. In § 273, Black on Judgments, it is said: "But while it is inadmissible to contradict the record by extrinsic evidence, it is always open to the party to show that one part of the record contradicts another part. Thus the recital of service in a judgment may be contradicted by producing the original summons and the return. See also *State ex rel. Atty. Gen.* v. *Wilson,* 181 Ark. 683, 27 S. W. (2d) 106; *Holt* v. *Manuel,* 186 Ark. 435, 54 S. W. (2d) 66. In the case of *Giese* v. *Jones,* 185 Ark. 548, 48 S. W. (2d) 232, it was held that, although the decree recited that publication of the notice as required by law was given, still, if the decree itself contradicted such finding, it was open to collateral attack. In *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, L. R. A. 1915C, 158, it was again held that every presumption in favor of the jurisdiction of the court and the validity of the judgment is indulged unless it affirmatively appears from the record itself that facts essential to the jurisdiction are lacking, and that a judgment or decree entered upon con-

structive service by publication is upon an equal standing with a judgment upon personal service, and it was there said: "The affidavit in proof of the publication of the notice of pendency of the suit is not a part of the record, however, from which it can be shown that there was want of jurisdiction by the court rendering the decree, no mention or recital of such proof of publication being found therein." In other words, in that case the decree failed to identify the service or notice that was published, but was couched in the following general terms: "Upon call of this cause, it appearing that all persons and corporations having or claiming interest in any of the lands hereinafter described have been fully and constructively summoned as required by law, and that said interested persons and corporations come not but make default."

The finding in the case at bar in the foreclosure decree is entirely different. It particularly identifies the manner of service in the language above set out. It names the newspaper in which the notice was published and the length of time it was published and further recites that the cause was submitted to the court upon the complaint, the delinquent list and "the proof of publication of the notice aforesaid." We think this is sufficient identification of the notice and proof of publication in the decree itself to make it a part of the record of the proceedings in this cause, and, while there is a general finding of due and proper service upon all the owners of said lands, it is limited by the terms of the decree itself when it undertakes to describe the means and manner of service by publication of the notice in a certain newspaper and by stating that the cause was submitted upon the proof of publication of said notice. The statute under which the notice was attempted to be given, § 3631, Crawford & Moses' Digest, requires that the notice shall contain a list of supposed owners with a descriptive list of delinquent lands and the amount due thereon from each. Since the notice as published failed to describe appellee's land, the court was without jurisdiction to condemn it for sale, and therefore correctly canceled it, unless, indeed, there is a presumption that some other or different notice was published. We think

there is no room for any such presumption in this case. The suit was filed December 4, 1925, and the decree was had January 5, 1926. Within that time it would not have been possible for a new publication to have started and been completed before the decree.

The decree of the court was therefore correct, and must be affirmed.

JOHNSON, C. J., (dissenting). I cannot agree with the majority opinion. In my opinion the effect of the majority opinion is to overrule a line of decisions which are now considered rules of property in this State. The majority opinion is to the effect that the solemn recitals of a judgment or decree may be contradicted by an affidavit. This is not the law and has never been, in my opinion.

The decree in this case reads as follows: "That due and proper service has been had upon all the owners of said lands and real estate hereinafter described by means and reasons of the publication of a notice of the pendency and purpose of said suit as is required by law, which notice was published for four consecutive weekly issues in the *Stuttgart Arkansawyer,* a newspaper of *bona fide* circulation in the Northern District of Arkansas County, etc."

The majority opinion advances the novel statement that, since the court found that the notice was published by the *Stuttgart Arkansawyer,* therefore any affidavit or proof of publication filed by the *Stuttgart Arkansawyer* is conclusive evidence of the manner of service.

The effect of the majority opinion is that the solemn recitals of this decree in a court of general jurisdiction may be overturned, contradicted and nullified by an affidavit attached to a publication. This assumption is based only upon the fact that the name of the newspaper which published the notice happens to appear in the decree. The question as to whether or not proper service was had in this case was purely and only a question of fact for the trial court to determine, and the mere fact that the decree recites that the notice was published in the *Stuttgart Arkansawyer* should not open the flood gates and tear down, nullify and contradict solemn judgments and decrees of courts of general jurisdiction. The only effect

of naming the newspaper in which the publication was published is to name the witness who effected the proof of publication. Certainly, this court would not permit the publisher of this newspaper to now make an affidavit that the *Stuttgart Arkansawyer* did not publish any such notice and thereby contradict, nullify and destroy the solemn recitals of this decree. If this court would not permit this procedure, then why it will permit the decree to be contradicted by an *ex parte* affidavit made and filed in said cause is beyond my power of comprehension.

Concededly, this is a collateral attack upon the decree of the court of superior and general jurisdiction.

In the case of *McDonald* v. *Ft. Smith & W. Ry. Co.*, 105 Ark. 5, 150 S. W. 135, this court, quoting from the third paragraph of the syllabus, said: "In the case of a domestic judgment collaterally attacked, the question of notice or no notice must be tried by the court upon an inspection of the record only; and where a judgment recites that the defendants were duly served with summons as required by law, it must be taken as true unless there is something in the record to contradict it."

In the McDonald case just cited it was a collateral attack upon the judgment of the circuit court condemning certain lands for right-of-way purposes. The appellant in the suit offered to show by an agreed statement of facts that "Ella Hare was, at the time of the institution of such condemnation suit, and has been continuously ever since that time, a person of unsound mind." The trial court refused to admit this evidence in contradiction of the record. The court held that this testimony was not admissible for the purpose of contradicting the recitals of the judgment to the effect that due and proper notice had been given.

It was also insisted in the McDonald case that the record did not disclose that any answer was filed or a defense made by the guardian of the insane person, and that the record affirmatively showed that an answer was only filed by the defendant Mat Gray, administrator. This court in disposing of that contention said: "Omission to appoint a guardian does not impair the authority of the

court to proceed in the case, but at most is an irregularity in the exercise of its lawful jurisdiction which on settled principles of law may impregnate its judgment with error, but cannot render it absolutely null. The effect of the omission to appoint a guardian *ad litem* for one laboring under legal disability, therefore, will not be to vitiate the judgment on collateral attack, but to make it voidable only by appeal, or other direct proceeding."

In the case of *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, this court, quoting from paragraph one of the syllabus, said: "In a decree ordering the sale of land in an action foreclosing a tax lien, the recital of facts necessary to the court's jurisdiction are conclusive upon a collateral attack."

In the same case, reading from the fourth section of the syllabus, this court said: "In an action attacking a decree collaterally for want of jurisdiction, the affidavit in proof of the publication of the notice of the pendency of the suit is not a part of the record from which can be shown a want of jurisdiction in the court rendering the decree."

In the Price case the decree in the foreclosure proceedings which was collaterally attacked, reads as follows: "Upon call of this case it appearing that all persons and corporations having or claiming interest in any of the lands thereinafter described have been fully and constructively summoned as required by law, and that said interested persons and corporations come not but make default."

In the statement of facts this court said: "Appellee attempts to show in this, an entirely different proceeding, that the judgment of the court condemning the lands to sale for payment of the delinquent taxes was without jurisdiction for failure to give notice of the pendency of the suit by publication as the law requires, notwithstanding the recitals of the decree that such notice had been duly given, by introducing what purported to be an affidavit in proof of the publication of such notice, showing only that it was published two times instead of four, as the statute provides."

In reference to this the court held: "The affidavit in proof of the publication of the notice of the pendency of the suit is not a part of the record, however, from which it can be shown that there was want of jurisdiction by the court rendering the decree, no mention or recital of such proof of publication being found therein. Another affidavit or other proof of the publication than the one presented here could have been filed in the other case, and it is conclusively presumed, as against this collateral attack, that the notice was published and that all persons interested were, as the decree recites, "duly and constructively summoned as required by law."

In the case of *Fiddyment* v. *Bateman,* 97 Ark. 77, 133 S. W. 192, this court held: "Where an overdue tax decree recited that due notice was given by publication of warning order as required by law, it will be presumed on collateral attack that due notice was given, though the proof of the warning order was defective in failing to show that the newspaper in which the publication was made had a *bona fide* circulation in the county and had been regularly published therein for one month before the date of the first publication of the warning order, and was also defective in failing to show the date of the second insertion of the warning order."

Numerous decisions of this court might be cited establishing the rule as stated in these cases. This court squarely decided that the affidavit in proof of publication of the notice of the pendency of the suit is not a part of the record which can be looked to in determining whether or not the court acquired jurisdiction of the subject-matter. If the recitals of the decree cannot be contradicted by the affidavit in proof of the publication, it is difficult to conceive just how such affidavit may be used in this case to contradict the solemn recitals of the record. It is my opinion that the effect of this majority opinion is to overrule the case of *Price* v. *Gunn.*

Next it is sought to uphold the decree of the trial court in this case on the doctrine announced in *Giese* v. *Jones,* 185 Ark. 548, 48 S. W. (2d) 232. The decree attacked collaterally in this case provided: "The first pub-

lication thereof was made on the 22d day of October, 1925; the second on the 29th day of October, 1925, the third on the 5th day of November, 1925, and the last on the 12th day of November, 1925."

"In the decree rendered in the suit brought by the commissioners of District No. 7 it is recited that the notice was published October 22, 1925, October 29, 1925, November 5, 1925, and November 12, 1925.

"It thus appears, from the face of these decrees, that the four weeks' notice required by law had not been given in any case when the decree of sale was rendered."

The decree collaterally attacked in *Giese* v. *Jones* was rendered by the court on November 14, 1925, and the last publication of the fourth notice occurred on November 12, 1925; therefore, it appeared from the fact of the decree itself that the notice was invalid which rendered the decree a nullity according to its own recitals.

By no stretch of imagination can it be said in the instant case that the *Giese* v. *Jones* case is authority therefor. I heartily agree that *Giese* v. *Jones* was rightly decided.

This court in the case of *Clay* v. *Bilby,* 72 Ark. 101, 78 S. W. 749, held: "If the decree or judgment does not exclude the conclusion, the presumption is that sufficient and competent evidence was before the court to sustain its finding as to the publication of notice." The majority opinion in this case is squarely in the teeth of *Clay* v. *Bilby,* just cited.

This court in the majority opinion in effect holds that, since the decree states that the publication was made in the *Stuttgart Arkansawyer,* no presumption will be allowed that any other or different evidence was produced or that the fact was otherwise than as stated in the decree. This seems to have been the doctrine announced by the Supreme Court of the United States in *Settlemier* v. *Sullivan,* 97 U. S. 444; but this court did not follow the case referred to, but on the contrary distinguishes between the two by using the following language: "But this is not true in case of service by publication. In that case, no statute forbidding, parol evidence may be received

to prove publication of notice; and, if the decree of judgment does not exclude the conclusion, the presumption is that sufficient and competent evidence was before the court to sustain its findings as to the publication of notice." *Clay* v. *Bilby, supra.*

This court in *Shaw* v. *Polk,* 152 Ark. 18, 237 S. W. 703, quoting from the third paragraph of the syllabus, held: "A recital in a decree that the defendants had been duly served with summons cannot be contradicted in a collateral attack by proof to the contrary."

This court held in *Road Improvement Dist. No. 4* v. *Ball,* 170 Ark. 522, 281 S. W. 5, quoting from the second paragraph of the syllabus: "Objection to the jurisdiction of a court of superior jurisdiction which does not appear on the face of the record is not available in a collateral attack, but only on appeal."

The majority are perfectly willing to accept as true the statement in the decree that the notice was published in the *Stuttgart Arkansawyer,* but unwilling to accept as true the other recitals in the decree to the effect that the notice was published in the form and manner required by law; they permit an *ex parte* affidavit to contradict and nullify this recital in the decree. It is immaterial whether or not this notice was published in the *Stuttgart Arkansawyer;* it is immaterial who made the affidavit in the proof of publication. This court should conclude that the trial court had before it legal and competent testimony to establish the facts recited in the decree.

The great weight of American authority is that the recitals of a judgment or decree of a court of superior jurisdiction are conclusive except when directly attacked. See case note 68 A. L. R. 390.

Suppose the decree collaterally attacked in this case had provided "that service was had by publication in the form and manner required by law," and it was ascertained by evidence that but one newspaper was published in the county, and that this newspaper denied by affidavit that it had published the notice. Would this court hold that the decree could be contradicted and nullified in this manner? I think not, but in effect this is exactly what

this court is now holding. I conceive the settled law of this State to be that on collateral attack a judgment or decree in its recitals as to jurisdictional matters is conclusive unless it appears from the face of the decree that it is a nullity.

No Arkansas case is cited in support of the rule now announced by this court, and I am sure that we are now departing from an established rule which has become a landmark in judicial construction and interpretation which almost amounts to a rule of property.

For these reasons I respectfully dissent.

HAYDEL *v.* WIDOW'S FUND OF SAHARA TEMPLE.

4-3001

Opinion delivered May 1, 1933.

A. M. Coates, for appellant.

Coleman & Gantt, for appellee.

McHANEY, J. M. L. Case was a member of Sahara Temple, an organization of Shriners in Pine Bluff, Arkansas. He was also a member of the Widow's Fund, a beneficiary organization open to members of the Shrine. As such member, he was issued a certificate, and, under the bylaws, it was provided that upon his death in good standing the sum of $1,000 should be paid to the beneficiary named in said certificate. Charles E. Case, the

only child of M. L. Case, was named his beneficiary therein and died September 6, 1931, leaving surviving him the appellant as his only child and heir by law. M. L. Case died April 4, 1932, but, prior thereto and subsequent to the death of his son, Chas. E., he made a will leaving all his property to appellant and to his sister, Mrs. Erminnie Loetzerich, share and share alike. Under the by-laws of the Widow's Fund, a member might change his beneficiary at will, and, although Mr. Case discussed the matter of change of beneficiary with the secretary of the Widow's Fund, he never actually did so, unless his will executed in the presence of said secretary may be said to be a change of the beneficiary. Under the will Mrs. Loetzerich was appointed executrix, but, after having qualified, she resigned, and the appellee, Simmons National Bank, was appointed executor in succession. On the death of Mr. Case the Widow's Fund of Sahara Temple was uncertain as to whom the $1,000 should be paid, and therefore brought its interpleader suit in the Jefferson Chancery Court, paid the fund into court and prayed that the true owner be ascertained, the fund paid to such owner and it be discharged. Both appellant and the Simmons National Bank answered the interplea claiming the fund, and the court entered decree awarding the fund to the executor.

We think the Widow's Fund of Sahara Temple must be considered as a mutual benefit association and the rights under the certificate as if it were a beneficiary certificate issued by such association. In 7 Cooley's Briefs on Insurance 6410, it is stated: "The beneficiary in the certificate issued by a mutual benefit association, in which the member is given full power to direct the disposition of the benefit and to change the beneficiary, has no vested right in the contract of insurance evidenced thereby, as the contract is between the association and the member to whom the certificate is issued, and not between the association and the beneficiary named in the certificate."

Charles E. Case therefore did not take any vested interest in the certificate, and whatever expectancy he had in the certificate terminated at his death. Therefore,

unless a new beneficiary had been designated by the member, M. L. Case, the proceeds of the certificate were payable to his estate on his death and therefore to his administrator. We have many times held that "when the beneficiary in a policy of life insurance unlawfully kills the insured, public policy prohibits a recovery by him, and that the amount of the insurance automatically becomes an asset of the deceased's estate, to be recovered by the administrator for the payment of debts and distribution to the heirs." *Cooper* v. *Krisch,* 179 Ark. 952, 18 S. W. (2d) 909, and cases there cited. Moreover the will executed in the presence of the secretary of the Widow's Fund might be said to be a new designation of beneficiary, as under § 4 of the bylaws of the Widow's Fund it is provided that "such beneficiary may be changed by notifying the secretary, in writing, of the new beneficiary." The secretary was so notified in writing by the will to which he was a witness.

Affirmed.

HOME INDEMNITY COMPANY OF NEW YORK *v.* JELKS.

4-3006

Opinion delivered May 8, 1933.

Buzbee, Pugh & Harrison and *Dudley & Barrett,* for appellant.

Basil Baker, for appellee.

JOHNSON, C. J., (after stating the facts). But one question is presented in this appeal for determination,

namely: Did the trial court err in refusing to direct a verdict for appellant?

We think that, under the terms of the policy of insurance sued on in this case, when appellee produced facts and circumstances in testimony showing, or tending to show, that the safe was forcibly broken and entered, and that loss was sustained by reason thereof, this made a *prima facie* case on behalf of appellee, and the burden then shifted to appellant to show by testimony that the burglary was effected by manipulating the tumblers or lock, which would exempt it from liability.

In brief and oral argument it is insisted on behalf of appellant that the testimony of the two expert witnesses, Johnson and Linzel, is reasonable, consistent and unimpeached, therefore that the trial court should have, as a matter of law, so advised the jury.

Let's see. This court held in *Tatum* v. *Mohr,* 21 Ark. 349, quoting from a headnote of the opinion:

"It is competent for witnesses skilled in the science and practice of medicine to give their opinions to the jury on questions involving the soundness of a slave, in relation to the disease with which he was afflicted, its character, etc., but the jury are the judges of the weight to be attached to their opinions."

Again, this court held in *Arkansas S. W. Ry. Co.* v. *Wingfield,* 94 Ark. 75, 126 S. W. 76:

"It is for the jury to determine what value his opinion is entitled to under the circumstances, and to give it such weight as they think it deserves."

It is evident from previous decisions of this court that it is the exclusive province of the jury to determine the value and weight to be given the testimony of expert witnesses, and the jury is authorized to believe or disbelieve the whole or any part of such expert witnesses' testimony.

The jury, in the exercise of their exclusive province in this case, has determined to disregard the testimony of the expert witnesses, therefore we cannot, as a matter of law, say that they should not have done so. To do so would overrule the cases hereinabove cited, and we are unwilling to do this.

No error appearing, the judgment of the trial court is affirmed.

[redacted]

FUTRALL *v.* MCKENNON.

4-2945

Opinion delivered May 8, 1933.

[redacted]

Harry T. Wooldridge, for appellant.

I. N. Moore and *Henry W. Smith,* for appellee.

SMITH, J. When the receiver, appointed for that purpose, took over the National Bank of Arkansas, of Pine Bluff, for liquidation, he found, among its assets, a note dated February 14, 1930, executed by C. R. McKennon & Son to the order of Walter C. Hudson, who had been president of the bank. Hudson had sold the note to the bank for its face value, less a discount of six per cent. to its due date, and had received credit on his deposit for the proceeds of the note. The receiver demanded payment of the note, but the makers refused to pay unless a certain credit was allowed, which, being refused, resulted in this suit.

Two defenses were interposed, the first being that, the president of the bank having full knowledge of the

circumstances under which and the consideration for which the note had been executed, the bank was bound by his knowledge. This defense passed out of the case under the authority of *Bank of Hartford* v. *McDonald,* 107 Ark. 232, 154 S. W. 512, where it was held that, when an officer of a bank is individually interested in a note, his knowledge concerning it is not to be imputed to the bank, when his acts conflict with the interests of the bank.

The note was transferred by Hudson to the bank by delivery and without indorsement, and the second defense, which was predicated upon that fact, is this: Hudson rented his farm to McKennon & Son for the year 1930 for $1,500. Under the rental contract, which constituted the consideration for the note, it was agreed that the tenants should have credit for necessary repairs, including damage done by fire. Hudson advised his tenants that the buildings on the farm were insured against loss by fire, and directed that he be notified if such loss occurred. Two buildings burned, and Hudson was advised of that fact, and directed his tenants to rebuild them. This was done, and the cost thereof, with certain smaller items for repairs, constitute the credits which the makers of the note demanded be allowed before paying the balance due on the note.

There was a finding for defendants, and judgment accordingly, and for the reversal thereof it is insisted that this defense is not available against a transferee of the note. No other question is presented for decision.

It was held in the case of *Funk* v. *Young,* 138 Ark. 38, 210 S. W. 43, that a receiver of an insolvent bank is not an innocent purchaser of its notes, and takes them subject to any equities that could be asserted against the bank itself.

To decide the question stated, it is necessary to consider certain sections of the Uniform Negotiable Instruments Act, approved February 21, 1913 (Acts 1913, page 260), appearing as parts of the chapter on Negotiable Instruments in Crawford & Moses' Digest.

By § 7796 of this chapter, it is provided that an instrument, if payable to order, is negotiated by the indorsement of the holder completed by delivery; and §

7797 of the same chapter provides that the indorsement must be written on the instrument itself or upon a paper attached thereto.

Section 7815 of this chapter reads as follows: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

Section 7824 of the same chapter reads as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

It was held in the case of *Harrison* v. *Morgan-Curry Co.*, 115 Ark. 44, 150 S. W. 117, that one who takes a negotiable note payable to order by delivery merely, but without written indorsement, is not an innocent purchaser, and takes the note subject to all equities existing between the original parties. This holding was reaffirmed in the case of *Johnson* v. *T. M. Dover Merc. Co.*, 164 Ark. 371, 261 S. W. 913, and the later case of *Shultz Construction Co.* v. *Crawford County Bank*, 182 Ark. 569, 32 S. W. (2d) 177.

Appellant argues, for the reversal of the judgment appealed from, that the doctrine of set-off was unknown to the common law, and that no provision is made therefor in the Negotiable Instruments Law in effect in this State, and that our set-off statute has no relation to suits on promissory notes except where there exists some inherent defect in the note itself, and that, as the makers could not maintain an independent action by separate suit against a transferee of the note for their claim for the expenditures for the repairs, they cannot, in a suit

on the note against them by the transferee, set up these expenditures by way of a set-off.

We do not concur in this view. Act 267 of the Acts of 1917 (vol. 2, Acts 1917, page 1441) is the most comprehensive legislation on the subject of counterclaim and set-off of which we have any knowledge. It is there provided that a counterclaim "may be any cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them," and that "A set-off may be pleaded in any action for the recovery of money, and may be a cause of action arising either upon contract or tort."

We think this statute is sufficiently broad to admit a defense against one, not being the holder of a note in due course, that there were credits which should be applied against the note.

Appellant cites as sustaining his position the case of *Harris* v. *Esterbrook,* decided by the Supreme Court of South Dakota and reported in 55 S. Dak. 538, 226 N. W. 751, and which, he says, is on all fours with the instant case. This is a well-considered case, and is followed by an extensive annotation in 70 A. L. R. 241.

In the case just cited a bank sold the note of a depositor, payable to its order, to the purchaser by delivery and without written indorsement. After the bank had been taken over by the State Superintendent of Banks for liquidation, its transferee sued the maker of the note, who sought to set off against the note the amount of his deposit in the bank on the day it closed its doors. The opinion refers to several sections of the Uniform Negotiable Instruments Act of that State which are identical with our own, but it quotes also § 2307, Rev. Code 1919, of that State, which reads as follows: "In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration, before due." We have no statute containing any such limitation on set-offs or counterclaims.

Referring to the manner in which the note had been transferred, the court there said: "It is also well established that such a transferee, whether his title be legal or equitable, takes title subject to equities and defenses. The apparent unanimity on this point is as marked as the lack of unanimity as to the time when such equities and defenses may accrue."

The opinion recites that on the day the note matured the maker had on deposit with the bank more than sufficient funds to pay the note, but it is recited also that he did not use the deposit for that purpose. The opinion recites that the maker's balance on the date the bank sold the note was only $7.94, but it was said: "It is not necessary therefore to decide whether the $7.94 was a valid set-off between appellant [purchaser] and respondent [maker]; because the deposit balance on the day of transfer was entirely withdrawn." The opinion had quoted cases holding that "the defense of set-off or counterclaim which is available to a debtor as against an assignee of a creditor must have existed as a present right when the assignment was made," and construed § 49 of the Negotiable Instruments Law of that State, which is identical with § 7815, Crawford & Moses' Digest, as meaning that "* * * the set-off that may be interposed against a negotiable promissory note transferred without indorsement, in good faith, and for value, must be a set-off which existed as a present right when the transfer was made."

The effect of the decision in that case is that, there being no right of set-off at the time of the transfer, that right could not subsequently be acquired.

Certain cases are cited by appellant which apparently support his contention, but a careful analysis of them discloses the fact that they originated in States having statutes which impose limitations on the right of counterclaim and set-off somewhat similar to those at common law, which do not prevail in this State, and for this reason we do not review them.

The annotator's note to this South Dakota case contains a declaration of law, in support of which many cases are cited, reading as follows: "The cases seem

to be unanimous in holding that a set-off or counterclaim between the maker and the payee of a negotiable instrument is available against one not a holder in due course, where the set-off or counterclaim arose out of the same transaction as the instrument itself and existed at the time of the transfer by the payee."

This declaration of the law is itself decisive of this case. The consideration for the note here in suit was the rental contract between Hudson and C. R. McKennon & Son, and this contract was that the McKennons should pay, as rent, the sum of $1,500, less the cost of repairs. It is true these repairs had not been made when the note was executed, but it is true also that it was executed in contemplation that such repairs would be made and that the cost thereof would be credited on the note. The credit claimed arose out of the same transaction as the note itself, and the right thereto, when the repairs had been made, existed at the time of the transfer of the note to the bank.

The credit was therefore properly allowed, and the judgment allowing it is affirmed.

SMALLWOOD *v.* PETTIT-GALLOWAY COMPANY.

4-2990

Opinion delivered May 8, 1933.

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Verne McMillen, for appellant.

W. R. Donham, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in not finding her entitled to a deduction from the price for materials and installation of the waterworks system in the residence as indicated in her statement of the amount required to put it in a usable condition with the purchase of the larger tank as shown to be necessary for its practical operation.

Appellee examined the premises and determined what materials were necessary to be furnished and did the work of installation of these materials into the waterworks system, guaranteeing it should be done in a workmanlike manner, and the warranty was necessarily implied that the materials used would be reasonably fit for the purpose for which they were intended, appellee knowing when the proposal was made that appellant had no information about such materials and the construction of the plant, and that she was necessarily relying upon the judgment of appellee for the right materials to be furnished and the work properly done in order to supply and distribute the water through said system.

The law implies that, where chattels or machinery are sold for a particular purpose and the purchaser knows nothing about such materials or their use, he necessarily relies on the judgment and good faith of the vendor that the articles purchased are reasonably fit for the purpose for which they are intended, the law implying the warranty that they are of such character. *McCaskey Register Co.* v. *McCurry,* 181 Ark. 649, 26 S. W. (2d) 1108; *Dyke* v. *Magdalena,* 171 Ark. 225, 283 S. W. 374; *Western Cabinet & Fixture Co.* v. *Davis,* 121 Ark. 370, 181 S. W. 273.

When there is an agreement that the work, for which the materials were agreed to be and are furnished by the contractor, shall be completed in a workmanlike manner, it covers not only the construction and installation, but also the system used to accomplish the result desired and contracted for. There was a waterworks system to be

installed by appellee on premises that had already been inspected by it for distributing and carrying water for domestic use throughout the premises from a well already dug, and the contractors are bound to the construction of such a system under the agreement that it shall be done in a workmanlike manner, and will, upon completion, give reasonably good and satisfactory service, since he knew what was to be done, the result to be accomplished, and that the manner or method of accomplishing the desired result was left to his judgment, knowledge and experience. The law will import into the contract an implied agreement that the waterworks or system of distributing the water will be proper and suitable for the purpose for which it was designed, namely, the proper distribution of the water through the house and premises, it being a contract for the doing of certain work to accomplish certain results. *Miller* v. *Winters,* 144 N. Y. Supp. 351.

The testimony shows that the materials for construction of the waterworks were suggested and selected by appellee, who was familiar with the construction of such systems, and appellant had as much right to expect reasonably satisfactory service from this plant when it was completed as though it had already been completed and sold to appellant for such use as it was proposed to be put to in its construction under the contract. The testimony shows the service rendered was not reasonably satisfactory because of either wrong construction or the wrong selection of materials for construction by the appellee, who was experienced in such matters and had the sole selection of materials to be used, knowing that appellant was altogether unfamiliar with such matters.

The preponderance of the testimony discloses that the waterworks as constructed by appellee were inadequate, and did not distribute the water throughout the premises as appellant under her contract had the right to expect would be done; and that appellee was notified of this fact, and finally, not remedying the condition, appellant had to install certain other machinery, tanks, etc., for securing the service she was entitled to expect under the contract made.

The chancellor erred in not allowing her credit on the contract price for the cost of the larger tank and the installation thereof, which should have been deducted from the contract price. The cause therefore must be reversed, and it will be remanded with directions to allow the credit of appellant for $243.51 and render judgment for the balance due under the contract, $362.83. It is so ordered.

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

4-2987

Opinion delivered May 8, 1933.

Ingram & Moher, for appellant.

G. W. Botts, for appellee.

MEHAFFY, J. This is the second appeal in this case. The opinion on the first appeal is reported in 186 Ark. 20, 52 S. W. (2d) 738. The facts are stated in that opinion, and it is unnecessary to restate them here.

The suit, as originally brought, was for tax, penalty and interest. The answer filed denied the material allegations in the complaint, denied that the lands were included in the drainage district, and denied that there were any assessments or taxes due on the lands.

The chancery court held that no proper notice was given, and that the county court had no jurisdiction to annex the lands, and dismissed the complaint of the drainage district for want of equity. The drainage district appealed to this court, where the decree of the chancery court was reversed, and the cause remanded for further proceedings.

At the trial in chancery court after the cause was remanded, a decree was entered declaring a lien on the lands for the delinquent assessments and costs, providing for a sale of the lands if assessments and costs were not paid, and giving a judgment for attorney's fees, but not allowing any penalty or interest. This appeal is prosecuted to reverse the decree finding against appellant as to penalty and interest.

Section 3631 of Crawford & Moses' Digest provides for the payment of taxes in drainage districts, and further provides that, if the taxes are not paid at maturity, the collector shall report such delinquencies to the commissioners of said district, who shall add to the amount of the tax a penalty of 25 per cent., and shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated having chancery jurisdiction, and said court shall have judgment against said lands for such taxes, said penalty of 25 per cent. and interest on the same.

The judgment of this court on former appeal is the law of the case and is conclusive of every question decided on the former appeal. *Shackleford* v. *Ark. Baptist College,* 183 Ark. 404, 36 S. W. (2d) 78; *American Co. of Arkansas* v. *Wheeler,* 183 Ark. 550, 36 S. W. (2d) 965; *City of N. Y. Ins. Co.* v. *American Co. of Ark.,* 184 Ark. 426, 42 S. W. (2d) 757; *Childs* v. *Motor Wheel Corp.,* 164 Ark. 149, 261 S. W. 28; *Jeffett* v. *Cook,* 175 Ark. 369, 299 S. W. 389.

The complaint in the original case was for taxes, penalty, attorney's fees and interest. The main contentions of the appellee in the court below on the first trial were that the lands in controversy were not included in the district, and that the law was not complied with in extending the district so as to embrace these lands. If

the lands were not within the district, of course there would be no taxes, penalty, attorney's fees, nor interest. On the other hand, if the lands are properly within the district, then it follows of course that the taxes, penalty, attorney's fees and interest are due.

This court reversed the case and remanded it for further proceedings in accordance with the principles of equity and with the opinion. That necessarily meant that the lower court should enter a decree for the taxes, penalty, attorney's fees and interest.

When this case was here on former appeal, it was reversed and remanded as we have said, and that meant that the decree as a whole was reversed. "We were speaking of the decree as a whole, and not that part only which referred to the finding of the trial court with reference to the Standard Shingle Company. The trial court found that the complaint of Gross and Shields should be dismissed for want of equity. That part of the decree was reversed as well as that part relating to the Shingle Company. For, as we have stated, the decree was reversed as a whole and not in part. If it had been the purpose of this court to reverse the decree in part and affirm in part, we would have expressly so declared and indicated that part which was affirmed, and that part reversed, and given directions accordingly. By declaring that the decree is therefore reversed, and directing the trial court to render a decree in accordance with this opinion, we intended, and the language necessarily means, that the trial court should understand that its entire decree was erroneous, and that a decree should be entered by it accordingly, in effect changing and reversing its former decree *in toto.*" *Berry* v. *Gross,* 172 Ark. 1084, 291 S. W. 801.

In the instant case the decree was reversed, and the cause remanded with directions to enter a decree in accordance with the opinion of this court. That necessarily means a finding that the lands are within the district, and that the taxes, penalty, attorney's fees and interest are due.

The appellee prosecutes a cross-appeal to reverse that portion of the decree allowing attorney's fees.

Section 2 of act 506 of the Special Acts of 1923 reads as follows: "The attorney filing or bringing said suit shall receive a fee not exceeding 10 per cent. of the first $500 of taxes collected by such proceedings, and 5 per cent. on all additional sums up to $5,000 and 3 per cent. on all other sums so collected and that same be taxed as costs and apportioned against the several tracts in proportion to tax thereon. No suit for the collection of such delinquent taxes shall be brought after three years from date same became delinquent."

It follows from what we have said that the decree must be affirmed on cross-appeal, and reversed on appeal with directions to enter a decree in accordance with this opinion.

HOLMES *v.* METROPOLITAN LIFE INSURANCE COMPANY.

4-2903

Opinion delivered April 10, 1933.

[redacted]

Sam T. Poe, Tom Poe and *Donald Poe,* for appellant.

Moore, Gray & Burrow, for appellee.

JOHNSON, C. J., (after stating the facts). We think the trial court erred in giving to the jury appellee's instruction No. 1, which is copied in the statement of facts.

This instruction told the jury that: "even though you may find from a preponderance of the evidence that the plaintiff is partially disabled, and even though you find that he has lost his eye entirely, and that by reason thereof his efficiency in the prosecution of any work or the pursuit of any occupation for which he may be fitted by training and experience is thereby impaired, nevertheless it does not follow from this that such partial disability entitles him to recover on the $2,000 certificate and its accompanying group policy, etc."

The effect of this instruction was to tell the jury that the loss of appellant's left eye was only a partial disability. This was one of the controverted issues in the case. It was a question for the jury to determine whether or not the loss of an eye constituted total and permanent or partial disability.

Section 23, article 7, of the Constitution of this State provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on request of either party."

The instruction given by the trial court and heretofore quoted was in violation of this constitutional mandate. It told the jury that the loss of an eye was partial disability, when this was a question of fact for the jury to determine.

If the loss of appellant's left eye, or the impairment of the vision of his right eye, or the loss or impairment of any one of the other physical defects complained of by him, either singly or all concurringly, produced or effected a total and permanent disability, he would be entitled to recover. It was therefore reversible error to single out the loss of an eye and tell the jury that this was only a partial disability.

Furthermore, this instruction is erroneous for the reason that it emphasizes to the jury the fact that the loss of an eye is only partial disability under the clauses of the policies sued on, instead of submitting the loss of an eye with all other physical defects for consideration and determination of the jury.

In a long line of decisions by this court it has been held: "It is not the province of the court to instruct the jury upon the effect or weight of evidence. It is the exclusive province of the jury to judge of the strength or weakness of all facts adduced to sustain an issue." *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880, and cases therein cited.

It is insisted on behalf of appellee that subsequent clauses in instruction No. 1 cured and made harmless the defect complained of in said instruction. To this we cannot agree. It was impossible for the jury to harmonize the different phrases in said instruction.

Since this case must be reversed and remanded for the error herein pointed out, we deem it unnecessary to discuss other alleged errors because it is probable that they will not occur on a retrial of the case.

For the error indicated, this case is reversed and remanded to the Pulaski County Circuit Court for a new trial in accordance with law.

SMITH and MCHANEY, JJ., dissent.

BOURLAND *v.* COLEMAN.

4-3002

Opinion delivered April 10, 1933.

George W. Dodd and *Daily & Woods,* for appellant.

W. L. Curtis, for appellee.

BUTLER, J. The city of Fort Smith operates under a commission form of government, as established by act No. 13 of the Acts of 1913 and as amended by act No. 3 of the Acts of 1917. The governing body consists of a mayor and two commissioners, and these, by the act as amended, also constitute the respective board of commissioners for each of the improvement districts in the said city. It is required that they shall cause to be kept the records of the money and revenues of each improvement district separate from the others, and separate and distinct from those of the city. It is also required that "each and every board of improvement district shall quarterly print in pamphlet form a detailed and itemized statement of the receipts and expenditures," etc., to

which report any taxpayer may within six months file exceptions in the chancery court, which there may be examined and disallowed as to any items found to be illegal with the right of appeal to the party aggrieved.

This action was instituted by taxpayers of Improvement District No. 35, and is grounded upon exceptions taken by plaintiff to certain items in two quarterly reports, one covering the period of October 1, 1931, to December 31, 1931, and the other from January 1, 1932, to March 31, 1932. The complaint alleges the organization of the district, official capacity of the defendant, and charges illegal expenditure of funds which plaintiff alleged were collected for the purpose of paying interest and retiring bonds of the district. Various items were challenged, but the only item involved is $1, attorney fee, paid George W. Dodd, in the first report named above and a similar item in the second report. From a decree holding the two items improper charges against said district and adjudging a recovery thereof, this appeal is prosecuted.

It is the contention of counsel for the appellee that, from the record made in the case, the sole question presented is whether or not one-half of the salary of the city attorney can be paid out of the funds of the various improvement districts. He asserts that the appellant's abstract of the record discloses that the salary of the city attorney is fixed by the city commissioners at $200 per month, one-half of which salary is paid by the city and one-half by the improvement districts, and that therefore, under our decision in *Bourland* v. *Southard,* 185 Ark. 627, 48 S. W. (2d) 555, the chancellor correctly found the items in question were illegal charges against the district and that their recovery should be had.

By § 8 of ordinance 1494 of the city of Fort Smith provision is made for a city attorney at a salary of $100 per month; and by § 14 of that ordinance, under that part relative to improvement districts, it is provided that the city attorney shall be legal adviser for the various improvement districts, for which services he shall receive the salary of $100 per month. The evidence is to the effect that the salary provided by § 8 aforesaid was paid

to the attorney by a city warrant drawn on the city treasury, and the $100 per month provided by § 14, *supra,* was prorated among the various districts upon a fair and equitable basis, and the part allocated to each district was paid out of the funds of that district. The board of commissioners, acting for the improvement districts from time to time, would meet and make the necessary appropriations, including that of the proportionate part of the salary of the attorney. In order to show the manner in which this was done, the record book of District No. 35 was introduced, and the record of the meeting of its board of commissioners of date October 3, 1931, was introduced and made a part of the evidence. It is as follows:

"Regular meeting of the board of Improvement Paving District No. 35. Hon. Fagan Bourland, chairman, presiding. Board met at 10:00 A. M.

"Members present: * * *

"The secretary reported the following collections for the month of September: * * *

"The following payroll for the month of September was approved and ordered paid: * * *. Geo. W. Dodd. $1.

"There being no further business, the meeting was declared adjourned"; signed by the chairman and secretary.

Mr. Dodd has served twice as city attorney, first for about two and a half years, including the year 1924, and to May, 1925; then again from April, 1929, until the present time. He organized district No. 35, drew the ordinance and supervised the selling of the bonds and letting of the contracts. He was paid for his services just as he is being paid now. After he went out of office as city attorney in 1925, he was not paid anything more until he became the city attorney again. During all this time he has not filed a claim against the district and has attended to all the legal business of the several districts without the aid of any other attorney. He has received from the beginning until now for all his services as attorney for the districts $100 per month, allocated among them, and paid by check thereon, holding himself ready to perform, and performing all legal services necessary, including the

enforcement of the collection of delinquent taxes. His method in this particular is to write a letter to the delinquent, giving about a month's notice before filing suit. Under the statute, when suit is filed, a $3 fee is taxed against each tract as costs, which, under the plan pursued, is not appropriated by the attorney, but paid into the treasury of the respective districts. District No. 35 is still functioning, and since its organization the attorney has been paid for his entire services to it from its funds a total of $67.75.

The estimated cost of Improvement District No. 35 was $61,670, including $1,000 for legal and clerical expenses and, with the estimated interest, totalling $80,000. The authorized bond issue was $53,000 of coupon bonds with maturities beginning August 1, 1925, each year to and including August 1, 1934, and the total amount paid the contractor was $41,539.93.

The above is a fair summary of the pertinent facts, and, in our opinion, does not justify the conclusion reached by counsel for the appellee or sustain that of the court below; nor does it bring this case within the rule stated in *Bourland* v. *Southard, supra.* The court there stated: "The question for us to determine is whether the commissioners had the right to expend any of the funds of the improvement district to pay a part of the salaries of certain officers in the employ of the city or to expend the funds for any purpose other than the cost of construction, engineering and legal services." In answering that question in the negative, the reason given by the court was that "the commissioners could not lawfully expend any money collected from the taxpayers except that which was necessary, as a part of the cost of construction. When Improvement District No. 11 was formed under the Constitution and laws, a majority of the taxpayers agreed to it. A majority must have consented in order to form a district. Under the law existing at that time they consented to assessments which were necessary in the cost of the construction of the improvement, and the taking or appropriating of any part of the assessments collected for any other purpose would be a violation of the Constitution."

In the instant case, the facts are essentially different from those in the case cited, and the question presented is not that suggested by counsel for the appellee, but, rather, can the commissioners of the city of Fort Smith, acting in their capacity as the board of the various improvement districts therein, employ an attorney with a continuing salary to represent the districts in all legal matters, fairly prorating the salary among the districts and employ the same person as city attorney, paying him for such services as the legal representative of the improvement district from the funds thereof, and for his services as city attorney from the city treasury?

The learned chancellor himself bears witness to the wisdom and fairness of the plan in the following words: "I feel sure you are saving the district money, and, if you can do it legally, it is a fine thing, but the question is, can you do it legally?" We agree with the chancellor's estimate of the plan and think his question can be answered in the affirmative.

The board of improvement is clothed with the duty of conducting the affairs of the district and is impliedly vested with the power necessary for the proper administration of these affairs, and, under § 5656 of Crawford & Moses' Digest, it is expressly impowered with the authority to employ whatever agents may be needed and to provide for their compensation, which, with all other necessary expenditures, shall be taken as a part of the cost of the improvement. The services of an attorney are necessary in the proper formation of an improvement district, the raising of funds to carry on the work and to attend to such litigation as might from time to time arise, and that such does arise we take judicial knowledge. Boards of improvement therefore have power to employ attorneys, and we can see no just reason why an attorney who perchance may represent the city in which the improvement districts lie may not also represent the improvement districts. It could make no difference, although the board of commissioners of the city is also the governing board of the district.

Act No. 233 of the Acts of 1931 makes the attorney representing cities of the second class and incorporated

towns the attorney for all boards and commissioners of improvement districts within the municipality, and providing for his compensation as may be agreed upon by the board of commissioners. While there is nothing in the act relating to cities of the first class, it registers the legislative approval of a plan similar to that employed by the city of Fort Smith as applicable to municipalities of lesser grade and indicates to our minds that the Legislature thought that for cities of the first class acting under a commission form of Government such as Fort Smith no such legislation was needed, as they already had that power, which we so hold.

It will be remembered that the actual cost of construction exceeded $40,000, and the authorized bond issue in District No. 35 exceeded $50,000. The taxpayers in forming the district recognized that a district of this character needs the services of an attorney and themselves determined their probable value, impliedly leaving to the commissioners to fix within the limit named the amount of the compensation and how and when it should be paid. It would make no difference, it appears to us, when or in what manner the fee was paid, so that it was reasonable and the services performed. It may be that the greater portion of the work of an attorney for an improvement district is performed during, and soon after, its creation, but, as suggested by counsel for the appellant, it is equally true that important legal questions may arise from time to time as long as the district functions, and litigation may arise of great importance to it and its taxpayers. Therefore the plan adopted by the city of Ft. Smith and its improvement districts appears to be both wise and lawful.

In the case at bar, as we interpret the facts, the commissioners had not expended any money of the improvement districts for paying its city attorney as such, but rather the items of expense questioned were paid to the attorney as the representative of the improvement districts, and these items were in the minds of the taxpayers when they consented to the formation of the districts, as it was contemplated and expressly provided that as much as $1,000 might be needed and used for

legal and clerical expenses. Therefore, the rule stated in *Bourland* v. *Southard, supra,* that the "taking or appropriating of any part of the assessments collected for any other purpose" (than the necessary cost of construction of the improvement) "would be a violation of the Constitution," does not apply.

It follows from the views expressed that the trial court erred in decreeing that the items questioned (attorney's fees) were improperly expended and that a recovery of the same should be had. The decree as to these items is therefore reversed, and the cause remanded with directions to dismiss the complaint as to these items. In all else the decree is affirmed.

ÆTNA LIFE INSURANCE COMPANY *v.* DAVIS.

4-2971

Opinion delivered April 17, 1933.

James B. McDonough, for appellant.

John P. Roberts, for appellee.

BUTLER, J. On January 6, 1932, Harvey A. Davis and Riley T. Davis brought suit to recover for total and permanent disability benefits against the Ætna Life Insurance Company on a policy issued by the company to Harvey A. Davis on July 11, 1925, in which Riley T. Davis was named as beneficiary. It was alleged that Harvey A. Davis became totally and permanently disabled by disease during the time the said policy was in full force. A breach of the contract was alleged, for which anticipatory damages were laid in the sum of $2,999, for which judgment was prayed.

The defendant company made answer, admitting the issuance of the policy, but denying that the plaintiff became totally and permanently disabled at a time when the policy was in effect, and alleged failure to pay the annual premium due July 11, 1930, when due or within the grace period; and, "by reason of such failure, the said policy wholly lapsed and became null and void on and after August 11, 1930."

On the trial of the case under the evidence adduced, there was a verdict and judgment in favor of the plaintiff in the sum of $2,500.

The applicable part of the policy is as follows: "If, before default in payment of premium, the insured becomes totally and permanently disabled by bodily injuries or disease and is thereby prevented from performing any work or conducting any business for compensation or profit, the following benefits will be available:

"When such disability occurs before age sixty: A waiver of the payment of premiums falling due during such disability, and an income of ten dollars a month for each one thousand dollars of the sum insured payable to the life owner each month in advance during such disability.

"If, before attaining the age of sixty years, the insured becomes totally disabled by bodily injuries or disease and is thereby prevented from performing any work or conducting any business for compensation or profit for a period of ninety consecutive days, then, if satisfactory evidence has not been previously furnished that such disability is permanent, such disability shall be presumed to be permanent. In such a case, benefits shall accrue from the expiration of the said ninety days, but not from a date more than six months prior to the date that evidence of such disability satisfactory to the company is received at its home office. No benefit shall accrue prior to the expiration of said ninety days unless during that period evidence satisfactory to the company is received at its home office while the insured is living that the total disability will be permanent, in which event benefits will accrue from the commencement of disability."

Counsel for the defendant insurance company challenge the correctness of the ruling and judgment of the court below on a number of grounds, which will be considered in the order suggested.

1. The first ground for reversal presented by counsel, and upon which he seems chiefly to rely, is that plaintiff "failed to prove that Harvey A. Davis made proof to the home office of the company as required by the policy, and for that reason there can be no recovery in this case." In developing this contention, counsel assert that "the failure of the insured to make proof ninety days prior to the expiration of the policy defeats absolutely plaintiff's right of recovery." This contention and the supporting argument appears to be based on the assumption that the contract of insurance prescribed the time, form and place of the making of proof of disability, and that the failure to do this in the manner specified works a forfeiture of the insured's right to recover. There may be such conditions in contracts of insurance, but we do not find any such in the one before us. It is a familiar rule that contracts of insurance should be construed so as to effectuate the intention of the parties, and in cases of ambiguity the doubtful questions should be resolved in favor of the insured. In order to sustain the contention

of the appellant, something must be read into the policy which the appellant company failed to incorporate therein. The only restriction we find in the contract is that no recovery can be had for a period of time greater than six months previous to the date the proof of disability is made and received by the company where it is not made and received within ninety days after the disability has commenced. There is no mode specified by which the proof of loss is required to be made or how it is to be transmitted to the insurer. From a fair consideration of the contract, the right to recover must be based on the total and permanent disability occurring during the life of the contract and not on any particular time when proof is made and received. *Hope Spoke Co.* v. *Maryland Casualty Co.,* 102 Ark. 1, 143 S. W. 85, 38 L. R. A. (N. S.) 62, Ann. Cas. 1914A, 268; *Sovereign Camp, W O. W.,* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567.

If therefore the disability exists and commenced when the contract was in force, it is immaterial how or when proof is made, if within the statutory period, and recovery may be had for the damage sustained, excluding that occurring beyond six months from the time proof is made. As stated in the case of *Hope Spoke Co.* v. *Maryland Cas. Co., supra,* the proof of disability is intended to give the insurer an opportunity to investigate the facts affecting the question of its liability and the extent thereof. This end is served when the complaint is filed, and no prejudice can result if, as in the instant case, no claim is made for benefits accruing before the filing of the complaint or the statute prescribing a penalty or attorney's fee is invoked.

2. The second, third and fourth grounds for reversal are based on the contentions (a) that the evidence is insufficient to prove that the insured was totally and permanently disabled prior to the lapse of the policy, (b) which it is claimed occurred when plaintiff failed to pay the premium due July 11, 1930, on or before the expiration of the grace period, and (c) there can be no recovery upon a permanent disability arising prior to the lapse of the policy.

The policy was issued on July 11, 1925, and the annual premiums were regularly paid when due down to

July 11, 1930. The premiums were payable in advance, and the time for paying the premium due on July 11, 1930, did not expire until August 11, 1930. The policy was written when the insured was nineteen years old. In April, 1926, the insured entered the State Sanitorium at Booneville, suffering with tuberculosis, and was discharged from that institution in January, 1927, during which time he was paid five monthly installments of sick benefits. On his discharge from the sanitorium, the superintendent caused to be sent to the insurer (at whose request we are not advised) a certificate stating that the insured "is now leaving the sanitorium with an arrested case (tuberculosis) and in good physical condition." The insurer paid no further monthly benefits, and the insured paid the annual premium falling due in that year and for the years subsequent, including the year ending July 10, 1930. The evidence tendered by the insured and accepted by the jury is to the effect that, while he was in the sanitorium, acting under the orders of the physician in charge, he did some light work in the institution, occupying him about two hours a day, for which work he was paid; that on his discharge he was directed by the physician to rest and eat wholesome and nutritious food, and these directions he attempted to follow as much as he was able. After leaving the sanitorium, he took his temperature for a time and began in the afternoons to have a rise in temperature. Just when this began after his discharge is not shown, but, as stated by him, he had a little temperature in the afternoons "all along." In the summer of 1927 he tried to do some work on the farm, but could only do a small amount of work and soon had to quit. He tried to do other work. In 1928 he began to work for a lumber company, but was unable to continue long in this employment. As he expressed it, "I tried it, but did not hold out very long." He was unable to work in 1929. About July 1, 1930, he secured employment with a construction company on a State highway. He soon became unable to do the work first assigned him, and was given lighter work, keeping time and turning on and off the water at a pump station as required. He was unable to put in a whole day during this time, was obliged fre-

quently to rest, and was spitting up blood. He stayed with this job several weeks, finally quitting sometime in August. Before beginning the highway job he suffered with pains in his lungs and ran a temperature in the afternoons.

Dr. J. T. Riley, who is now and has been in charge of the State Sanitorium at Booneville for some time, but who was not in charge when insured was first received, testified in the case and was given a history of the insured from the time he entered the sanitorium in April, 1926, down to and including the time he was working on the highway in 1930. Witness was asked whether or not in his opinion the insured was able to perform any work for compensation or profit. After some colloquy between counsel for the defendant and the court, witness stated in effect that during these times the insured was unable to do any work, and that in his opinion the insured was totally and permanently disabled.

Another physician testified to the effect that one suffering from active tuberculosis on being treated in the sanitorium is discharged with an arrested case should do no work for at least two years after leaving the sanitorium; that, when the insured was again received into the sanitorium, he was afflicted with marked active tuberculosis.

The evidence adduced on behalf of the plaintiff, having been accepted by the jury, must be considered in the light most favorable to him and given its strongest weight, and, when so considered, is ample to warrant a finding that the insured was totally and permanently disabled within the meaning of the policy in July and August, 1930, and, indeed, had been at all times from the date of his discharge from the sanitorium in 1927. It is argued that, since the insured worked in July and August of 1930 at a remunerative wage, that is sufficient to establish the fact that he was not suffering from a total and permanent disability within the meaning of the contract sued on. We do not think that this fact is conclusive of the question. The evidence in this case shows that the insured was a farm laborer, and it is reasonable to infer that he was without training or experience which

would enable him to conduct with success any business or be able to make a living except by manual labor. This being his situation, in order to perform any work or conduct any business for compensation or profit, more is required than mere strength to perform any given task or to follow any certain vocation for a time. It must exist to the extent as would enable one to do all the substantial acts necessary in the performance of the work or vocation in the usual and customary manner. This expression connotes the ability, moreover, to do the work or follow the vocation without suffering physical pain caused thereby and without danger to one's physical wellbeing. One of the physicians expressed it in the following way: When asked if he thought a man was totally disabled when he had recently worked at a job for $2 per day, answered, "You can work a horse when he is sick, but it wouldn't be to the best interest of the horse"; and Dr. Riley said, "The fact that he worked and earned $2 a day would not convince me that he was able to do so."

It clearly appears from the evidence that the insured was never at any time since April, 1927, able to do all the substantial acts necessary in the conduct of any vocation in which he was fitted to engage in the usual and customary way without peril to his health; he was therefore totally and permanently disabled within the meaning of the policy. *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Mo. State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Travelers' Protective Ass'n* v. *Stephens, ib.* 660, 49 S. W. (2d) 364; *Mutual Life Ins. Co. of N. Y.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433.

It is sufficient to say on the third and fourth grounds urged for reversal that it is immaterial whether or not the premium due July 11, 1930, was paid, and there was no lapse of the policy because the total and permanent disability commenced prior to that date, and under the provisions of the contract there were no premiums due as they were waived.

The fifth ground urged is that the plaintiff is not entitled to recover present value of the payments upon the theory that the defendant breached the contract. This contention cannot be sustained because liability was de-

nied on the ground that the policy lapsed for failure to pay the annual premium before the expiration of the grace period, August 11, 1930. This was a renunciation of the contract on the part of the insurer, and brings this case within the rule announced in *Roehm* v. *Horst,* 178 U. S. 1, 20 S. Ct. 780, followed in *Kirchman* v. *Tuffli Bros.,* 92 Ark. 111, 122 S. W. 239, and in *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 & Accident Co.* v. *Whitfield,* 186 Ark. 198, 53 S. W. (2d) 10; *Atlas Life Ins. Co. of Tulsa* v. *Bollin,* 168 Ark. 218, 53 S. W. (2d) 1. The rule in those cases may be thus stated: "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."

It is contended, in the last place, that the court erred in giving and refusing certain instructions. We have examined these instructions with care, and are of the opinion that they correctly submitted the issues to the jury in accordance with the views we have expressed. If there was any error, it was in favor of the appellant, and it therefore has no cause to complain.

Let the judgment be affirmed.

SMITH *v.* SCHOOL DISTRICT NO. 89.

4-2986

Opinion delivered April 24, 1933.

D. H. Howell, for appellant.

Partain & Agee, for appellee.

JOHNSON, C. J., (after stating the facts). The trial court erred in submitting this controversy to a jury. The uncontradicted testimony shows that no valid contract was made between appellant as a teacher and the appellee district. The testimony of Mr. Meadows, quoted in the statement of facts, demonstrates that the minds of the

parties never met upon the terms and conditions of the contract of employment. Appellant had applied for the position of teacher for a nine months' period at a salary of $95 per month. A majority of the board refused to employ him at this salary. A majority of the board also agreed that they would employ Mr. Smith as a teacher for the approaching term at $90 per month, and that this reduction of salary would be taken up with appellant for his acceptance, but this did not make a contract between the parties. The contract was actually made and consummated when appellant agreed to teach the school at $90 per month, which occurred some four or five days after the board meeting. All the witnesses agreed that no meeting of the board was had after March 20. Therefore the board was not in session when this contract was finally executed.

It is elementary law that, where a party submits an offer of a contract, this offer must be accepted without reservations. Any reservations or limitations in the acceptance in law is a rejection of the offer.

The rule is well stated in 6 R. C. L., § 31, page 608, as follows: "* * *The acceptance (of the terms of a contract) must likewise be unequivocal and unconditional. If to the acceptance of the proposal a condition be affixed before the party to whom the offer is made, or any modification or change in the offer be made or requested, there is a rejection of the offer."

The rule is stated as follows in 13 C. J., § 86: "An acceptance, to be effectual, must be identical with the offer and unconditional. Where a person offers to do a definite thing, and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. This is true, for example, where an acceptance varies from the offer as to time of performance, place of performance, price, quantity, quality, and in other like cases."

In the case of *Weaver* v. *Gay,* 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94, quoting from the third paragraph of the syllabus, the Supreme Court of West Virginia held: "If to the acceptance of such proposal a condition be

affixed by the party to whom the offer is made, or any modification or change in the offer be made or rejected, this will in law constitute a rejection of the offer."

The Supreme Court of North Dakota stated the rule as follows, in the case of *Horgan* v. *Russell,* 24 N. D. 490, 140 N. W. 99, 43 L. R. A. (N. S.) 1150:

"It is the settled law of this State that, before an acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms."

Since appellant had no valid contract with appellee district, he is not entitled to recover herein. This view of the situation makes it unnecessary for us to discuss or determine other questions presented in briefs.

Since the judgment entered by the trial court is the only lawful one which could have been entered under the facts in this case, the same is in all things affirmed.

KIRBY and BUTLER, JJ., dissent.

BUTLER, J., (dissenting). All members of the board of directors were present when appellant's application to teach the school was submitted to it. Therefore, a majority could legally contract with him. *School District* v. *Bennett,* 52 Ark. 511, 13 S. W. 132; *School District* v. *Traywick,* 118 Ark. 597, 177 S. W. 27. The question, then, is from a view of the evidence most favorable to the appellant, was there such an agreement then made which he could enforce? The majority has answered in the negative and invoked the familiar rule that where an offer is made the acceptance must be unequivocal and unconditional; that, where that acceptance is conditional or a new element is contained in it, there is no agreement, but such condition or new matter engrafted is to be deemed and treated as a rejection of the offer.

In the state of the case made by the appellant, it is my judgment that the rule announced has no application. If, when appellant's offer to teach the school at $95 per month had been rejected by the modification of the salary, the board had rested, then the rule stated in support of the decision reached would have applied. This, however, is not the situation, as is to be observed

from the statement of facts formulated by the majority and which fairly reflects appellant's evidence. He was acceptable to the majority as a teacher, but the price set by him for his services was thought to be too much and it was then agreed to hire him at a salary of $90 per month if he would accept the same. This was a rejection of the application of the appellant but it was also something more. It was a counter offer which the appellant had the right to accept within a reasonable time, in which there would arise a contract, the action on the part of the board having been taken at a time and place where it was authorized to act.

"A counter proposition operates as a rejection of an offer, even if the offeree performs some services referable to such offer * * *. Since the acceptance with a modification is at least a counter offer, it may be accepted by the original offeror and thus may constitute a contract." Page on Contracts, § 184; *Iron Works* v. *Douglass,* 49 Ark. 355, 5 S. W. 585.

As I view it, the situation in legal effect is as if appellant had filed no application with the board, but that it, without any such, had agreed for him to teach the school at $90 per month, and, this being communicated to him, he within a reasonable time had accepted. In such state of the case, it seems to me there could be no question but that under the rule stated and our decisions there would have arisen a binding contract. *Kempner* v. *Cohn,* 47 Ark. 519, 1 S. W. 869; *Emerson* v. *Stevens Grocery Co.,* 95 Ark. 421, 130 S. W. 541; *Blanton* v. *Manufacturing Co.,* 138 Ark. 508, 212 S. W. 330; *Jerome Hdw. Co.* v. *Davis Bros. Lbr. Co.,* 161 Ark. 197, 255 S. W. 906; *Southern Surety Co.* v. *Phillips,* 181 Ark. 14, 24 S. W. (2d) 870.

The general rules governing the making and construction of contracts have been uniformly applied to such as were made by school districts or other *quasi* corporations, subject only to some statutory limitation, and the rule that an offer made when accepted within a reasonable time constitutes a completed contract when made by school boards. *Morton* v. *Hancock Co.,* 161 Tenn. 324, 30 S. W. (2d) 252; *Baxter* v. *School District,*

217 Mo. App. 389, 266 S. W. 760; *Picou* v. *St. Bernard Parish* (La.) 132 So. 130.

Lee v. *Mitchell,* 108 Ark. 1, 156 S. W. 450, was a case where the majority of a school board at a meeting attended by all of the directors and participated in by all of them agreed to hire a teacher, who was not present, at a certain salary. The contract was drawn and signed by the president and secretary of the board and then sent through the mail to the teacher who accepted and signed the contract. The contract was attacked as invalid, but this court upheld it.

The argument made by the appellee district, which appears to have weight with the majority of this court, is that the signing of the contract was at a time when the board was not in session and when one of the directors was absent from the State, and therefore that this was the time when the contract was made, and it is invalid under the rule announced in the case of *School Dist.* v. *Bennett,* 52 Ark. 511, and the case of *School Dist.* v. *Jackson,* 110 Ark. 262, 161 S. W. 153, that no contract can be made except at a meeting of the school board. This contention overlooks the fact that the contract was made at a meeting of the board (subject to acceptance or rejection by the teacher), and the written contract was merely the evidence of its former action. It would therefore be immaterial when or where the contract was actually signed if it was signed within a reasonable time. *Lee* v. *Mitchell, supra; School District* v. *Hundley,* 126 Ark. 622, 191 S. W. 238.

I therefore respectfully dissent from the opinion of the majority.

HOWINGTON *v.* FRIEND.

4-3036

Opinion delivered May 1, 1933.

[redacted]

C. T. Carpenter, for appellant.

James G. Coston, J. T. Coston and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

JOHNSON, C. J., (after stating the facts). It is insisted, on behalf of appellant, that this case is ruled by *City Oil Works* v. *Helena Improvement District No. 1,* 149 Ark. 285, 232 S. W. 28, 20 A. L. R. 296, and *McCoy* v. *Board of Directors of Plum Bayou District,* 95 Ark. 345, 129 S. W. 1097, 29 L. R. A. (N. S.) 396. We cannot agree with this contention. In the McCoy case the alleged damages accrued by reason of the construction of the levee in the first instance. This court held in effect that the levee district was not liable to a property owner for damages accruing by reason of the construction of the levee. In the City Oil Works case it was determined that it was necessary to move the levee back and cut off the oil mill between the new levee and the river because of the caving in of the old levee. It was not contended in either case that taxes had been paid to the district for a long number of years. In the instant case appellee has paid taxes to the levee district for the past thirty years and had a perfect right to expect that his lands would continue to be protected by the levee. This, in our opinion, differentiates the instant case from either of the cases cited *supra.*

Again, when this court passed upon the questions presented in the City Oil Works case and the McCoy case, there was no authority of law for the board of directors in levee districts to contract or assume any liability for damages which accrued by reason of the withdrawal of levee protection.

Notwithstanding, the board of directors of St. Francis Levee District had no authority under the law to make a contract with appellee at the time this one was made, we are of the opinion that this contract has been validated by act 14 of 1932 and is now a binding obligation of the district. Section 1 of act 14 of the extraordinary

session of the Legislature of 1932, in part, reads as follows:

"Section 1. In all cases where the board of directors or commissioners of any levee district have, prior or subsequent to the passage of this act, agreed, contracted or promised, formally or informally, to pay any landowner or landowners for damages to land caused by withdrawal of levee protection therefrom, or by inclosing such land within a loop or circle of such levee, or surrounding the same by such levee, such agreement, contract, promise or understanding, when evidenced by a writing, whether a formal contract or a resolution of the board, or other instrument, shall be valid and enforceable between the parties."

There is, and can be, no doubt but that the Legislature could have in the first instance authorized the assessment of damages to the property owners for the withdrawal of protection. Since the Legislature could have done this in the first instance, it can by a subsequent act cure and validate all contracts and agreements in reference to such subject-matters. This, we think, has been done in the instant case.

This court held in *State ex rel. Hall,* v. *Canal Construction Company,* 134 Ark. 447, 203 S. W. 704, quoting from the syllabus:

"In statutes governing improvement districts, if a defect consists in doing some act, or in the mode or manner of doing it, which the Legislature might have made immaterial by a prior law, it may do so by a subsequent one. * * *

"Under the statute providing for the organization of an improvement district, an error was made in the engineer's estimate of the amount of excavation. The contractor bid upon the erroneous estimate. *Held,* it was proper for the Legislature thereafter to pass an act providing for payment for the increased cost of the improvement."

In *Favor* v. *Wayne,* 134 Ark. 30, 203 S. W. 22, quoting from the syllabus, this court held: "The rule in regard to curative or healing acts is that, if the thing omitted or not done, and which constitutes a defect in

the proceedings, is something which the Legislature might have dispensed with by a previous statute, it may do so by a subsequent one."

In *Allen* v. *Harmony Grove Consolidated School District,* 175 Ark. 212, 298 S. W. 997, the court used the following language, quoting from *Green* v. *Abraham,* 43 Ark. 420: "The rule applicable to cases of this description is substantially the following: If the thing wanting, or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the Legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute. And, if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

In *Hall* v. *Mitchell,* 175 Ark. 641, 1 S. W. (2d) 59, this court held: "The Legislature, when enacting our homestead statute, could have dispensed with any requirement as to the wife's signing it, and, this being so, it had the authority, where no vested rights are affected, to do the same by subsequent legislation. The right which a curative statute or healing act takes away in such a case is the right in the party to avoid his contract. Such legislative acts are sustainable only because they are supposed not to operate upon the deed or contract by changing it, but upon the mode of proof."

In the more recent case of *Common School District No. 42* v. *Stuttgart Special School District No. 22, ante* p. 119, this court held:

"We think that § 54 of act 169 of 1931 is applicable to the order of the county board of education made and entered on March 8, 1930, and that all omissions and irregularities therein, whether by lack of petition or notice, are cured and validated by said act, and that said order of the county board of education of Arkansas County has established the true boundary line between said two districts.'"

Since we have reached the conclusion that the Legislature could have authorized by an appropriate act the

recovery of damages for withdrawal of levee protection in the first instance, we now hold that it is authorized to validate and cure by a subsequent act all contracts and agreements with reference to the payment of such damages.

Since the conclusions here announced are decisive of all the issues in this case, it will not be necessary to discuss other interesting points discussed by counsel.

It follows from what we have said that the levee district could not recover this fund from appellee in the first instance, therefore a citizen and taxpayer's rights stand upon no higher ground. Since the levee district could not maintain this suit, certainly the appellant cannot maintain it as a taxpayer for the use and benefit of the district.

The decree of the Poinsett Chancery Court is in all things affirmed.

[redacted]

AFFLICK *v.* LAMBERT.

4-3000

Opinion delivered May 1, 1933.

[redacted]

Brewer & Cracraft and *W. G. Dinning,* for appellant.

Bevens & Mundt, for appellee.

MEHAFFY, J. The appellee, J. B. Lambert, brought suit in the Phillips Chancery Court against the appellants, C. W. Afflick and B. C. Pouncy, for the dissolution of a partnership which was formed in April, 1928, and for a distribution of the assets.

It was alleged that appellee and appellants were partners operating under a written contract, which was filed as an exhibit to the complaint; that on January 20,

1932, the partnership was dissolved by the appellee in accordance with the option stated in the contract; that at the time of dissolution there were no debts owing by the partnership, and that it owned a large body of real estate, consisting of acreage, suburban and city property, which was described at length; that the legal title to said property was in C. W. Afflick as trustee, for the benefit of all the partners, and that appellee was the owner of an undivided one-third interest in and to said property.

The complaint alleged the value of the real property and other property belonging to the partnership; that there were mutual accounts existing between the appellee and appellants, and that it was necessary to have the accounts adjusted. We do not deem it necessary to set out the written contract, because there is no controversy about its terms.

Appellee afterwards filed an amendment to his complaint reaffirming and reiterating all the allegations of the original complaint, and stated that the original written contract was, subsequent to its execution, modified by verbal agreement, had and made by and between all of the parties thereto, whereby charges made on the books of the partnership against the account of appellee were agreed to be temporary charges only, which upon settlement were to be adjusted according to the rights and equities of the parties.

The original written contract was unambiguous, and there is no controversy about its construction or interpretation, but the only controversy in the case arises on the question of the oral modification of the written contract. The appellee contends that the contract was modified, and the appellants contend that there was no modification of the written contract. This is the only question presented for our determination.

This court has many times held that a contract may be varied by the parties before performance. One of the recent cases is *Elkins* v. *Aliceville*, 170 Ark. 195, 279 S. W. 379. In that case the court referred to a number of authorities, and then said:

"The principles of law decided in these cases are recognized as controlling by counsel for the plaintiff, but he claims that under the original contract the time for performance expired at the end of sixty days, and that after this time the plaintiff was under no legal obligation to take the bonds. In carrying out and applying the rule of law above announced, the parties to a contract may modify or waive their rights under it and engraft new terms upon it by letters, and in such case the promise of one party is the consideration for that of the other. In other words, a contract may be varied by the parties before the performance, for the reason that the power to enter into the contract equally authorizes them to abrogate or modify it, and this right to change or modify the contract equally extends to a change in the time of performing it. * * *

"There is no rule of law forbidding the relinquishment of an existing contract and the substitution of a new one in its stead, and that is what was done in the case at bar. * * *

"It is well settled that the parties to a contract may at any time rescind it in whole or in part by mutual consent, and the surrender of their mutual rights and the substitution of new obligations is a sufficient consideration."

It is therefore a well-settled rule of this court that any parties who can make a contract can rescind or modify it by mutual consent. If they are capable of making the contract in the first instance, they may by mutual consent modify it in any manner. Parties to a written contract may rescind it by oral agreement, or they may modify it by oral agreement. Black on Rescission & Cancellation, vol. 1, p. 20; 13 C. J. 593; 6 R. C. L. 914. The appellee testified that a modification of the partnership contract was made in the spring of 1929. He said:

"It became very evident in the spring of 1929 that to carry on the work it would be necessary for Merrifield & Lambert to receive some compensation for their services." He then testified that he met Mr. Afflick and Mr. Pouncy in Simsboro, and it was agreed upon at that time for them to allow a drawing account of five per cent. on

all sales made, which should be chargeable against appellee's interest in the partnership.

He then testifies about another conference with Afflick and Pouncy in the spring of 1930, in which he states they went thoroughly into the cost of operation in the promotion work, and it was agreed that they were to be allowed a commission of five per cent. as a drawing account, and that whatever cost there was to the firm of Merrifield & Lambert would be adjusted at the expiration of the partnership. The firm of Merrifield & Lambert were doing the promotion work. The appellee's testimony is corroborated by the testimony of Merrifield. Both Mr. Afflick and Mr. Pouncy contradict the evidence of Lambert and Merrifield.

Whether there was a modification, as testified to by appellee, was a question of fact for the chancellor. This court has repeatedly held that, where there is a mutual agreement to modify a contract, the mutual promise of the parties will constitute a sufficient consideration for a valid agreement. There was not only the testimony of the witnesses, but numerous letters were introduced in evidence and considered by the chancellor, but we do not deem it necessary to set out the testimony at length.

We have not called attention to nor discussed the numerous authorities cited and relied on by the parties, and have not discussed their different contentions, because, as we view the case, it is simply a question of fact as to whether there was a modification of the contract by mutual consent. The chancellor found that there was, and his findings are not against the preponderance of the evidence.

Since there is no controversy about any other feature of the case, except the modification of the contract, the decree of the chancellor must be affirmed. It is so ordered.

REILLY *v.* HENRY.

4-3003

Opinion delivered May 1, 1933.

Utley & Hammock, for appellant.

Harvey G. Combs and *John F. Park,* for appellee.

BUTLER, J. The plaintiff, appellant here, brought suit to recover from the property of her divorced husband, Robert B. Henry, deceased, alimony and costs formerly decreed to her in the Pulaski Chancery Court, alleging that the same was under the control of the defendants, Mrs. Zada Henry and J. T. Henry, mother and father of the deceased, and also in the action sought to recover the proceeds of a certain life insurance policy issued by the Central States Life Insurance Company upon the life of the said Robert B. Henry, in which policy the plaintiff was named as beneficiary at the time of its issuance. Plaintiff alleged that she was the rightful beneficiary by virtue of a contract fully performed with her deceased husband; that the defendant, Mrs. Zada Henry, had been fraudulently substituted as beneficiary. She prayed for an injunction against the insurance company restraining payment of the proceeds of the said policy to the substituted beneficiary and for judgment on said policy as the rightful beneficiary. Plaintiff also sought to recover a one-third interest as a partner in the mercantile business of J. T. and W. T. Henry.

The defendants, the Henrys, answered, denying all the material allegations of the complaint, and the defendant, Central States Life Insurance Company, filed a separate answer admitting liability on the policy and tendering its check payable to the chancery clerk in the sum of $1,985.68 in full discharge of the policy and prayed for an order requiring Mrs. Zada Henry to surrender the policy to the clerk of the court and to discharge the defendant life insurance company. This tender was approved by the court, and Mrs. Zada Henry was required to surrender the original policy into the registry of the court to be held with the proceeds thereof pending determination as to the rightful beneficiary.

Testimony was adduced at the trial on behalf of the plaintiff and the defendants, and the court entered a decree denying the prayer of the first paragraph of the complaint for reformation of the policy that plaintiff be named as beneficiary therein. The court decreed that the prayer of the complaint for a one-third interest in the mercantile business of the Henrys be denied, and found that the plaintiff was entitled to the sum of $310 before then adjudged to her as alimony and rendered judgment against the defendants, Henrys, for said sum, and that said judgment be a lien upon the store with all assets therein. From this part of the decree no appeal has been prosecuted by the defendants, but plaintiff has appealed from that part of the decree denying her right to recover the proceeds of the policy and an interest as a partner in the mercantile business.

We first dispose of the question of the partnership as the issue involved is merely one of fact. The storehouse was built in the summer of 1926, and a stock of merchandise was installed therein and business begun sometime in the fall of that year. Plaintiff drew a check on her account in a local bank for the sum of $750 which it is admitted was used in the construction of the store building, and which plaintiff claims was for the purchase of a one-third interest in the business thereafter to be conducted therein. There was evidence tending to support this contention, likewise evidence to the contrary;

all of which we have carefully considered and are unable to say that the conclusion reached by the trial court on this question is against the preponderance of the testimony. The decree in this respect will therefore be affirmed.

Regarding the contention of plaintiff as to the ownership of the proceeds of the insurance policy, a more difficult question is presented. The policy was issued January 2, 1926, on the life of Robert B. Henry, and plaintiff, then his wife, was named as beneficiary therein. The policy, however, provided for a change of beneficiary by the insured under the title "Beneficiary," which is as follows: "The insured may designate one or more beneficiaries if none be named herein, and may designate one or more contingent beneficiaries whose interest shall be as expressed in or by indorsement of the company on this policy and may change any beneficiary or contingent beneficiary at any time while this policy is in force, all by written notice to the company at the home office, and subject to any assignment hereof. Such designation or change shall take effect only upon approval and indorsement of the same on the policy by the company."

Counsel for the appellee states the contention of the appellant as follows: "Appellant earnestly insists that she is the owner of insurance policy No. 73243 by reason of the fact that this policy was taken out by her husband and delivered to her with the understanding or agreement that she was to pay all premiums on said policy, and that thereby it became her property. This contention would be sound and be worthy of merit if it were not for the terms of the policy itself."

Plaintiff and Robert B. Henry were married in October, 1923. The insurance policy was issued in January, 1926. In June, 1932, plaintiff brought suit for a divorce from Robert B. Henry and obtained a decree of divorce on July 7 of that year. On August 7 following Robert B. Henry was fatally injured and died within a few days. The evidence, which is undisputed, is to the effect that the policy was taken out and given to the plaintiff by the insured with the understanding that she was to pay

all the premiums. Plaintiff remained in actual possession of the policy until about May, 1932, when she delivered it with other of her papers to her father-in-law, J. T. Henry, with the request that he put it in his safety deposit box for safe keeping. The policy remained in the deposit box until after plaintiff instituted her action for divorce when her father-in-law delivered it to her husband without her knowledge or consent, and he obtained a change in the name of the beneficiary to Mrs. Zada Henry, also without her knowledge. This was accomplished just a few days before the rendition of the decree of divorce. The day after the funeral of Robert B. Henry, plaintiff went to the office of the insurance company in Little Rock for the purpose of making proofs required by the policy. She was then informed for the first time that her father-in-law had surrendered the policy to Robert B. Henry, and that he had obtained a change in the name of the beneficiary.

It is admitted that plaintiff paid the first premium, all intervening premiums, and the last premium. These were payable quarterly, and each was for the sum of $14.32. There were twenty-six premiums which plaintiff paid. It is her contention that the premiums were paid in accordance with the agreement of her husband when the policy was first procured; that they were paid out of her own funds, and that the policy was at all times her property of which she had possession at all times. While admitting that the plaintiff paid the premiums, it is the contention of the defendants that they were paid with her husband's money, and their counsel insist that this fact is established by plaintiff's own testimony. To support this view, they present certain excerpts from plaintiff's testimony which, if taken without reference to her testimony as a whole, would tend to show that during the time she was making payments of the premiums she was not working, had no money of her own, that what money she had was earned by her husband, and all payments of premiums were made with money which he had given her. These excerpts, taken from the body of plaintiff's testimony, would give support to the contention of counsel. It is clear, however, when we consider

the entire evidence, not only of the plaintiff but of the other witnesses, that she was referring to the payment of premiums from the time of the issuance of the policy until the time the Henry mercantile business commenced. During this interval she was not working except as a housewife, and the money she received was earned by her husband and was given to her as allowances for household and personal expenses, and what she could save from these allowances was her own to do with as she pleased, and out of these savings she paid the insurance premiums. Her savings account at the bank was introduced and showed during these times she had been able to save substantial sums.

The evidence is undisputed that beginning in October, 1926, plaintiff worked continuously in the mercantile establishment until the latter part of May or the first of June, 1932, when she left her husband and brought suit for divorce. A part of this time her husband was also working in the store, but for how long and what else he did the record does not disclose. Plaintiff admits in her testimony that, after she began working in the store, when the premiums would fall due she would get the money at the store, either from the cash drawer or ask some one in the store for it. This, however, does not indicate that it was not her own money for she was rendering valuable services during all that time, nor does it support the contention that "every premium paid on the life insurance policy of Robert B. Henry was paid with money earned by him and furnished to her for the express purpose of keeping these premiums alive, and that later when appellant and her husband came out to the home of the appellees to work in the store on Prospect Avenue that all of said premiums were paid with money furnished appellant from the store by the appellees." From the testimony it is evident that the store was conducted as a family enterprise, the father, one son, W. T. Henry, and the plaintiff working all the time, and plaintiff's husband working part of the time. For a little more than the first year plaintiff was paid no salary, for about two years she was paid a small salary of $5 per week, and for the remainder of the time she

again worked without salary. During this last period the bank account discloses she was able to accumulate very little.

J. T. Henry, the father, in his testimony intimates that plaintiff's personal bills were paid out of the store in excess of the value of her services, but it is significant that the items of such expenses and amounts of money were not given. Mr. Henry contented himself with the general statement: "I paid most of Miss Reilly's bills, or she was given money for same by me or the boys. She was privileged to take money from the cash drawer and ticket same to herself. I reckon she paid her house rent and other bills herself and with money she took from the store."

Relating to the manner in which the premiums were paid and the source from which the money was derived, plaintiff testified: "The insured, Robert B. Henry, did not furnish me the money to pay the premiums, although some of it may have been paid out of money he furnished me for household and living expense." This testimony is not disputed except by insinuation which we think is not warranted from the testimony.

It is our conclusion that the preponderance of the testimony establishes these facts: first, that the policy was procured with an understanding between the plaintiff and her then husband that she was to pay the premiums; that with this understanding, when the policy was obtained, it was delivered to the plaintiff and kept by her until surreptitiously taken from the lock box, and that during all of the time she complied with her agreement by paying the quarterly premiums out of her earnings or with money she saved out of her allowances given her by her husband which was her own to do with as she pleased.

The rule is well established that where the policy provides for a change of beneficiary by the insured, the beneficiary first named has no vested interest as in ordinary policies, but this rule is not absolute and indefeasible, as contended by the appellees. Circumstances may arise, either in the procurement or during the life of the policy, such as would establish an equitable in-

terest in the proceeds thereof. There are many cases which recognize this exception to the rule, and we have found none to deny it where the contest for the proceeds is between rival claimants and which do not involve the rights of the insurer arising out of the contract as written.

The principle just stated is recognized by the Supreme Court of Vermont in the case of *Modern Woodmen of America* v. *Headle*, 88 Vt. 37, 90 Atl. 893, reported at page 580, L. R. A. 1915A, and many cases are there cited supporting it.

In *Cronan* v. *Metro. Life Ins. Co.*, Supreme Court of Rhode Island, reported at page 618, 147 Atl., 50 R. I. 323, it is said: "The law is well settled that a beneficiary who pays premiums or loans money upon the security of the policy acquires in the policy a vested right which will be protected in equity against one who thereafter, without valuable consideration, becomes the substituted beneficiary. Although the policy contains a clause to the effect that no assignment of the policy will be recognized unless consented to by the insurance company, a beneficiary who acquires vested rights is only required to notify the insurance company of the fact before payment is made to another person."

In the case of *Shoudy* v. *Shoudy*, 55 Cal. App., p. 344, 203 Pac. 433, the husband had procured a policy which provided that he might change the beneficiary, and at the time the policy was written he named his wife as the beneficiary. Afterward, in contemplation of divorce, he agreed to maintain the policy for his wife as long as she remained single. The divorce was obtained, and shortly afterward the beneficiary was changed, and one whom the insured had married was substituted as beneficiary in lieu of the divorced wife. The substituted beneficiary, just before her marriage to the insured, had loaned him a sum of money equal to the policy, and after the marriage her husband informed her that he had protected her with the life insurance policy. She, however, did not become possessed of the policy and never saw it. Neither did she or the first-named beneficiary know of the change until after the death of the

insured. In a contest which arose between the first and the substituted beneficiaries, it was the latter's contention that the judgment of divorce determined all the rights of the first-named beneficiary, and that her interest in the policy at no time was more than a mere expectancy subject to defeat at any time by the act of the insured under the power given by the terms of the contract of insurance. The court disagreed with both contentions, and as to the last, while holding that when the policy was first taken out the beneficiary named had no vested or equitable rights therein which the insured could not have ended at will by change of beneficiary, yet when he agreed for a consideration to keep the policy in being for the beneficiary as long as she remained single, and "when this offer was accepted by her, the quality of her interest as a beneficiary in said policies became changed from that of a mere expectancy to a more fixed and permanent relation. She had thenceforth an equitable interest in said policies of which she could not be divested by the mere act of the insured in changing the name of the beneficiary."

In *McDonald* v. *McDonald,* a case from the Alabama Supreme Court, reported in 212 Ala. 137, 102 So. 38, 36 A. L. R. 761, in referring to the contention that the face of the policy at the death of the insured with respect to the beneficiary where the same had been changed under the power in the policy, must be taken as conclusive, the court recognized that some courts support the contention and made the following declaration: "But we think it should be considered at least that equities may arise in favor of the named beneficiary which would deny such right, as, for example, the insured may for valuable consideration estop himself from changing his designation of the beneficiary."

In the case of *M'Glynn* v. *Curry,* 82 App. Div. 431, 81 N. Y. S. 855, the facts were that the insured, on obtaining a life insurance policy in which her niece was designated as beneficiary, delivered the same to said niece, using language from which a gift might be inferred. Afterward the policy, at the mutual request of the insured and the beneficiary, was delivered to an uncle of both for

safe keeping, and was deposited by him in a safe in his house where it remained for a time when it was sent by the mother of the beneficiary with other papers to the insured without directions from the beneficiary or any one representing her, or any expressed or implied intent of the beneficiary, to part with the ownership. The insured, after obtaining possession of the policy, attempted to substitute another for the beneficiary first named under the power contained in the policy. Upon the death of the insured, in an action between the first and last named beneficiaries, the insurer, as in the case at bar, appeared not as a contestant but for the purpose of having determined which one of the claimants was entitled to the proceeds of the policy. In deciding in favor of the beneficiary first named, the court held that from the circumstances as disclosed by the testimony it was fairly to be inferred that, when the insured delivered the policy to the beneficiary, it was her intention to convey to said beneficiary the policy—that the unqualified delivery was effectual for that purpose—and the rights thus fixed could not afterwards be divested by the act of the insured: "Each installment is, in fact, part consideration of the entire insurance for life (*New York Life Ins. Co.* v. *Statham,* 93 U. S. 24, 30, 23 L. Ed. 789); and when the insured, in the case at bar, made her initial payment and delivered the policy, with intent to convey ownership in the plaintiff, there was a value involved, of which the plaintiff could not be divested by any subsequent act on the part of the insured without her consent. The plaintiff, by reason of the consummated gift, had a property right in the whole contract; and, while this might be forfeited by a failure on the part of the assured or the plaintiff to make the quarterly payments provided for in the policy, the insured had parted with the right to transfer this policy or its benefits to any other person than the beneficiary named, and her letter requesting the company to insert in the policy the name of a new beneficiary could not operate to vest in the defendant (the substituted beneficiary) any right to the money which is now conceded to be due under the policy." Followed in

Jacobs v. *Strumwasser,* 84 Misc. 28, 145 N. Y. S. 916, and cited in *Continental Life Ins. Co.* v. *Sailor,* 47 Fed. (2d) 911, which announces the same rule.

As suggested by the Alabama court there are some cases which would appear to hold a view contrary to the principles announced in the cases above cited and quoted from, but an examination of those cases, in so far as our research has extended, discloses that these were contests between the beneficiary first named and the insurer, and to sustain the contention of the first beneficiary loss would fall upon the insurer, and it is for that reason that contracts, either express or implied, between the insured and the beneficiary which would prevent the former from exercising the privilege of changing the beneficiary as provided in the policy are not recognized. "The remedy to enforce any contract of that kind is not to be applied in a suit on the policy between the original beneficiary and the company." *Royal Union, etc.* v. *Lloyd,* 254 Fed. 407, 135 C. C. A. 627.

It must be remembered that the insurer in the instant case appears, not as a contestant, but merely for the purpose of determining the rights of the respective claimants to the proceeds of the policy, which, when ascertained, it is ready to pay and has, indeed, already paid the proceeds into the court. As between the claimants, the preponderance of the evidence establishes a case for the beneficiary first named stronger than in the cases cited which deny to the insured the right to exercise the privilege of changing the beneficiary allowed by the terms of the policy. All that the insured ever did was to make application for the policy and the agreement between him and his wife, the delivery to and the subsequent possession of the policy by her, and the payments by her of the premiums, are facts which, if not sufficient to warrant the conclusion that she was at all times the legal owner of the policy, did create such equities in her favor as in good conscience would prevent the exercise of the power of change contained in the policy and render ineffectual any attempt of the insured to divest her interest therein.

It follows from the views expressed that the decree of the trial court must be, and it is, hereby modified and judgment is entered here in favor of the appellant (plaintiff in the court below) for the proceeds of the policy, and its custodian is directed to pay the same over to her on demand. As thus modified, the decree is affirmed.

JOHNSON *v.* YOUNG MEN'S BUILDING & LOAN ASSOCIATION.

4-2996

Opinion delivered May 8, 1933.

[redacted]

Basil Baker and *E. L. Westbrooke,* for appellant.

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

JOHNSON, C. J., (after stating the facts). It is apparent from the foregoing statement of facts that but one question is presented here for determination, namely: Was there a delivery and acceptance of the deed dated January 12, 1923, from C. W. Claunch and wife to their son, C. L. Claunch?

The acceptance of the deed in the instant case will be presumed because the grant is beneficial to the grantee, and, in addition to this, his father or mother could have accepted the grant for him, the grantee then being a minor. *Graham* v. *Suddeth,* 97 Ark. 283, 133 S. W. 1023.

This court has clearly stated the rule in reference to the delivery of a deed as follows:

"Any disposal of a deed accompanied by acts, words or circumstances which clearly indicate that the grantor intends that it shall take effect as a conveyance is a sufficient delivery." *Russell* v. *May,* 77 Ark. 89, 90 S. W. 617.

The facts and circumstances in the instant case are to the following effect:

C. W. Claunch and wife had but one living child, the grantee in the deed of January 12, 1923. The wife and mother owned and contributed towards the purchase of this property equally with her husband. A very valuable portion of the property was owned by them under conveyances which effected an estate by the entirety. The mother and father desired to avoid the consequences of this estate by executing a deed to their only child, thereby preventing either survivor taking the title in the event of death.

It is perfectly evident that the mother joined in this deed with the specific intent of vesting a present title in the son because she could have had no other reason for executing the deed. She owed no debts at the time the deed was executed, and owed no debts at the time of her death in January, 1931. She had told her son of the deed and of her wishes on many occasions and had so advised her husband. The husband stands in no different light except he contracted certain surety liabilities beginning in 1928, some five years after the execution of this deed.

It is insisted on behalf of appellant that the retention of the deed by the grantors destroys their apparent

intention of delivery. This is not the case. It was the purpose of the grantors to retain possession of the property until the death of one or the other of them. This is not always inconsistent with the grant or intention of delivery of the deed.

This court held in *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244, quoting from the fourth headnote:

"The fact that a deed was found among the effects of the grantor at his death raises no presumption against delivery if the grantor reserved an interest in the property conveyed, and therefore had an interest in the preservation of the deed."

Since the grantors had the intention and purpose of retaining the possession of the property until the death of one or the other of them, they had the right to retain the deed to effectuate this purpose.

It is next insisted by appellant that the failure to have the deed recorded is fatal to the presumption of delivery. We cannot agree to this. This court held in *Irwin* v. *Dugger,* 142 Ark. 104, 218 S. W. 177, quoting from the fourth headnote:

"The mere facts that a debtor did not record a deed to him of land, and that his wife and son did not record deeds from him, are not of themselves sufficient evidence of fraudulent purpose as to constitute fraud in law, but are circumstances tending to impeach the want of good faith of the parties."

The recording of the deed in the instant case might have defeated the purpose of the grantors in retaining possession and control of the property until the death of one of them, and we think a fair explanation of it.

It is next insisted that the continued possession and control of the property by the grantors and their lease of the property for a term of years nullifies the apparent intention of delivery. Neither can we agree to this. Their continued possession and control was nothing more nor less than the enjoyment of the estate retained by them or which was intended to be retained and enjoyed.

No error appearing, the decree is affirmed.

STUTZENBAKER *v.* ARKANSAS POWER & LIGHT COMPANY.

4-3007

Opinion delivered May 8, 1933.

[redacted]

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

House & Moses and *Ingram & Moher,* for appellee.

SMITH, J. Mrs. Mae Stutzenbaker owned a house in the city of Stuttgart, which she occupied as her home. She rented certain of the rooms to other occupants. This building was partially destroyed by fire on February 20, 1932, which also damaged the furniture and furnishings belonging to all the occupants of the house. Suit was brought by all of the occupants for the damage thus caused against the Arkansas Power & Light Company, it being alleged that the fire was the result of the negligence of the defendant in the manner hereinafter discussed. From a verdict and judgment in favor of the defendant is this appeal.

The building had been wired for electricity by a contractor employed by Mrs. Stutzenbaker, who owned and used several electrical appliances in the house, including a cook stove. The light company contracted to furnish electric current for use in the house and had made electrical connections with it. The plaintiffs decided to move from the house, and notified the light company to

discontinue service and to disconnect the wires from the stove so that it might be removed.

The house—a frame dwelling—faces north on West Fourth Street. In the rear of the house is an alley which runs east and west. In order to furnish electrical service to the house, a pole was located in the alley, and from this pole three wires ran to the house and were fastened to the rear or south side thereof by means of porcelain knobs. One of these wires is known as a 220-volt wire, and the other two are known as 110-volt wires. The 220-volt wire entered the house through a piece of iron pipe an inch in diameter. This conduit through which that wire entered the house was located at a point opposite a switch box on the south wall of the kitchen, and the stove meter was directely below the switch box. From the bottom of the switch box the wires, inclosed in a flexible cable about 1⅛ inches in circumference, led to the electric stove. On the outside south wall of the house was located a light meter near a point where the wires extending from the pole reached the house. This meter was installed in a rectangular box built in the wall. The light service wires entered the wall through two porcelain tubes immediately above the box containing the meter, and the wiring from the porcelain tubes to the meter is concealed in the wall. This wiring and the box were the property of Mrs. Stutzenbaker, and were installed by her. From the porcelain tubes the light wires come out of the wall and connect to two of the wires supplying current to the stove. The two wires to which the light wires are connected are known as 110-volt wires, and this connection and the other wiring in the house were installed by Mrs. Stutzenbaker's contractor.

In response to the direction to discontinue service, an electrician employed by the light company went to the house at about 8:30 on the morning of the fire, and he first pulled the stove switch in the box on the wall. He did this for his own safety, and when the switch was pulled the current to the stove was shut off. The electrician then cut the 220-volt wire six inches from the knob, and he testified that he wrapped the short end so cut around the porcelain knob on the outside of the house.

Whether the short end was wrapped around the porcelain knob is one of the disputed questions of fact in the case. The electrician testified that he cut the remaining two 110-volt wires immediately below the connection which Mrs. Stutzenbaker's contractor had made and taped the ends of both wires. He further testified that he then removed the conduit from the wall and taped the ends, and he then cut the wires below the switch box which served the electric stove, and Mr. Stutzenbaker moved the stove out from the wall. The electrician further testified that, when the wires were cut below the switch, this completely eliminated any current to the stove, and he then took off the lock nuts, which fastened one end of the conduit to the switch box, and removed the conduit and wires entirely, and removed the switch box from the wall. This left no wires whatever inside of the house which led to the stove. He testified that, before leaving the premises, he went out in the alley and cut the 220-volt wire off a few inches from the pole 160 feet from the house, and wrapped it back around a porcelain knob on the pole. This left only the 112-volt lighting service to the house, which was fed from the remaining two service wires coming from the porcelain knobs down to the wires and the connection made by appellants' contractor. According to the testimony on the part of the plaintiffs, the wires were not cut at the pole until after the fire had occurred and been extinguished.

After the electrician left, Mr. Stutzenbaker carried away the stove, the wires, the switch box and the conduit entrance used in connection with the stove. There was left in the house a new oil cook stove, which had been brought there only a day or so before the fire, but the oil cook stove had not been put in use according to the testimony of the plaintiffs, and contained no oil. Smoke coming from the house was discovered about 11 A. M. of the same day, and, before the fire causing it could be extinguished, the damage had been done, for which the plaintiffs sue.

Certain pictures offered in evidence and other testimony in the case leave little doubt as to the point of origin of the fire. Mrs. Wilson, the first witness to see

the fire, testified that the blaze first appeared near a point where the two light wires entered the building. The fire chief testified that in his judgment the fire originated on the inside of the kitchen where Mrs. Wilson saw the first blaze coming out. There was in the west wall at this point a 2 x 4 studding, which was burned nearly in two. McConnell, the first person to enter the house, testified that as he went into the kitchen the three wires extending from the pole to the house were still up, and immediately after he had passed under them, two of the three wires came loose from their anchorage to the house and fell to the ground, and, to prevent further contact, this witness pulled the down portion of one of the wires away from the down portion of the other wire. Witness Estes, who came up to the rear of the house immediately following McConnell, observed the two down wires, and testified that the insulation substance on them had burned for some distance toward the pole.

Appellants state their theory of the case as follows: When the electrician cut the three wires loose from the stove, he did so at a point some distance below where the two extensions entered the house near the west door top, thus leaving them loose and with their ends naked. A considerable wind was blowing and two of the three wires formed a short circuit so that they dropped loose from their fastenings some 14 or 15 feet away from the location of the wires, this being evidenced by the fact that the insulation burned off these two wires some distance towards the pole.

The court submitted the case to the jury under instructions declaring the law to be that, if the defendant's electrician by disconnecting the wires from the stove had left them uninsulated, and had so cut the wires as to leave them near enough each other for the dangling ends to be brought or blown together, thereby producing a short circuit and causing the fire, and this was negligence, then the defendant was liable for the damages thus occasioned.

This instruction appears to correctly submit the controlling question of fact, and the verdict of the jury in defendant's favor would be conclusive of the case if

other instructions had not been given which we think are erroneous.

Instruction numbered 2 reads as follows: "You are instructed that, if you find from the evidence that the fire originated inside of the building of the plaintiff, then your verdict should be for defendant company." This instruction is peremptory in its nature, as the testimony appears to be undisputed that the fire originated inside of the house. If the fire was caused by cutting the wires and leaving their ends untaped, so that a short circuit might be and was formed as a result of that action, it would be immaterial where the fire originated. The defendant would be responsible for the result of its negligence, if it were negligent, wherever the vagaries of the electric current manifested the negligence.

There were six plaintiffs in the case, and in an instruction numbered 12 the court stated the damages for which each had sued. This instruction was concluded with the following declaration of law: "You are instructed that each plaintiff would have to make out his or her own case, and you are further instructed that you cannot find for one plaintiff merely because one or more of the plaintiffs, in your judgment, might be entitled to a verdict. The burden of proof is upon each plaintiff to make out his own or her own case by a preponderance of the testimony." The part of the instruction above copied was erroneous. Several of these plaintiffs offered no testimony as to the origin of the fire, although there was testimony as to the damages which the plaintiffs had severally sustained. If there was liability as to any one of the plaintiffs, there was liability as to all. If any one of them was entitled to be compensated, all of them were; and if the testimony on the part of one or more of the plaintiffs established liability, the others were entitled to the benefit of that testimony, although they may have had no knowledge as to the cause of the fire and had offered no testimony on that subject.

For the error in giving instructions numbered 2 and 12, set out above, the judgment must be reversed, and the cause will be remanded for a new trial.

MURPHY *v.* MARTIN.

4-2958

Opinion delivered May 8, 1933.

David L. King, for appellant.

Sidney Kelly and *W. P. Smith,* for appellee.

HUMPHREY, J. The purported last will and testament of S. P. Murphy, deceased, was filed in vacation with the clerk of the probate court of Sharp County, Southern District, and by him examined, approved, and admitted to probate on the 5th day of May, 1930. At the succeeding regular term of the probate court, appellees entered a contest, making averments as follows:

"1st. That the paper writing alleged to be the last will and testament of S. P. Murphy, deceased, is not in form as required by law; therefore is not subject to probate.

"2d. That said S. P. Murphy was not possessed of testamentary capacity at the time of the alleged execution of said paper writing purported to be his last will and testament.

"3d. That said purported will is not in the handwriting of said S. P. Murphy."

An answer was filed by appellants denying the first two allegations contained in appellees' contest.

On the trial of the cause, the probate court admitted the will to probate, from which judgment an appeal was duly prosecuted to the circuit court of said county, Southern District, where a change of venue was prayed and granted to the Northern District thereof.

The cause was there tried *de novo* and sent to a jury upon the pleadings, testimony adduced, and instructions of the court, resulting in a verdict and consequent judg-

ment that the instrument in controversy was an invalid will, from which is this appeal.

The undisputed testimony showed that the will was written by Verdus Murphy, a son of S. P. Murphy, and signed by the testator writing his initials "S. P.," which was the usual way of signing his name; that he also signed the will by mark, which signature was witnessed by Cleo Massey and Theodore Eason; that the will was read to S. P. Murphy, after which he signed same in the manner set out above in the presence of the witnesses aforesaid and that they, at his request, signed same as witnesses in his presence and in the presence of each other.

In view of this undisputed testimony, the court should have assumed, in instructing the jury, that the will was in due form and executed in the manner prescribed by law. Instead of doing so, he submitted that issue to the jury in instruction No. 4, over the objection and exception of appellants. Instruction No. 4 is as follows:

"You are instructed that in this case the contestees contend that S. P. Murphy did subscribe the will in question by fixing thereto the initials, "S. P.," and they contend that the initials were used by him as a usual and customary signature, and, if you should believe from the evidence that the initials, "S. P.," were the usual and customary signature of S. P. Murphy, and that he thus subscribed the paper in question, using the said initials "S. P." for his signature, then and in that event the will would have been properly subscribed. You are instructed that the other part of the purported subscription, the part S. P. Murphy written by another party to the will, is to be considered by you as no part of the subscription to the will for the reason that it does not comply with the law as to what constitutes a subscription to a will, and you are therefore to consider only the initials "S. P.," alleged to have been fixed to the will, in arriving at a conclusion as to whether the will has been subscribed."

The submission of this issue to the jury was calculated to confuse and mislead them. The sole issue which should have been submitted to the jury under the disputed testimony was the testamentary capacity of the

testator at the time he executed the will. The testimony was in conflict on that issue.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

WYLIE *v.* RURAL SPECIAL SCHOOL DISTRICT NO. 9.

4-3005

Opinion delivered May 8, 1933.

T. D. Wynne, S. F. Morton and *J. T. Richardson,* for appellant.

Paul G. Matlock and *John L. McClellan,* for appellee.

MCHANEY, J. October 10, 1930, appellee school district, having complied with act 119, Acts of 1927, p. 358, entitled "An act creating a revolving loan fund to aid needy school districts in repairing, erecting and equipping necessary school buildings, and for other purposes," borrowed $10,000 from said fund through the State Board of Education. This amount was remitted to appellee by draft in its favor which was deposited with Ed Hawkins, then treasurer of Dallas County, who credited same to appellee on his books as "building fund," and he deposited said sum, to the best of his recollection, to his credit as county treasurer, in the Bank of Fordyce. He also had on deposit in said bank other county and school funds. On November 17, 1930, Hawkins as county treasurer had deposits in Bank of Carthage, First State Bank of Stuttgart, Merchants' & Planters' Bank & Trust Company, Pine Bluff, Merchants' & Planters' Bank, Sparkman, Bank of Fordyce, and the First National Bank of Fordyce. On said date all of said banks closed their

doors with the exception of Merchants' & Planters' of Sparkman and the First National of Fordyce, and were taken over by the Bank Commissioner for liquidation. The treasurer had on deposit in all banks the sum of $64,941.39, and in insolvent banks $44,980.85, consisting of county and school district funds. None of said banks were authorized depositaries, but were such as selected by the treasurer. He therefore sustained a loss of approximately 70 per cent. of all funds.

Appellee school district had let a contract to construct a new school building with the funds so borrowed, and from time to time, both before and after the bank failures, drew its warrants on its "building fund" to its credit in the county treasury to pay for the construction of said school building, and all of said warrants were honored by the treasurer and checks were drawn on open banks in payment of said warrants, all of which were paid. Appellant succeeded Hawkins as county treasurer in January, 1931, and she thus honored one or more warrants on appellee's "building fund" in said month. Appellee at all times had to its credit on the books of the treasurer a sum in excess of all warrants drawn on its "building fund."

Sometime in the spring of 1931, the State Auditorial Department made an audit of the treasurer's books and reached the conclusion that the loss of school district and county funds occasioned by the failure of banks should be prorated among the different agencies. The result of this would be that appellee had been overpaid by reason of such warrants drawn on its "building fund" and honored, after the bank failures in the sum of $5,136.25, and appellant was directed to charge back to appellee said sum. This suit was brought by appellee to enjoin appellant from so doing. The court granted the relief prayed, hence this appeal.

Several interesting questions are discussed by learned counsel on both sides, but we think it necessary to discuss only one of them in this opinion. Was there in fact any overdraft against appellee? We think not. While the record fails to show affirmatively that the Bank of Fordyce, the bank in which the $10,000 "building fund"

was deposited, was reorganized or reopened and paid its depositors in full, it inferentially shows such to be the fact. The total loss above mentioned was sustained in three banks, one in Pine Bluff, one in Stuttgart and one in Carthage. No loss was therefore sustained in the Bank of Fordyce, although appellee's "building fund" borrowed as aforesaid, was there deposited to the best recollection of Mr. Hawkins. If so, then there has been no loss of appellee's "building fund" sustained, and consequently no overdraft. The evidence supports the chancellor's finding, and the decree must be affirmed.

SMITH & SHOPTAW *v.* STANTON.

4-3009

Opinion delivered May 8, 1933.

C. C. Wait, for appellant.
Robert Bailey, for appellee.

BUTLER, J. The principal question argued by appellants involves the action of the trial court in refusing to dismiss an appeal prosecuted to that court from the probate court.

In the motion filed by the appellants it was alleged that J. A. Akins died in February, 1917, the owner of 159½ acres of land and personal property valued at $350. He left surviving him his widow, Mrs. Lou M. Akins, and a daughter, Mrs. Stanton, his only child and sole heir at law. J. L. Stanton, the husband of the aforesaid daughter, was appointed administrator of the estate, at what time the record does not disclose. Mrs. Akins, the widow, was allotted the lands as her dower and homestead, and occupied the same as such until her death on January 15, 1927. She purchased from the appellants a bill of lumber which was furnished at different times from the latter part of July to November, 1926, and was used by her in repairing or rebuilding a house on her homestead. She paid a part of this bill before her death, but at that time there remained unpaid a balance in the sum of $286.24. Administration was had upon her estate which appears to have been solvent, and was in the course of administration during that year. It seems that the administration of the estate of J. A. Akins had not been closed, and the appellants, being uncertain to whom they should look for payment of the balance of their account, filed two claims for the same, one against the estate of J. A. Akins and the other against the estate of Mrs. Lou M. Akins.

On the 24th day of October, 1927, the probate court acted upon both of these claims, disallowing the one filed against the estate of Mrs. Lou M. Akins and allowing the one against the estate of J. A. Akins. From the latter order the administrator of the estate of J. A. Akins made an affidavit for, and prayed an appeal on the date of the rendition of the judgment in the probate court. No appeal was taken by the appellants from the order of the court disallowing their claim against the estate of Mrs. Lou M. Akins. The appeal taken by the administrator of the estate of J. A. Akins was not lodged in the circuit court until October 22, 1928. On November

7, following, the circuit court met, and on that day the appellants filed in that court a motion to dismiss the appeal. No action was taken by the court on said motion or any proceedings had on the said appeal until November 7, 1932, a day of the fall term of the circuit court, when the appellants renewed their motion to dismiss the appeal.

In the meantime the administration of the estate of Mrs. Lou M. Akins had been concluded, and after all debts due by the estate had been paid a balance was left in the hands of the administrator which he was ordered to, and did, remit to the heir of Mrs. Lou M. Akins who resided in Rome, Georgia.

Included in the motion to dismiss was a copy of the order of the probate court just referred to approving the settlement of the administrator and directing him to pay over the balance on hand to the heirs of Mrs. Akins. From the recitals of this order it appears that there had been litigation in the chancery court between the heirs of J. A. Akins and the heirs of Mrs. Lou M. Akins, in which litigation the administrators of the respective estates were parties. A demurrer was filed to the motion to dismiss upon which the court did not act, but in its judgment rendered at that term of the court the motion to dismiss the appeal was overruled. After the recital overruling the motion to dismiss it is recited in the judgment that the attorney for the administrator moved for a trial of the issues, and the attorney for the appellants, electing to stand on his motion to dismiss, refused to plead further. Thereupon the court "proceeds to hear the issue, and the court finds that Smith & Shoptaw, appellants, did not have a *bona fide* claim against J. L. Stanton, administrator of the J. A. Akins estate, but that their claim, if any, was against the estate of Mrs. Lou M. Akins," and rendered judgment in favor of the appellee.

It is contended that the refusal of the trial court to dismiss the appeal prosecuted from the probate court was contrary to law and an abuse of the court's discretion. This contention is based on § 2262 of Crawford & Moses' Digest, which provides that all appeals allowed ten days before the first day of the term of the circuit

court next after appeal allowed shall be determined at such term, unless continued for cause, and upon our decisions construing that section and similar provisions of the statute relating to appeals from justice of the peace and county courts.

In many of those cases the action of the circuit court in dismissing the appeal for failure to prosecute the same within the time named in the statute was upheld; in others its action in refusing to dismiss the appeal was likewise upheld. This court has held that the statute impliedly imposes upon the appellant the duty of having the transcript filed at the commencement of the next term of the circuit court, where the appeal was allowed by the probate court ten days before the first day of the next term of the circuit court; that the statute is merely directory, but should not on that account be ignored, but should be followed by persons appealing. We have laid down the rule, however, that the failure to have the transcript filed within the time mentioned in the statute does not give the other party to the suit the absolute right to have the appeal dismissed, but that in each case the circuit court in the exercise of a sound discretion may or may not dismiss the appeal, and that it would be only in cases where there was an abuse of this discretion that this court would overrule the judgment of the circuit court.

The industry and research of counsel for the appellants has collected in his brief nearly all the cases of this court bearing on the question presented, which cases sustain the announcement just made. Among these cases are the following: *Miller* v. *Oil City Iron Works,* 184 Ark. 900, 45 S. W. (2d) 36; *Briner* v. *Holleman,* 115 Ark. 213, 170 S. W. 1010; *Graham* v. *Drainage District No. 11,* 161 Ark. 40, 255 S. W. 883; *Goyne* v. *Ashley County,* 31 Ark. 552; *Hughes* v. *Wheat,* 32 Ark. 292; *Wilson* v. *Stark,* 48 Ark. 73, 2 S. W. 346; *Bates* v. *Mitchell,* 96 Ark. 555, 132 S. W. 917; *Hart* v. *Lequieu,* 110 Ark. 284, 161 S. W. 201; *Geo. E. Keith Co.* v. *January,* 131 Ark. 389, 199 S. W. 89; *Miller* v. *Fearis,* 184 Ark. 859, 44 S. W. (2d) 343.

It appears from the record before us that there has been great delay on the part of both parties, the appellee

delaying the filing of his appeal and the appellants delaying the prosecution of their motion to dismiss. Just what the reasons were for this inaction is not clearly shown, but, plainly, both parties have been dilatory in the prosecution of their respective contentions before the circuit court. The appellee delayed the filing of his appeal until just within the year allowed for appeals from judgments of the probate court, and the appellants delayed nearly four years in bringing to the attention of the circuit court and pressing for its decision his motion to dismiss. It was the duty of the appellee, of course, to excuse his delay, but there is significance to be attached to the delay on the part of the appellants to press their motion for a decision, and from all the circumstances in the record before us we are unable to say that there was any abuse of the court's discretion in the judgment reached by it.

On the question of the liability of the estate of J. A. Akins, the trial court reached a correct conclusion. It is the general rule that a life tenant may not recover from the reversioner for improvements made by the former and consequently no charge for the same can be made upon the inheritance. To this general rule exceptions may, and do, arise, where to apply it would be contrary to good conscience and fair dealing. 21 C. J. 953; 17 R. C. L. 635, § 25; *Merritt* v. *Scott,* 81 N. C. 385; *Dean* v. *Feely,* 69 Ga. 804; *Pratt* v. *Douglass,* 38 N. J. Eq. 516; *Caldwell* v. *Jacob,* 22 S. W. 436, 16 Ky. Law Rep. 21-24; *Killmer* v. *Wuchmer,* 79 Ia. 722, 18 Am. St. Rep. 392; *Gambril* v. *Gambril,* 3 Md. Ch. 259.

The case at bar does not come within the exception, and the general rule stated is applicable. The judgment of the trial court is therefore affirmed.

Cox *v.* Wasson.

4-3071

Opinion delivered May 15, 1933.

[redacted]

M. F. Elms, for appellant.

Ingram & Moher, for appellee.

JOHNSON, C. J., (after stating the facts). It is perfectly evident from the foregoing statement of facts

that the chancellor was fully warranted in finding from the testimony that the deposits made by Mrs. Cox on January 28 and February 2 were general deposits and not collection items. This is established by the testimony of Mr. Hayes, the assistant cashier of the bank, and he is fully corroborated by the deposit slips which were issued at the time and accepted by Mrs. Cox as the evidence of the transaction.

A chancellor's finding of facts will not be disturbed on appeal unless clearly against the preponderance of the evidence. *Cherry* v. *Brizzolara,* 89 Ark. 309, 116 S. W. 668; *Compagionette* v. *McArmick,* 91 Ark. 69, 120 S. W. 400; *Sullivan* v. *Winters,* 91 Ark. 149, 120 S. W. 843; *Lyons* v. *First Nat'l Bank,* 101 Ark. 368, 142 S. W. 856; *Kissire* v. *Plunkett-Jarrell Grocery Co.,* 103 Ark. 473, 145 S. W. 567.

It is true, of course, that the testimony on behalf of appellee was controverted by the testimony on behalf of appellants, but this made the issue of fact for the trial court's determination, and we cannot say that the chancellor's findings were against a preponderance of the testimony.

It is next insisted on behalf of appellant that the deposit slip executed on February 17, 1933, evidencing the deposit in the name of the administrator of the estate of Mrs. Cox, which deposit slip provided on its face, "trust fund to be paid under of court," created an express trust under subdivision 5 of § 1 of act 107 of 1927. To this we cannot agree. This court held in *State, etc.,* v. *Arkansas Bank & Trust Company,* 183 Ark. 1108, 40 S. W. (2d) 429; that the agreement there under consideration did not create an express trust "because the agreement was not with the county, and to be an express trust within the meaning of the act (act 107 of 1927), the agreement must be between the trustee and the *cestui que* trust, signed by the trustee at the time the contract for the deposit of the fund was made. Express trusts are thus created by the direct and positive act of the parties manifested by some instrument in writing whether by deed, will or otherwise."

It is perfectly evident that the notation on the deposit slip referred to above does not create an express trust as defined in the case cited *supra* or as defined by any other authority which has been called to our attention in briefs.

We therefore conclude that the chancery court of Arkansas County was correct in classifying the claims in this controversy as common instead of preferred. No error appearing, the decree of the Arkansas Chancery Court is in all things affirmed.

MATTHEWS *v.* BYRD.

4-3094

Opinion delivered May 15, 1933.

C. E. Love, for appellant.

C. B. Crumpler, for appellee.

Hal L. Norwood, Attorney General, *Sam T. Poe, Tom Poe* and *M. A. Matlock, amici curiae.*

SMITH, J. This appeal involves the constitutionality of §§ 5 and 6 of House Bill No. 559, which, after its final passage, became act 250 of the Acts of 1933. The Secretary of State has certified that this bill, having remained with the Governor twenty days, the General Assembly not being in session, became a law March 30, 1933.

The title to this bill, when introduced in the House, was "A bill for an act to be entitled: 'An act to fix the compensation of county officers,' " and this title was not changed.

The legislative journals show that the bill, having been passed in the House, was amended in the Senate, and that the House concurred in the Senate amendments. The amendments consist in the addition of the two sections of the act which are numbered 5 and 6.

Section 2 of this act fixes the compensation of the county officers of all the counties of the State. It deals with each county separately, and contains various provisions in regard to compensating these officers, and it is insisted that this, in effect, is the consolidation of seventy-five local bills into a single act, all of which are void, because all are local, and that therefore the entire act must fall as being unconstitutional.

Section 3 of the act provides that the compensation allowed by § 2 shall be the maximum compensation, records of which shall be kept, with directions as to the disposition of fees collected in excess of the compensation allowed, etc.

Section 4 provides that nothing contained in the act shall be construed as limiting or restricting the right of the people to initiate such laws as they may, from time to time, deem advisable for the compensation of county officials.

The first amendment to the bill, which appears as § 5 of the act, reads as follows: "That § 10,084 of Crawford & Moses' Digest of the statutes of Arkansas be amended so as to read as follows: 'The clerks of the several counties of this State shall cause the list of delinquent lands in their respective counties, as corrected by them, to be entered in a well-bound book, appropriately labeled, which book shall be a permanent public record, and open to the inspection of the public at all times.' "

A comparison of this § 5 of the act with the section of the digest which it amends discloses that it eliminates the requirement appearing in § 10,084, Crawford & Moses' Digest, that the county clerk shall cause the list of the delinquent lands to be published weekly for two weeks, and, in lieu thereof requires the clerk to enter of record the list of delinquent lands in a well-bound book, to be kept as a public record, open to the inspection of the public at all times.

The other amendment to the bill, which appears as § 6 of the act, amends § 10,085, Crawford & Moses' Digest. The amendment is to the effect that, instead of publishing the list of all the delinquent property, as § 10,085, Crawford & Moses' Digest, requires, there should be published a notice in substance as follows:

"NOTICE OF DELINQUENT TAX SALE

"The lands and lots and parts of lots returned delinquent in.....County for the year 19....., together with the taxes and penalties charged thereon agreeable to law, are contained and described in a list or record on file in the office of the clerk of the county court and notice is hereby given to all parties in interest that said several tracts, lots or parts of lots, or so much thereof as may be necessary to pay the taxes, penalties and costs due thereon, will be sold by the county collector at the courthouse in said county on (here state the date of sale) unless the said taxes, penalties and costs as charged thereon agreeable to law, be paid before that time; and that the sale will be continued from day to day until the said tracts, lots and parts of lots be sold."

Section 6 of the act provides that this notice shall occupy a space of not more than six inches double column in the publication in which it appears, and that the county clerk shall make a certificate, at the foot of the record, containing the delinquent list, stating in what newspaper the notice of the delinquent land sale was published, and the dates of publication.

Sections 7 and 8 of the act read as follows:

"Section 7. The provisions of this act are hereby declared to be severable, and, if any provision of this act should be declared unconstitutional by any court of last resort, the same shall not affect the remainder of this act.

"Section 8. That by reason of the distressing financial condition of the State, which has resulted in the partial collapse of many factors of State and county governments and the inability of the people to meet the demands of government at this time, an emergency is hereby declared to exist, and this act, being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force from and after its passage."

The court below held that §§ 5 and 6, *supra,* were unconstitutional, and the effect of that holding is to leave §§ 10,084 and 10,085, Crawford & Moses' Digest, in force and effect, and these statutes, unamended, require the publication of the delinquent lists in a newspaper for the time and manner there specified.

For the affirmance of this decree, it is insisted that the provisions of § 2, relating to the compensation of county officers, are unconstitutional and void, and that the whole act must therefore fail, notwithstanding the provisions of § 7, above quoted, as to the separability of the act, for the reason that, if § 2 of the act is void, the whole legislative scheme and purpose is defeated.

We do not consider or decide whether § 2 is valid legislation or not, for the reason that the provisions of §§ 5 and 6 may stand and be enforced, whether § 2 be constitutional or unconstitutional. The law of the subject has been many times declared, and in one of the

latest of these cases, that of *State* v. *Hurlock,* 185 Ark. 807, 49 S. W. (2d) 611, it was said:

"This court has frequently held that, when a statute is unconstitutional in part, the valid portion of an act will be sustained if complete in itself, and capable of being executed in accordance with the apparent legislative intent." (Citing cases.)

The Legislature has manifested and declared its intention in regard to this legislation in a manner too plain to admit of doubt. Section 2 fixes the compensation of county officials. Section 3 makes the provisions of § 2 effective by providing the disposition to be made of fees collected in excess of the compensation allowed by § 2. Sections 5 and 6 dispense with the publication of the delinquent list. These are the provisions of the act, and the Legislature has declared these provisions to be severable, and has declared that, if any provision should be declared unconstitutional, that declaration should not affect the remainder of the act.

We therefore proceed to consider the constitutionality of §§ 5 and 6, without regard to the constitutionality of §§ 2 and 3. Standing apart and considered alone, we think §§ 5 and 6 are valid laws and within the power of the General Assembly to enact, and it is not contended that the provision for notice of delinquency to the property owners, there provided for, does not constitute due process of law. *Turpin* v. *Lemon,* 187 U. S. 51, 23 S. Ct. 20.

It is insisted, however, that the amendments appearing as §§ 5 and 6 of the act are violative of article 5, § 21, of the Constitution, which provides that: "No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its purpose."

It is argued that the purpose of this bill, as reflected by its title, was to fix the compensation of county officers, and that this purpose was changed by the amendments to such an extent as to violate the section of the Constitution above quoted. We do not think so. The recitals of § 8, set out above, of the facts constituting the emer-

gency requiring that the act take effect immediately, disclose the legislative purpose to be the reduction of the cost of government generally, and by this act to reduce the cost of county government in particular.

The Attorney General, in the brief filed by his office, calls attention to his report to the General Assembly which enacted the legislation in question, and to the recommendations which that report contain showing the great cost of tax sales and the small revenue, in comparison, derived from them. There was a movement in the General Assembly, little short of a crusade, to reduce the cost of government, and this act, 250, is a manifestation of that purpose, as is evidenced by the recitals of its emergency clause, set out above. It appears to be reasonably certain that the primary purpose of the act was to reduce the expenses of county government, and the amendments to it have a direct relation to that purpose, and certainly do not change the purpose to reduce expenses.

Prior to this act the county clerks of all the counties were allowed fees: "For furnishing copy of delinquent lands to printer for each tract, .05." Section 4577, Crawford & Moses' Digest. The amendments dispense with this service, and to that extent change the fees which county clerks have heretofore been allowed. Act 157 of the Acts of 1933, which was approved March 25, 1933, increased the fee to 10 cents for furnishing copy of delinquent lands to the printer for each tract, if that service was still required.

We do not think the amendments are violative of § 21 of article 5 of the Constitution. In the case of *Hickey* v. *State,* 114 Ark. 526, 170 S. W. 562, it was said that it was not the object of this section to hamper legislation by requiring a number of bills to accomplish the result which a single bill might effect, but that the purpose of the section was to forbid amendments which were not germane to the subject, thereby changing its original purpose. *Cone* v. *Garner,* 175 Ark. 860, 3 S. W. (2d) 1; *Loftin* v. *Watson,* 32 Ark. 414.

Like all other legislation, the General Assembly has a discretion, not to change the purpose of the bill, but to determine whether an amendment does change the purpose, and a legislative act will not be declared unconstitutional as violative of this section of the Constitution unless it obviously appears that the amendments adopted do change its original purpose.

It is argued that the title of the act declares its purpose, and cannot be reasonably construed as embracing legislation having only an incidental relation to compensation of county officers.

Section 22 of article 5 of the Constitution of 1868 provided that "No act shall embrace more than one subject, which shall be embraced in its title." But this provision was omitted and does not appear in our present Constitution. We said, in the case of *Westbrook* v. *McDonald,* 184 Ark. 746, 43 S. W. (2d) 356, 44 S. W. (2d) 331, that: "It is settled law that even the title of an act is not controlling in its construction, although it is considered in determining its meaning when such meaning is otherwise in doubt. *Conway* v. *Summers,* 176 Ark. 796, 4 S. W. (2d) 19."

In the case of *Cone* v. *Garner, supra,* it was contended that the act there under review was violative of § 21 of article 5 of the Constitution, and the title of the act was cited as supporting that contention, but we there said:

"But our Constitution does not provide, like many Constitutions, that each bill shall have a title in which shall be expressly stated the purpose of the bill, or any words to that effect.

"In a very recent case this court said: 'It is obvious that the title is not as broad as the act, but there is no provision in our Constitution to the effect that the caption of an act must indicate all the subject-matter embraced in the act itself.' *Huff* v. *Udey,* 173 Ark. 464, 292 S. W. 693."

We conclude therefore that §§ 5 and 6 of act 250 are valid enactments, and the decree of the court below will be reversed and the cause remanded to the chancery court, with directions to enter a decree restraining the

county clerk from causing appellant's land to be advertised in the manner and form required by §§ 10,084 and 10,085 of Crawford & Moses' Digest, which sections were amended as herein stated.

HINES *v.* MILLS.

4-3012

Opinion delivered May 15, 1933.

Cleveland Cabler, for appellant.

R. W. Wilson, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Jefferson County affirming an order of the probate court of said county directing appellee, as guardian of Veota House, to invest $994.50 of the ward's money in Cities Service common stock. The order was made by the probate court on petition of the guardian on September 9, 1930. The trust fund invested was obtained from the United States Government through the Veterans' Administration, and appellant, acting in the interest of the trust fund, through his attorney, in 1932, filed a petition in said probate court to charge appellee with the amount thus invested on the ground that the probate court was without authority to make such order. The order of the probate court was made pursuant to § 12 of act 36 of the General Assembly of 1929,

known as the Uniform Veterans' Guardianship Act, which is as follows:

"Every guardian shall invest the funds of the estate in such manner or in such securities, in which the guardian has no interest, as allowed by law or approved by the court."

The language of the act is unambiguous, and, as written, has one meaning only. It says and means that a guardian may invest his ward's funds in securities "allowed by law or approved by the court." It is contended by appellant that the word "or" should be construed as meaning "and" in order to effectuate the intent of the Legislature. In other words, it is contended that the statute means and was intended to mean that a guardian might invest the trust fund in only such securities as the law allowed if and when approved by the court. It is only permissible to use the words "or" and "and" interchangeably in statutes where the context requires that it be done to effectuate the manifest intention of the Legislature or where not to do so would render the meaning ambiguous or result in an absurdity. It is not necessary to substitute the conjunctive "and" for the disjunctive "or" in the statute to prevent either a dubious meaning or an absurd one. There is nothing in the context to indicate that the Legislature intended in the enactment to use the word "and" in the place of the word "or." If the purpose of the Legislature was to authorize guardians to invest the trust fund in securities designated by it as well as those which the probate court might approve, then the word "or" was not used by it through mistake. The word "or" was used without rendering the meaning either dubious or absurd. It would not be permissible for this court to substitute the word "and" for "or" to effectuate a change in the intention of the Legislature. Such a change would amount to an encroachment upon legislative prerogatives.

Appellant argues that it must be done in order to harmonize this statute with other statutes relating to the same subject. We think not if this statute be treated as enlarging previous statutes by permitting the guardian

to invest the trust fund in additional securities when approved by an order of the probate court. There is no conflict between this act and previous acts relating to the investment of trust funds by guardians; so, if the word "or" is left in the act in question, all the acts are *in pari materia,* and may be read as a harmonious whole.

"The current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of limiting or extending their operation." *Waller* v. *Harris,* 20 Wend. 562; *Phillips County* v. *Pillow,* 47 Ark. 404, 1 S. W. 686; *Fernwood Mining Company* v. *Pluna,* 138 Ark. 459, 213 S. W. 397; *Parker* v. *Wilson,* 99 Ark. 344, 137 S. W. 926.

No error appearing, the judgment is affirmed.

SQUIRES *v.* NEW AMSTERDAM CASUALTY COMPANY.

4-3077

Opinion delivered May 15, 1933.

John L. McClellan and *Sam T. & Tom Poe,* for appellant.

Buzbee, Harrison, Buzbee & Wright, for appellee.

HUMPHREYS, J. This is an application to this court for a writ of prohibition against Will G. Akers, special chancellor of the Pulaski Chancery Court, and the New Amsterdam Casualty Company, which is a party to the litigation in said court, to inhibit them from proceeding by restraining order or injunction to prevent petitioner herein from prosecuting his suit in the Little River Circuit Court to recover on a $10,000 judgment which he obtained against H. E. Pattison in the circuit court of Saline County. The suit to collect the judgment from the New Amsterdam Casualty Company was based upon a bond executed by it to qualify the Union Indemnity Company to do business in Arkansas, in which latter company H. E. Pattison held an indemnity policy.

Appellant sustained injuries in an automobile collision through the negligent operation of a car owned by H. E. Pattison and recovered the judgment aforesaid against him on account of the injuries received. He obtained an execution against Pattison out of the circuit court of Saline County, which was returned *nulla bona.* The Union Indemnity Company, in which Pattison held an indemnity policy, became insolvent. It owned some real estate in Little River County in this State. Subsequent to the insolvency of the Union Indemnity Company, the petitioner herein filed an attachment suit against the Union Indemnity Company in the circuit court of Little River County and levied upon the real estate. He made the New Amsterdam Casualty Company a party defendant, alleging its liability for the payment of the judgment under its qualifying bond executed to obtain the right of the Union Indemnity Company to do business in Arkansas. During the pendency of this suit in Little River County, the New Amsterdam Casualty Company was made a defendant in a suit brought by the Independence Indemnity Company in the chancery court of Pulaski County, which company had also executed a qualifying bond to qualify the Union Indemnity Com-

pany to do business in Arkansas. The New Amsterdam Casualty Company filed an answer and cross-complaint in the suit of the Independence Casualty Company, in which it made the petitioner herein a cross-defendant along with others, in which it pleaded that the petitioner herein be required to interplead and file its claim against the New Amsterdam Casualty Company for adjudication in the Pulaski Chancery Court and that he be enjoined from further prosecution of his suit at law in the circuit court of Little River County against the New Amsterdam Casualty Company. In the cross-complaint, it admitted the execution of the qualifying bond in the sum of $20,000, but denied any liability thereunder to the petitioner or other cross-defendants, and obtained from Will G. Akers, special chancellor, a restraining order commanding your petitioner to refrain from prosecuting his suit at law in the circuit court of Little River County against the New Amsterdam Casualty Company.

This application must be treated as a request for a writ of prohibition against Will G. Akers, special chancellor, only, for a writ of prohibition lies to the court and not to the parties to the litigation. *Dunbar* v. *Bourland*, 88 Ark. 153, 114 S. W. 467; *Merchants' & Planters' Bank* v. *Hammock*, 178 Ark. 746, 12 S. W. (2d) 421.

The only other question arising on this petition for a writ of prohibition is whether the chancery court of Pulaski County had jurisdiction under the allegations of the cross-complaint of the New Amsterdam Casualty Company to issue a restraining order against the petitioner herein. The gist of the cross-complaint was to implead the petitioner herein to file and litigate their respective claims against the New Amsterdam Casualty Company under the qualifying bond it executed in behalf of the Union Indemnity Company. It admitted the execution of the bond, but denied any liability to the cross-defendants thereon. The doctrine of the prevention of a multiplicity of suits is invoked to sustain the jurisdiction of the chancery court and to justify the issuance of the restraining order. Other legal or equitable rights to relief must exist in one before equity will, at his instance,

enjoin the prosecution of numerous actions at law growing out of the same transaction. 1st Pomeroy's Equity Jurisprudence (Fourth Edition), § 250; *Jones* v. *Harris*, 90 Ark. 51, 117 S. W. 1077.

The cross-complaint cannot be maintained as an action of interpleader or an action in the nature of interpleader, thereby conferring jurisdiction on the chancery court to issue the restraining order, for essential and necessary averments are lacking to so treat or construe it.

In the first place, liability under the bond was not admitted; but, on the contrary, was specifically denied. An admission of liability was essential and necessary before the cross-complaint could be treated as a bill of interpleader or a bill in the nature of a bill of interpleader. *Southwestern Telephone & Telegraph Co.* v. *Benson*, 63 Ark. 283, 38 S. W. 341; *Crass* v. *Memphis & C. R. Co.*, 96 Ala. 447, 11 So. 480.

In the next place, the money was not deposited in the court to be prorated among the claimants, nor was an offer to do so contained in the cross-complaint, and for this reason also the cross-complaint was fatally defective as a bill of interpleader or a bill in the nature of a bill of interpleader conferring jurisdiction on the chancery court to issue a restaining order. 15 R. C. L., 230.

"In a proper case for a bill of interpleader complainant may have an injunction restraining claimants from further prosecution of their actions at law pending the litigation under the interpleader, but only on bringing the fund into court. 33 C. J. 452.

The case of *Chicago, Rock Island & Pacific Railway Co.* v. *Moore*, 92 Ark. 446, 123 S. W. 233, cited and relied upon by respondent, in no way contravenes the principles announced herein. In that case the Chicago, Rock Island & Pacific Railway Company admitted liability and offered to pay the amount into court, and also averred an equitable issue of alleged claim of a lien upon its railroad in addition to the prevention of a multiplicity of suits. That suit was clearly one in the nature of a bill of interpleader.

The writ of prohibition is granted.

SMITH *v.* COLE.
BROWN *v.* PENNIX.

4-3089

Opinion delivered May 22, 1933.

James D. Head and *R. H. Berry,* for appellants.

Hal L. Norwood, Attorney General, *Pat Mehaffy,* Assistant, *Will Steel* and *R. V. Wheeler,* for appellees.

Ben E. Carter, William C. Gibson and *Joseph Morrison, amici curiae.*

JOHNSON, C. J., (after stating the facts). There are two questions presented on these appeals for adjudication, namely:

First, is § 2 of act 250 of 1933 general in its application or special and local? Secondly, if local and special in its application, then is it administrative in effect?

A provision of § 2 of act 250 reads as follows:

"The county judge and the sheriff, county clerk, circuit clerk, treasurer and assessor and their respective deputies shall receive the respective compensations as now fixed by the Initiative Act for Union County, as adopted at the general election for the year 1932."

Section 2 has no application to Union County other than the above quotation, therefore, it must be admitted that this is a clear exemption of Union County from the provisions and application of § 2 of said act.

Since Union County has been exempted from the provisions of section 2 of act 250 of 1933 under the doctrine as laid down by this court in *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. (2d) 617, this section is local and special in its application.

In *Webb* v. *Adams,* just cited, this court said in reference to an exemption of one county from the application of the enactment: "Now if a general law must apply throughout the territorial limits of the State, the exclusion of one or more counties from its provisions makes it a local statute."

The exemption of Union County from application of the provisions of section 2 of said act brings it squarely within the teeth of the case just cited, and we have no hesitancy in holding that section 2 of act 250 of 1933 is local and special in its application.

Since determining that section 2 of said act is local and special in its application, it then behooves us to determine whether or not it is administrative in its purposes and therefore justified, notwithstanding it is local and special under previous decisions of this court.

Amendment No. 14 to our Constitution reads as follows:

"The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

In the case of *Cannon* v. *May,* 183 Ark. 107, 35 S. W. (2d) 70, reading from the first headnote, this court held:

"Acts 1929, No. 150, placing the treasurer and clerk of the county and probate courts on salary, is unconsti-

tutional, being a 'local or special act' within the prohibition of amendment 12 (14) to the Constitution, since it applies to only one county in the State."

In the earlier case of *Smalley* v. *Bushmiaer,* 181 Ark. 874, 31 S. W. (2d) 292, this court held an act fixing the compensation of the sheriff of Crawford County and the deputy clerk of said county to be local and special legislation and therefore prohibited by Amendment 14 to our Constitution.

In the case of *Powell* v. *Durden,* 61 Ark. 21, 31 S. W. 740, this court expressly held that an act of the Legislature fixing the salaries of officials of Sebastian County was a local act under the Constitution of this State.

In all the cases which have appeared in this court wherein county officials' salaries were involved by acts of local application, we have uniformly held that such acts were local in their application, and special in their nature.

It is true that this court in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, held that statutes establishing or abolishing separate courts relating to the administration of justice were not local or special in their operation, but it would certainly be a long step for this court to now hold that a county official salary act, as set up in § 2 of act 250, was in aid of the administration of justice, and therefore one in which the State would be interested in its sovereign rights. By implication this doctrine was denied by this court in *Cannon* v. *May,* and *Smalley* v. *Bushmiaer,* cited *supra,* and other cases recently decided by this court.

It is next most earnestly contended on behalf of appellants that, since section 4 of article 16 to the Constitution of 1874 providing: "The General Assembly shall fix the salaries and fees of all officers in the State, and no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person, or at any rate other than par value; and the number of salaries of the clerks and employees of the different departments of the State shall be fixed by law," it is and was the imperative duty of the Legislature to fix the salaries

of the county officials by either general, special or local legislation, and that special or local legislation is not prohibited because of this constitutional mandate.

This contention was so strenuously argued in the case of *Webb* v. *Adams*, cited *supra*, and received such serious consideration as to evoke a dissenting opinion by three justices of this court, but the court in the end specifically held against this insistence in the following language:

"It is true that article 14 of our Constitution deals with the subject of education and requires the Legislature to make provision for the support of our common schools. It does not require, however, the Legislature to accomplish that purpose by local or special legislation."

In our opinion it is immaterial whether or not local legislation is induced by constitutional mandate or is passed because not prohibited by the Constitution. If such legislation is invalid, it is not strengthened by the fact that it was superinduced by constitutional mandate. It is the duty of this court to harmonize all provisions of the Constitution and amendments thereto and to construe them with the view of a harmonious whole.

The objective of the constitutional mandate found in § 4 of article 16 can be fully accomplished by general legislation throughout the State, and we know of no other method to be pursued, so long as the 14th Amendment is permitted to stand.

It is next insisted on behalf of appellants that, since this court has held in *Matthews* v. *Byrd*, cited *supra*, that §§ 5 and 6 of act 250 of 1933 were constitutional and valid enactments, therefore, under the doctrine of *State* v. *Pitts*, 160 Ala. 133, 49 So. 441, all the provisions of this act thereby became constitutional and valid. This contention is based upon the theory that where a substantial portion of an enactment is general in its application, other and minor provisions of the act would stand, notwithstanding they do not have application to all sections of the State.

It is true this court cited *State* v. *Pitts,* with approval in the case of *Webb* v. *Adams* on the question of an exemption of one county, but it does not follow from this that we must adhere to all that is said in the opinion. We think that to hold in the instant case that, because §§ 5 and 6 of the act were found to be constitutional and valid enactments, this would cure constitutional objections to the balance of the act, would in effect nullify Amendment 14 to our Constitution. This part of the opinion in *State* v. *Pitts* we consider unsound, and especially in view of the fact that the 14th Amendment to our Constitution specifically condemns local legislation when it does not have application throughout the entire State. We therefore decline to follow this part of the holding of the Alabama court. *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 719.

The effect of our views is that § 2 of act 250 of 1933 is unconstitutional and void, and that the trial courts committed no error in so declaring.

The act is attacked on other constitutional grounds which we find it now unnecessary to consider.

The views herein expressed do not in the least conflict with the doctrine announced in *State* v. *Crawford,* 35 Ark. 263, nor in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S. W. 844, nor with the law as laid down by the Supreme Court of the United States in *Harwood* v. *Wentworth,* 162 U. S. 547, 16 S. Ct. 890. We are in full accord with the law and doctrine announced in each of these cases, but neither of them have application to the facts of this case.

Let the judgments be affirmed.

SMITH and MCHANEY, JJ., dissent.

SMITH, J., (dissenting). In the dissenting opinion in the case of *Cannon* v. *May,* 183 Ark. 112, 35 S. W. (2d) 70, I undertook to show that the General Assembly had power to fix the compensation of all officers in the State, either by fees or by a fixed salary, under the authority of section 4 of article 16 of the Constitution. In the later case of *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779, it was held that the electors of each county had the

power, under Amendment No. 7, to fix the fees and salaries of county officers.

Conferring this power upon the electors of a county did not deprive the General Assembly of the same right. It was said in the case of *State ex rel.* v. *Donaghey,* 106 Ark. 56, 152 S. W. 746, construing the first I. & R. Amendment, that it was not the purpose nor the intention of the people, in the adoption of the I. & R. Amendment, to abrogate or destroy the Constitution of the State. Subsequent cases construing this amendment and the later I. & R. Amendment have reiterated this holding, and have declared the purpose and effect of the amendments to be to reserve to the people the right "to propose laws and amendments to the Constitution, and to enact or reject the same at the polls as independent of the General Assembly"; but, in reserving that power to themselves, the people did not deprive the General Assembly of the power committed to it by the Constitution to legislate. So it does not follow that, because the electors of a county may fix county salaries under the present I. & R. Amendment, the General Assembly may not do so under an original section of the Constitution. The present state of the law is, in my opinion, that fees and salaries of county officers may be fixed either by the electors themselves or by the General Assembly. There are now two methods of doing so. I do not repeat here the argument presented in the dissenting opinion in *Cannon* v. *May* to the effect that the right of the General Assembly to fix fees and salaries was not affected by the amendment prohibiting the General Assembly from enacting local or special laws. Whether right or wrong, that opinion presents my views on the subject and speaks for itself.

Answering the argument by which the majority reached the conclusion announced in *Cannon* v. *May, supra,* I there undertook to distinguish that case from the case of *Smalley* v. *Bushmiaer,* 181 Ark. 874, 31 S. W. (2d) 292, which the majority thought was controlling, and I did this by pointing out that in the Smalley case the General Assembly had fixed a different fee for feeding prisoners in Crawford County from that paid in other counties, and I there said that, although the Constitution

might contemplate that the same fee should be paid for the same service throughout the State (which I did not concede), it certainly did not contemplate that all similar officers of different counties placed upon a salary should be paid the same salary.

It must be conceded—and I make the concession—that the fees and salaries fixed by act 250 of the Acts of 1933 are not equal and uniform, but why should they be to make such legislation valid? I know of no constitutional requirement that they shall be, and the majority opinion in the instant case, and other cases which it cites, recognizes that they do not have to be equal and uniform, provided the General Assembly, in fixing diverse fees and salaries, does so according to some basis of classification. Now, if the General Assembly has this power at all, should we not assume that the power had been exercised in a constitutional manner? The Legislature does not have to declare the reasons inducing its action in a particular case, or in any case, and the court should go no further than to inquire whether the General Assembly has exceeded its power or had acted without power. *Cobb* v. *Parnell,* 183 Ark. 429, 36 S. W. (2d) 388.

The history of act 250 of the Acts of 1933 is too recent to be ignored. It was enacted pursuant to a demand for economy in government, which was wide-spread and insistent, and which would take no denial. Committees to which the legislation was referred held numerous public sessions, which were attended by large delegations from all sections of the State. The legislative journals show that innumerable amendments were offered and considered, and who can know what information was acquired by the General Assembly as to the diverse conditions of the various counties which induced the lack of uniformity in the matter of fees and salaries? The General Assembly was not required to incorporate its findings of fact in the legislation, and citation of authority is not required upon the proposition that every intendment must be indulged in favor of the constitutionality of an act, and that legislation will not be held unconstitutional unless it is obviously so.

The act under review has been held unconstitutional because it omits Union County from its provisions, but I submit it is not open to that objection. It fixes the fees of Union County. It does this, it is true, by adopting the fees fixed in the initiated act upheld in the case of *Dozier* v. *Ragsdale, supra,* but this adoption is a re-enactment of the initiated legislation.

The Dozier case, as I read it, is authority for upholding the act here struck down. It was there said: "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."

Will act 216 of the Acts of 1931 now be held unconstitutional? It cannot, in my opinion, be distinguished from act 250 of the Acts of 1933. The act of 1931 reads as follows: "Section 1. It is hereby determined and declared that the salaries and fees now being drawn by the different county officers of the State of Arkansas according to the provisions of the general statutes of the State and special and local acts passed by the General Assemblies of the State of Arkansas for the years of 1927, 1929 and 1931 are based upon a proper classification of the different counties of the State according to population, wealth, location and volume of business transacted in the different counties, and it is hereby declared that all of said county officers shall continue to receive the salaries and fees they are at this time receiving under said laws and local and special acts. And the deputies and employees of all such offices shall be entitled to and continue

to receive the same salary as now provided by said special acts the same salary as they are now receiving under such local and special acts heretofore passed. And all such county officers shall be entitled to receive such other emoluments and office expenses as are now provided under special or local acts heretofore passed."

There was enacted, at the sessions of the 1927, 1929 and 1931 General Assemblies, numerous acts fixing fees and salaries for various officers, without attempting to make them equal and uniform throughout the State, and all these acts were passed subsequent to the general election of 1926, at which time the amendment was adopted prohibiting local and special legislation, and, if any of these scores of acts are valid, I do not think act 250 of the 1933 session can be declared invalid.

In my opinion, act 250 of the Acts of 1933 is valid legislation, and should be upheld as such.

And I am authorized to say that Mr. Justice McHaney concurs in that view.

HAGLIN *v.* HUNT.

4-3019

Opinion delivered May 22, 1933.

Geo. F. Youmans, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

SMITH, J. Appellees owned two lots in the Sebastian Bridge District which district was created by act 104 of the Acts of 1913 (Acts 1913, page 380). The act provides, among other things, for the assessment of benefits on the real property in the district, for making the amount of the assessment against each piece of real property a lien thereon, and for the collection of the benefits in annual installments. The method provided for enforcing delinquent assessments is by suit in the chancery court to foreclose the lien of the assessment, leading, as in other cases of foreclosure, to the sale of the property by a commissioner of the court appointed for that purpose.

The lots owned by appellees are described as lots 8 and 9, in block 4, of East End Place, an addition to the city of Fort Smith. Prior to the assessment of benefits a house had been built on the lots, a portion thereof being on each lot, and when the betterments were assessed the two lots were assessed as a single tract. The value of the lots was assessed at $4,000, and the annual benefit installment payable each year was $5. The 1927 installment was not paid, and a decree was rendered to enforce payment, pursuant to which the lots were sold to Ed Haglin, as a single tract, for the sum of $10, and upon the expiration of the time allowed for redemption, redemption not being made, a commissioner's deed was executed and approved by the court. A short time before this sale a loan of $2,300 was obtained on the security of the property from a local building and loan association.

This suit was brought to cancel the commissioner's deed, it being alleged that the sale was not made in conformity with the requirements of the act pursuant to which the improvement district had been organized and the sale held. It was also alleged and shown that full tender had been made to the purchaser.

Section 8 of the act provides that, immediately after ascertaining the cost of the improvement, the assessors of benefits there provided for shall assess "the value

of all benefits to be received by each landowner by reason of the proposed improvement as affecting each tract of land within said district," and that: "They shall ascertain the value of the real property within said district without said improvement, and the value thereof as benefited by said improvement, and shall charge against each lot, tract or parcel of real estate in said district an assessment according to the value of the benefit that will accrue to it by reason of the construction of said bridge."

The assessments having been made and approved, § 13 provides that the secretary of the district "shall annually thereafter extend against each of said lots, tracts and parcels of real estate the payment due thereon for such year."

After providing the procedure to enforce payment of delinquent assessments, § 25 of the act directs as follows: "The suit shall be brought in the name of the district, and, in its decree of condemnation, the court shall direct that, if the sum adjudged shall not be paid within ten days, the property shall be sold by a special commissioner, appointed for that purpose, upon twenty days' notice. *Provided,* that only so much of the property shall be sold as will pay the assessment, costs and penalty, and no more."

Notwithstanding this requirement, the report of the commissioner who made the sale shows that the two lots owned by appellees were sold *in solido* as a single parcel of land to Haglin for the sum of $10. The court below held that this sale was void, as not having been made in the manner required by law, and this appeal is from that decree.

At § 1200 of Sloan's Improvement Districts in Arkansas it is said: "The following defects in the notice of sale and the publication thereof are cured by confirmation and furnish no ground for a subsequent collateral attack on the sale: Failure to recite in a municipal district notice of sale that 'only so much of the property shall be sold as will pay the assessment, costs and penalty

and no more'." The case of *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, is cited in support of the text quoted.

The property involved in the Cassady case was there referred to as "the lot in controversy." As a matter of fact, the transcript in the case shows that the property involved was a half-lot. It was there insisted "that the sale was invalid because there was no notice to the effect that 'only so much of the property shall be sold as will pay the assessment, costs and penalty and no more.' Kirby's Digest, § 5700." A comparison of this section with § 25 of act 104 of the Acts of 1913 shows that the latter was copied from the former. The court there held that upon collateral attack the omission to state that only so much of the property would be sold as was required to pay the assessment, costs and penalty was a question which could not be raised. However, it was not held that this was an irregularity, but only that, if so, it was an irregularity which had been cured by the confirmation of the sale.

We have here a different question. The provisions of § 5700, Kirby's Digest, and those also of § 25 of act 104 of 1913, would apply in applicable cases, whether the notice of sale recited them or not, and we do not think this recital in the notice of sale would be essential to the validity of the sale in either case. Neither provides that the notice of sale shall recite that only so much of the property shall be sold as is necessary to pay the assessment, etc., but the direction is that only that quantity shall be sold, and the sale is subject to this statute, whether the notice recited its provisions or not. It is not stated in the opinion in the Cassady case, *supra,* that the sale was not made in conformity with § 5700, Kirby's Digest. The contention was that the notice of sale did not recite that it would be so sold; whereas in the instant case the fact is that the sale did not conform to the requirements of § 25 of act 104, and the form of the notice is therefore unimportant.

In the case of *Knight* v. *Equitable Life Assurance Society,* 186 Ark. 150, 52 S. W. (2d) 977, various objections were made to the form and sufficiency of a commis-

sioner's notice of sale, and the authorities upon the subject were there reviewed. The objections to the form of notice of sale were overruled, the opinion holding, in effect, that statutory requirements regarding such sales would be read into the notice, and need not be recited in it.

We conclude therefore that the Cassady case does not foreclose the question here presented.

At § 1611 of the chapter on Taxation in 61 C. J., page 1195, appears the following statement of the law: "A statute, providing that the officer conducting the tax sale shall sell only so 'much as may be necessary' of a tract to satisfy the taxes and costs, imposes an imperative limitation on him, and the sale will be void where he sells an entire tract when a portion of it would have been enough, or sells a larger portion than was necessary, or continues selling after enough has been disposed of to raise the required amount; and the fact that it was necessary to sell the quantity actually sold must, in some jurisdictions, appear of record, but there is authority that the record may be amended to show that in fact only so much was sold as was necessary to pay the tax and charges due thereon."

In the preceding section on this same page of C. J. appears this statement: "If there is a statutory provision that land sold for taxes should be sold as a whole, a sale to one who was asked to take the least quantity which he would accept for paying the taxes is void, although the purchaser refused to accept less than the whole."

The case of *Richards* v. *Howell*, 60 Ark. 215, 29 S. W. 461, is cited in the note to the text last quoted. In this Richards case a tax sale was made under a statute which required that the whole tract should be sold to the person offering to pay the highest price therefor, but the deed to the tax purchaser showed that the least quantity of the land was sold that any one would take and pay the taxes, penalty and costs charged against it, and that, no one having offered to pay them for less than the whole of the tract, it (the entire tract) was struck off to the person who offered to pay that price. In holding that

the sale was void as not having been made in conformity with law, Judge BATTLE said: "But it may be said that the whole tract sold only for the taxes, penalty and costs, and the original owner was not affected or prejudiced. How can this be truly said when it was not offered to the highest bidder? No one can tell how much it would have sold for, had it been sold in the manner prescribed by law. Some one might have given more for the entire tract, when he would not have paid the taxes, penalty and costs for less than the whole. It might have sold for more; it could not have brought less. The owner was entitled to the experiment. The collector had no authority to take it from him, and constitute himself the judge of what was for his benefit. The sale in question was void."

Here we have lots the assessed value of which, appearing upon the assessment books of the district itself, was $4,000, and upon the security of which the owner had recently borrowed $2,300. These lots were sold for taxes amounting to $5, with penalty and costs in addition. Can it be said that no one would have paid this small sum for one or the other of these lots had they been separately offered for sale, as the statute requires? As was said by Judge BATTLE in the Richards case, *supra,* the owner was entitled to the experiment.

In the case of *LaCotts* v. *Quertermous,* 83 Ark. 174, 103 S. W. 182, the headnote reads as follows: "Where the evidence shows that, though a town was not incorporated, it was a town in fact, and that the land within its limits was, for convenience, laid off into lots and blocks similar to the system prevailing in cities and incorporated towns, and was so assessed, a tax deed is void which shows on its face that two separate lots of land within such town were sold in mass for a lump sum." See also *Harris* v. *Brady,* 87 Ark. 428, 112 S. W. 974; *Chatfield* v. *Iowa & Ark. Land Co.,* 88 Ark. 395, 114 S. W. 927; *Belcher* v. *Harr,* 94 Ark. 221, 126 S. W. 714; *Campbell* v. *Sanders,* 138 Ark. 94, 210 S. W. 782; *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681.

We conclude therefore that the court below was correct in holding that the lots had not been sold in conformity with the law, and that the commissioner's deed was properly canceled, the amount due the purchaser having been tendered into court. Decree affirmed.

HILL *v.* DILLARD.

4-2968

Opinion delivered May 22, 1933.

W. A. Singfield and *J. H. Carmichael, Jr.,* for appellant.

W. R. Morrow, for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Pulaski County vesting the title to the north 29½ feet of lots 10, 11 and 12 in Fulk's subdivision of block 317, original city of Little Rock, Arkansas, in appellee and awarding him the possession thereof. Appellant claimed the title thereto under a probate sale of the south one-half of lot 13, block 317, Fulk's subdivision to the city of Little Rock, Arkansas, in November, 1930, to satisfy the debts of Aaron Battle, alleging that it was the purpose and intent of the administrator of the estate of Aaron Battle to include in the probate sale the north 29½ feet of lots 10, 11 and 12 in block 317, aforesaid, which property was also owned by Aaron Battle at the time he died. Aaron Battle died testate, leaving all his property to Mittie Hill, appel-

lant herein. Lots 10, 11 and 12 in block 317, aforesaid, were not actually included in the application to the probate court to sell the lands of Aaron Battle, deceased, to pay his indebtedness, which amounted to $300 or $400, nor in the order of sale, report of sale, confirmation of sale, or the administrator's deed. The only land included in the probate proceeding and the administrator's deed made pursuant to the judgment rendered therein was the south one-half of lot 13 in Fulk's subdivision of block 317, original city of Little Rock, Arkansas. The south one-half of lot 13 was valued at about $400, and the other lots and improvements thereon at about $2,200.

The administrator and appellant testified that it was the intention to also include in the probate sale the north 29½ feet of lots 10, 11 and 12 in said block 317, which Aaron Battle owned and upon which he lived at the time of his death.

Vesting the title to the north 29½ feet of lots 10, 11 and 12 in block 317 in appellee and decreeing him the possession thereof was in effect to reform the proceedings of the probate court and the administrator's deed made pursuant to the judgment rendered therein in substance and not form or for clerical errors only. Administrators' or commissioners' deeds may be reformed for clerical errors or in matters relating to form only. *Gates* v. *Gray,* 85 Ark. 25, 106 S. W. 947; *Cates* v. *Cates,* 157 Ark. 181, 247 S. W. 780. We are unable to find any authority in the chancery courts to reform orders of judgments of probate courts or deeds made pursuant thereto in matters of substance.

On account of the error indicated, the decree is reversed with directions to dismiss appellee's complaint.

ARKANSAS POWER & LIGHT COMPANY *v.* STUCK.

4-3020

Opinion delivered May 22, 1933.

Hawthorne, Hawthorne & Wheatley, for appellant.

Foster Clarke and *H. M. Cooley,* for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Craighead County, Jonesboro District, by appellee against appellant to recover $3,383.15 for damages to his brick kilns and contents through the alleged failure of appellant to furnish adequate equipment to operate said kilns with natural gas. The contract sued upon and alleged to have been breached as a ground for money damages claimed is as follows:

"Pine Bluff, Arkansas,
"November 18, 1929.

"Mr. E. C. Stuck, Jonesboro Brick Company, Jonesboro, Arkansas.

"Subject: Natural gas equipment.

"Dear sir: Complying with our verbal understanding and in consideration for the signing of a year's contract for natural gas in your brick plant, we will equip your plant to burn natural gas at our expense, and you are to use it for a year's time to determine if it is satisfactory. If the gas is satisfactory to you, you are to keep the equipment and pay us for same at a total cost of $1,200. If for any reason you decide to discontinue the use of gas, we are to take the equipment out at our expense, and you are not to pay us anything for the installation and for the use of it. You are to pay only for the amount of gas used under the regular rate schedule attached to contract.

"It is understood that the equipment is to consist of necessary meters and regulators which remain in our possession and a header of sufficient capacity for any of the kilns with outlets on this header, so that any kiln can be used plus two headers with nine burners each for installation on any kiln which you might use, and these will be equipped with necessary valves and unions so that they

can be connected and reconnected on another kiln at any time. This also includes a burner under your boiler.

"In other words we are to give you a trial installation at our expense, and, if satisfactory, you keep it and pay for it, and, if not satisfactory, we take it out at no cost to you other than the gas which you use.

"Sketch of equipment we furnish is attached hereto.

"Yours very truly,
"Arkansas Power & Light Co.
"By Chas. M. Rogers.

"Accepted E. C. Stuck."

Attached to this contract was a diagram showing the equipment and the construction thereof.

The equipment was installed by appellant, and the brick plant operated with natural gas until three kilns were finished. During the operation and completion of the first two kilns, complaint was made by appellee that the burners were working unsatisfactorily, and they were removed and plain open end pipes were installed in their places under a written supplemental agreement of date May 26, 1930, in which it was recited that the equipment was installed as per agreement, but the burners, proving unsatisfactory, were removed and plain open end pipes installed in their places, for which a deduction of $700 less actual cost of open end pipes should be deducted from the original price of $1,200 for the equipment. After the kilns had been furnished and the brick removed, appellee notified appellant to remove the equipment on account of its failure to perform the work intended. The notice was given in June, 1930, and, after appellant removed same, this suit for damages was instituted.

Appellant filed an answer denying the material allegations of the complaint. The cause proceeded to a hearing upon the pleadings, and at the conclusion of the testimony appellant moved for an instructed verdict, which was refused by the court over its objection and exception. The cause was then submitted to the jury upon the issues joined and the testimony adduced, which resulted in a verdict and consequent judgment against appellant in the sum of $3,000, from which is this appeal.

The contract upon which appellee based his suit provided the remedy in case appellee should become dissatisfied with the equipment. It plainly says: "If for any reason you decide to discontinue the use of gas, we are to take the equipment out at our expense, and you are not to pay anything for the installation and for the use of it. * * * In other words, we are to give you a trial installation at our expense, and if satisfied, you keep it and pay for it; and if not satisfied, we take it out at no cost to you other than the gas which you use."

It is apparent from the written contract that the equipment was sold subject to test and the principle governing sales of personal property on test is laid down in 24 R. C. L. 192 as follows:

"The general rule seems to be that an article of personal property sold subject to a test to be made by the buyer must be regarded as sold without warranty of fitness, and none can be or is implied."

A case involving the same principle as this may be found in 176 Mich. 109, 142 N. W. 362, 50 L. R. A. (N. S.) 805, under the style of *Twin City Creamery* v. *Godfrey*. In announcing the principle in the case mentioned, the court used the following language:

"Money damages cannot be recovered because of failure of a refrigerating plant to comply with the specifications, if the contract provides that in case the plant does not fulfill the conditions of the contract the contractor shall be allowed to enter and remove it upon refunding the payments which had been made upon the contract."

In the instant case, it is apparent that no other damages were contemplated by the parties than those incident to the removal of the equipment on notice. This remedy or measure of damages provided in the contract is exclusive; hence money damages for injuries incident to the test cannot be recovered.

The result would have been the same in the instant case had the contract contained an express warranty that the equipment would properly function because the contract itself provided for a remedy or measure of dam-

ages. This court said in the case of *Crouch* v. *Leake,* 108 Ark. 322, 157 S. W. 390, 50 L. R. A. (N. S) 774:

"The written contract expressed the terms of the warranty and provided the remedy that should accrue from a breach of it which was exclusive of any other mode of compensation and afforded the only relief to which they were entitled."

On account of the error indicated, the judgment is reversed, and appellee's complaint is dismissed.

FORT SMITH *v.* MCLEAN.

4-3025

Opinion delivered May 22, 1933.

George W. Dodd, for appellant.

Cravens & Cravens, for appellee.

KIRBY, J. This is the second appeal of this case, a sufficient statement of which appears in the former opinion in *McLean* v. *Fort Smith,* 185 Ark. 582, 48 S. W. (2d) 228.

The court directed a verdict in said cause, from which the appeal was taken, and this court reversed and remanded with directions for a new trial on April 11, 1932.

The facts developed upon this trial are virtually the same as were shown upon the first trial, and were in sharp conflict as to whether the building was a nuisance, and because that question was not submitted to the jury the cause was reversed.

Upon this trial upon virtually the same conflicting evidence, the court refused to submit the question to the jury of whether the building constituted a nuisance in fact or at common law which could be abated by the

city, submitting only the question of damages for its destruction to the jury—in effect directing a verdict upon the very question for which the cause was remanded in the first appeal for determination by the jury—and, of course, erred in doing so, the former decision being the law of the case. *McLean* v. *Ft. Smith, supra.* See also *Murphy* v. *Cupp,* 182 Ark. 334, 31 S. W. (2d) 396.

The court erred in refusing to leave to the determination of the jury the question of whether the building constituted in fact a nuisance that the city could abate, the ordinance giving it no such right unless the building was in fact a nuisance.

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

AMERICAN COMPANY OF ARKANSAS *v.* BAKER.

4-3013

Opinion delivered May 22, 1933.

Buzbee, Pugh & Harrison, for appellant.

Golden & Golden and *Williamson & Williamson,* for appellee.

BUTLER, J. The defendant (appellant) is a corporation. Plaintiff (appellee) was its servant and, in the discharge of his duties as such, was injured. The negligence of a fellow-servant concurring with that of another was charged as the proximate cause of the injury. An action was brought by appellee for damages against the fellow-servant and the corporation which resulted in a verdict for the defendant servant and against the employer, from which the latter has appealed.

1. On the return of the verdict into court, both the appellee and the appellant moved for a judgment, notwithstanding the verdict. The appellee moved for judgment in his favor against the defendant, Mitchell Godwin, his fellow-servant, and the appellant moved for a judgment in its favor. The overruling of appellant's motion is one of the principal grounds assigned for reversal of this case, the appellant basing its position on the general rule announced in the case of *Patterson* v. *Risher,* 143 Ark. 376, 221 S. W. 468, as follows: "Where a recovery is sought in an action against a principal and his agent based upon the act or omission of the agent which the principal did not direct and in which he did not participate and for which his responsibility is simply that cast upon him by law by reason of his relationship to the agent, a judgment in favor of and exonerating the agent generally *ex proprio vigore* relieves the principal of responsibility, and may be availed of by the principal for that purpose."

Appellant recognizes that there is an exception to this rule where the liability of the master and the servant is governed by different rules, as pointed out in the recent cases of *Mississippi River Fuel Corp.* v. *Senn,* 184 Ark. 554, 43 S. W. (2d) 255, and *Mo. Pac. Rd. Co.* v. *Morrison,* 186 Ark. 689, 55 S. W. (2d) 993, but contends that the exception cannot be applied in the case at bar for the reason that the court instructed the jury that contributory negligence was a complete defense as to both defendants. The instruction referred to is instruction No. 8 and was given by the court over the objection of the appellee and at the request of the appellant. The declaration of the court correctly stated the general rule, but failed to take into consideration the exception created by § 7145, Crawford & Moses' Digest. That section is as follows: "In all actions hereafter brought against any such corporation under or by virtue of any of the provisions of this act to recover damages for personal injuries [to an employee, or where such injuries] (a) have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury (and not by the court) in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such corporation of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Because of the above statute a different defense obtains as to the fellow-servant and the corporation. As to the former, the contributory negligence of the plaintiff, if any, remains a complete defense, whereas this is not so as to the corporation; as to the latter, the doctrine of comparative negligence established by the statute applies, and the rule announced in the Senn and Morrison cases, *supra,* therefore applies to the instant case. "It will therefore be seen that it might be perfectly proper to find a verdict in favor of the employee charged with negligence and against the master, because appellee would be entitled to a verdict against the corporation,

notwithstanding his contributory negligence, but would not be entitled to a verdict against the servant, no matter how guilty he may have been of negligence, if the injured party was guilty of any contributory negligence." *Miss. River Fuel Corp.* v. *Senn, supra.*

The appellant argues that, because of instruction No. 8, it cannot be said that the jury failed to find against the fellow-servant, Godwin, because of contributory negligence of plaintiff, for under the instruction of the court, whether right or wrong, if the jury found contributory negligence on the part of the plaintiff, it was its duty to return a verdict in favor of both defendants. This argument is untenable for the reason that the court was drawn into error at the suggestion of the appellant, and it is therefore in no position to take advantage of it, and the court correctly overruled its motion for judgment notwithstanding the verdict.

2. The second ground urged for reversal of the judgment and dismissal of the case is based upon the refusal of the court to direct a verdict because of failure of the evidence to justify the submission of the case to the jury. The appellant argues with great force that the testimony fails to establish any negligent act on the part of Godwin, the fellow-servant, which was the proximate cause of the injury to the appellee.

That part of the evidence necessary for an understanding of this issue establishes the following facts; appellee was a truck driver, and at the time of the injury was conveying a truck loaded with merchandise of the appellant along Highway No. 4 traveling toward Warren from Monticello. At a point between these two towns a considerable portion of the highway was covered with water, and in attempting to pass through this the truck driven by the appellee became mired and could not be driven further. He got out of the truck and waded through the water toward the west until he emerged from it. From this point the ground gradually ascended for about 500 feet to what the witnesses called "the brow of the hill." Between the edge of the water and this hill another truck of the appellant was standing which had been driven from Warren by Godwin and in which an-

other employee of the appellant, a Mr. Caraway, was riding. When they discovered the predicament of the truck driven by the appellee, they went back to where their truck was standing, then headed toward Warren, and turned it around and drove downward to near the edge of the water, their purpose being to take appellee with them and return to the mired truck and remove a part of its load so that it might be driven out. When Godwin's truck was near the water's edge, it was stopped for the purpose of allowing appellee to get on. Near the place where the truck stopped, a car driven by Mr. Beard was parked on the side of the highway. As appellee was preparing to, or in the act of, boarding Godwin's truck, a Ford car driven at a rapid rate of speed by a negro man attempted to pass between the truck and Beard's car, striking the appellee and inflicting upon him serious injuries. As to how and when the negro's car approached and for what length of time the truck had been standing, the evidence is in conflict.

Two disinterested witnesses, Mr. Triber Beard and Mr. R. L. Ragar, who were present at the time of the accident, testified that the truck driven by Godwin approached the water's edge and stopped before the negro appeared in his car over the brow of the hill some 540 feet away and at which point the truck could be plainly seen; that, without stopping or slackening his speed, the negro drove at a very fast rate—estimated by the witnesses to be between 35 and 50 miles an hour—between the standing truck and the car parked on the edge of the highway, glancing the door of Beard's Ford and without touching the truck. As to the relative position of Godwin's truck and Beard's car, these witnesses stated that there was ample room for the negro's car to pass between them, the back end of the truck which had been stopped about the middle of the highway being anywhere from ten to twenty-five feet from the front end of Beard's car.

The appellee testified that the truck driven by Godwin came rapidly down the hill and suddenly stopped with the rear end about even with the front end of the parked Ford, and that Godwin did not hold out his arm

or give any signal that he was about to stop the truck; that the truck had no rear-view mirror on it and just as it came to a stop—almost at the same instant—the negro came right in behind the truck striking the side of the truck and scraping the side of the car. At the time the witness was standing in front of the Ford car which prevented him from seeing the car driven by the negro until too late to avoid being struck by it; that the first time he saw the negro's car it had hit the Ford car and the truck about six feet from him. He estimated the time between the stopping of the truck driven by Godwin and the collision as not over three seconds.

It appears to us that the negligence, if any, was the sudden stopping of the truck without giving any signal or warning of that intention to one who might be driving closely behind it. The circumstances of this case are peculiar, but we are unable to say as a matter of law that there is no substantial evidence of any negligent act on the part of Godwin, the fellow-servant of the appellee. This court has no power to vacate a verdict of the jury or the judgment based thereon on the weight of the evidence, but we are obliged on appeal to view the evidence in the light most favorable to the appellee, giving to it every reasonable inference in support of the verdict, and, however much we may think the evidence preponderates against the finding of the jury, we may not interfere. This court has repeatedly pointed out that this is a duty and power resting solely with the trial judge to be exercised whenever, in his opinion, the verdict is against the clear preponderance of the evidence, and on that question his judgment is conclusive if there is any substantial conflict therein. *Taylor* v. *Grant Lumber Co.*, 94 Ark. 566, 127 S. W. 962; *McDonnell* v. *St. L. Sw. Ry. Co.*, 98 Ark. 334, 135 S. W. 925; *Blackwood* v. *Eads*, 98 Ark. 304, 135 S. W. 922; *McElroy* v. *Arkansas Valley Trust Co.*, 100 Ark. 596, 141 S. W. 196; *Johnson* v. *Mantooth*, 108 Ark. 99, 156 S. W. 448; *Wilhelm* v. *Collison*, 133 Ark. 166, 202 S. W. 28.

3. It is our opinion however that the case was submitted to the jury on the wrong theory. We think that the court correctly declared the law in instruction No.

9 by which the jury was told to disregard Godwin's failure to signal his intention to stop, etc., if it found the truck was stopped before the Ford driven by the negro came into view, but erred when, at the request of the defendant (appellant), it took from the jury the question of Godwin's negligence, if any, in suddenly stopping his truck without giving any signal of his intention to do so, if this was the proximate cause of the injury of appellee.

It was admitted that Godwin's truck stopped approximately in the center of the highway leaving less than fifteen feet of the main portion of the highway open for passing vehicles. In that state of the case, the court applied the statute which makes it unlawful for any person to park or leave standing any vehicle upon any highway unless a clear an unobstructed width of not less than fifteen feet upon the main traveled portion of the highway opposite such vehicle be left for free passage of other vehicles, and in instruction No. 1 told the jury that if Godwin so left his truck he was guilty of obstructing the highway.

We are also of the opinion that under the facts in this case instruction No. 2 was abstract. In the statute upon which instruction No. 1 is grounded the expression "or leave standing" is nothing more than a legislative definition of the word "park" which precedes it. Both the word "park" and the expression "or leave standing" have been frequently defined by the courts and must be deemed to have been used by the Legislature as meaning something more than a mere temporary or momentary stopping on the road for a necessary purpose.

"Under the automobile statutes the term 'park' has been defined by the courts as meaning, in substance, the voluntary act of leaving a car on the main-traveled portion of the highway when not in use. It means something more than a mere temporary or momentary stoppage on the road for a necessary purpose. Whether or not a vehicle standing in the roadway is parked must be determined from all of the surrounding circumstances and the reason for the vehicle standing, and is usually

a question for the jury." Huddy, Ency. of Automobile Law, vol. 3-4, § 59, p. 104.

In the statute before us the Legislature makes it clear by the use of the words "or leave standing" that it did not intend to make the temporary stopping of a vehicle in the highway a violation of the law, for by this expression they meant something more than a temporary stopping in the road where a fifteen feet clearance is not given. Generally, it is a question for the jury to determine from all of the surrounding circumstances and from the reason for the vehicle stopping whether it violates the law against parking on the public highway.

In Oregon the statute prohibiting the parking of vehicles on the highway provides that "no vehicle shall be parked upon the main-traveled portion of the highways of this State, provided that this shall not apply to any vehicle so disabled as to prohibit the moving of the same." In construing that statute the Supreme Court of Oregon in the case of *Martin* v. *Oregon Stages,* 129 Or. 435, 277 Pac. 291, said: "The word 'park' as used in the statute has not been accurately defined. It cannot be precisely defined so as to apply the meaning of the Legislature to all cases. Whether or not a motor vehicle standing in the roadway is parked must be determined from all the surrounding circumstances and the reason for the vehicle standing."

Under a statute similar in its effect to ours, the Supreme Court of South Dakota, in the case of *Bruening* v. *Miller,* 57 S. D. 58, 230 N. W. 754, 758, held that leaving a tractor upon the highway while the operator procured gasoline was not parking under the statute. In the case of *Newell Contracting Co.* v. *Berry,* 223 Ala. 109, 134 So. 870, the court said: "Parking with reference to motor vehicles is a term used as meaning the permitting of motor vehicles to remain standing on a public highway or street; the voluntary act of leaving a vehicle on the highway when not in use, and to 'park' means something more than mere temporary or momentary stoppage on the road for a necessary purpose."

In *Village of Wonewoc* v. *Taubert,* 203 Wis. 73, 233 N. W. 755, the court defined the term "parking" as applied to automobiles as meaning not only the voluntary act of leaving a vehicle on the street unattended, but also to stopping on the highway though occupied and attended for a length of time inconsistent with the reasonable use of the streets or highways, considering the primary purpose for which they exist.

In the case of *Sahms* v. *Marcus,* 239 Mich. 682, 214 N. W. 969, cited by appellant, in applying its statute making it "unlawful to park a vehicle on the beaten track or paved surface of any highway, etc.," the Supreme Court held as a matter of law that the statute was not violated where a driver stopped his car for a moment to recover his wife's hat, explaining that there is a difference between stopping and parking; that the statute is aimed at vehicles unable to move under their own power and left standing and those which are able to move, but left standing without watchman or caretaker; the purpose of the act being to keep the improved highways open for travel and free from non-moving vehicles, but not to prohibit a temporary stop for a necessary reason.

In *Billingsly* v. *McCommick Transfer Co.,* 58 N. D. 913, 228 N. W. 424, a decision from the North Dakota court, in discussing the statute of that State regulating the use of the highways, the court held "that 'parking' means more than a momentary or temporary stopping—that is, it has an element of a purpose unconnected with the car itself and an intent to leave it there in a supposedly safe place while engaged in other business or pleasure." See also *Bowmaster* v. *Depree Co.,* 252 Mich. 505, 233 N. W. 395; *Dare* v. *Boss,* 111 Or. 190, 224 Pac. 646.

Several of the witnesses, including the negro whose negligence is undisputed, testified that the truck had just stopped as the negro appeared on the brow of the hill some 540 feet away, while the appellee placed the time the truck was standing before the accident at a shorter interval than the others, so in any view of the evidence it is apparent that the truck was not "parked or left stand-

ing'' within the meaning of the statute, but momentarily for the purpose of affording appellee an opportunity to embark thereon that he might assist in the performance of a necessary work.

For the errors stated the judgment of the court below is reversed, and the cause remanded for a new trial.

DAVIS *v.* OAKS.

4-3017

Opinion delivered May 22, 1933.

Murphy & Wood, for appellant.

Jay M. Rowland, for appellee.

BUTLER, J. The Conservative Loan Company at Little Rock brought suit in the Garland Chancery Court against O. C. Davis to recover on a debt owing it by the latter and for foreclosure of a mortgage given on a twenty-five acre tract of land, with other lands, to secure the same. On the 15th day of October, 1923, it recovered judgment for $972.30 and a decree foreclosing the debtor's equity of redemption in the said lands.

In 1928 Davis moved to Texas, and the following year the Liberty Realty Company, acting through its agent, W. C. Oaks, took possession of the twenty-five acre

tract. In August, 1932, Davis brought suit in ejectment to recover possession of said lands naming as defendants the appellees, Liberty Realty Company, W. C. Oaks and Carrie Oaks, his wife. The defendants, appellees, answered and by way of cross-complaint set up an interest in the lands as owners of the judgment rendered in 1923 aforesaid and as owners of certain notes and deeds of trust executed by Davis, and further alleged ownership by virtue of a purchase from certain persons to whom the lands had been sold for the taxes delinquent thereon. The case, on motion of defendants, was transferred to the Garland Chancery Court, which after hearing the evidence, found that the appellee, Liberty Realty Company, was the owner of the judgment obtained by the Conservative Loan Company aforesaid which it found was a valid and subsisting judgment, and the court rendered judgment in favor of the said appellee for the amount of the same with interest from its date and declared the same a lien on the lands involved, etc. From that judgment and decree comes this appeal.

The pleadings and evidence have raised several questions involving the application of the statute of limitations, the ownership of a certain note for $1,925 and deed of trust to secure the same and certain other notes and deeds of trust executed from time to time by the appellant, and the rights of a mortgagee in possession after default, and the duty of the mortgagor attempting to recover, the effect of the tax sales under which appellee claimed title, etc. None of these questions become necessary for us to consider for the reason that the trial court has found as determinative of the rights of the parties these facts, namely, that a valid and subsisting judgment exists of which the appellee Liberty Realty Company is the owner, and which constitutes a lien on the lands sought to be recovered by the appellant.

The contention is made for the appellant, first, that said judgment has been paid. In support of this, the appellant testified that the judgment was included in a note for $1,925 with a deed of trust to secure the same executed by him to the Como Trust Company with the

express agreement made at the time that said note was given and received in full satisfaction and payment of a judgment obtained by the Conservative Loan Company, and which had been purchased from it by the Como Trust Company. He further claimed that the $1,925 note was barred by the statute of limitations. His counsel insist that an order caused to be entered by the chancery court, which was introduced in evidence, makes his client's testimony conclusive. That order, dated February 18, 1924, is as follows:

"Chancery Record N., p. 121.

"Conservative Loan Company,
v. No. 8171
"Oscar C. Davis *et al.*

"Settled and Dismissed.

"On this day it appearing to the court that this cause has been settled and should be dropped from the docket, it is therefore ordered, adjudged and decreed by the court that this cause be and the same is hereby dropped from the docket."

Section 6332, Crawford & Moses' Digest, is cited, which provides that, where the court is satisfied that the plaintiff has received full satisfaction of a judgment or decree, an order shall be made directing the clerk to enter its satisfaction on the record thereof which shall have the same effect as if it had been done by the party, and attention is called to the holding in the case of *State* v. *Martin,* 20 Ark. 629, that the action of the court under that section becomes *res judicata* as to all the facts determined by the court in such order. It is insisted that, before proceeding further on the judgment in favor of the Conservative Loan Company, it would be necessary to first vacate the order of February 18, *supra.*

The term at which the judgment of October 8, 1923, was rendered expired before the third Monday in December at which a new term began, so that the court was without jurisdiction to vacate that judgment except for the causes and in the method prescribed by the statute. Therefore, the order of February 18, following was ineffectual to accomplish that purpose and, indeed, it is

apparent no such purpose was intended, or that it was a proceeding under the section of the Digest above noted. There was no direction to the clerk or action taken by him under the provisions of that section. In that case there was nothing further before the court except to act on the report of sale when made, and the order, from its very terms, merely directed that the case be omitted from the docket and served to abate further proceedings until such time as the court's action might be asked. The recital, "It appearing to the court that this cause has been settled," at most is only evidentiary in its nature and subject to be rebutted as any other evidence.

Although the appellant testified in positive terms that the $1,925 note was given and received in full satisfaction of the judgment, he admitted that nothing had in fact ever been paid on the debt evidenced by the note. As he was the plaintiff, he was an interested party, and therefore his evidence could not be said to be undisputed, and his interest was doubtless taken into consideration by the court in determining the weight to be attached to his testimony. Then, too, opposed to his statement was the testimony of the attorney of the Como Trust Company, who prepared the $1,925 note and deed of trust securing it, and who stated that the note and deed of trust were not taken in satisfaction of the debt, but that the judgment was purchased by said trust company from the Conservative Loan Company for the sum of $1,000, and, contemporaneously with the execution of the aforesaid note and deed of trust, the Conservative Loan Company assigned in writing to the trust company its judgment, which assignment was on the same date filed for record in the office of the recorder of deeds and mortgages in and for Garland County; and that it was the intention not to accept the note in payment of the judgment but to retain the judgment lien as well. He gave as his reason for this action that he was not then informed of the condition of the title, and secured an assignment of the judgment for fear of some possible intervening incumbrance.

To refute this testimony, the appellant calls to our attention the testimony of a witness who at the time of testifying had charge of the records of the Liberty Realty Company, which company had purchased the assets of the Como Trust Company, and who, at the time of the above transaction, was in the employ of the Como Trust Company. This witness testified that he had no knowledge of the assignment of the judgment until his attention was called to it about the time the Liberty Realty Company took possession of the property. His lack of knowledge of this transaction has but little weight, for it appears that he had nothing to do with the dealings between the Como Trust Company, the Conservative Loan Company and the appellant Davis "except in a clerical capacity."

The preponderance of the evidence, as we view it, supports the chancellor in his finding that the judgment was unsatisfied and a present and valid liability.

It is next strenuously insisted that there is no evidence to sustain the chancellor in his finding that the Liberty Realty Company is the owner of the judgment. On this branch of the case the evidence is vague, but what there is seems to be undisputed, and is to the effect that the Como Trust Company paid the Conservative Loan Company $1,000 for the judgment against the appellant and took from it the assignment mentioned *supra*. Afterward it became insolvent, and on March 8, 1928, its affairs were placed in the hands of Hon. E. H. Wootton, a Special Deputy Bank Commissioner, for liquidation under the direction of the Garland Chancery Court. In the instant case there was introduced in evidence a number of the petitions, schedules, and court's orders in that proceeding. From these it appears that the affairs of the Como Trust Company were in great confusion, due to the conduct of one of its trusted officers. It is also fairly inferable from these records that the Liberty Realty Company purchased the entire assets of the Como Trust Company, which included the judgment in question, although no specific mention is made of it. In view of the fact that some of the assets, transfers of which were approved by the court, are not identified in

the petitions or orders with particularity, the evidence of E. H. Wootton, who testified from personal knowledge regarding the purchase by the Liberty Realty Company of the Davis judgment, was competent. In that connection Mr. Wootton testified that the deed of assignment of the judgment became, and is, the property of the Liberty Realty Company, and that he, himself, obtained and was familiar with the orders made transferring all of the assets of the Como Trust Company to the Liberty Realty Company. There was no testimony offered on behalf of the appellant controverting this evidence, and, while it may be said to be slight, we think it is sufficient to support the finding of the trial court.

An inference to be drawn from the argument of appellant's counsel is that, as there is no proof or claim that the transfer of the judgment to the Liberty Realty Company was made in writing, no valid assignment was made; counsel's statement being: "All assignments of judgments of courts of record must be in writing," and § 6303, Crawford & Moses' Digest, is cited.

A judgment may be transferred by parol so as to confer on the transferee an equitable interest therein which courts of equity will recognize and protect. *Clark* v. *Moss,* 11 Ark. 736; *Wier* v. *Pennington,* 11 Ark. 745; *Desha* v. *Robinson,* 17 Ark. 248; *Wright* v. *Yell,* 13 Ark. 503; 58 Am. Dec. 336.

The statute, § 6303 *supra,* was enacted to provide "a method of notice to protect all persons having an interest in causes of action and judgments." *K. C. etc. Ry. Co.* v. *Joslin,* 74 Ark. 552, 86 S. W. 435. This statute did not prescribe the only method for the transfer of judgments, and the rights of an assignee by parol assignment will still be protected in courts of equity. "But, aside from any statute on the subject, the rights of the judgment creditor can be transferred to another so as to carry the right to enforce the judgment." *Am. Ins. Co.* v. *McGehee,* 113 Ark. 486, 169 S. W. 251.

In view of the decision reached by the chancellor, the other questions raised and argued become unimportant, and, as we are of the opinion that the conclusion of the trial court is not against the preponderance of the evidence, its decree is affirmed.

McCANN *v.* DYKE.

4-3026

Opinion delivered May 29, 1933.

Hill, Fitzhugh & Brizzolara, for appellant.

Daily & Woods, for appellee.

SMITH, J. Appellees, doing business under the firm name and style of Dyke Brothers, brought this suit, in the chancery court of the Fort Smith District of Sebastian County, to enforce a materialman's lien against certain property owned by appellant. The complaint alleged that the plaintiffs had furnished building material used by defendant in the construction of the home in which she now resides, between August 31, 1928, and April 22, 1930, as shown in an itemized statement filed with the complaint, and that a just and true account of the material had been filed with the clerk of the Sebastian Circuit Court, duly verified, as required by § 6922 Crawford & Moses' Digest, on May 9, 1930. It was alleged that all proper credits had been allowed, and that a balance of $1,779.10 was due, including interest.

An answer was filed, admitting the original contract to purchase material, but which alleged that all proper credits had not been allowed, and that none of the items embraced in the original contract had been furnished within three months next prior to May 9, 1930. The answer further alleged that much of the material furnished

was defective and worthless, and that because of the defects appellant had been and would be required to replace the material or to be content with an inferior and faulty house, whereas she had contracted for the best material and had been charged therefor. It was alleged "that, on account of such defective material, and the furnishing of material not in accordance with the contract of purchase, the defendant has suffered a loss of $1,721.66, said loss being the amount it will cost the defendant to replace said defective and worthless material and to finish the same in accordance with the plans and specifications of said house, all of which was well known to the plaintiffs." This allegation—which we will first dispose of—presents the only serious or difficult question in the case.

The defendant owner had employed an architect to build her home, but had not let a building contract. On the contrary, she employed a building superintendent, who employed the labor and ordered the material from the plaintiffs used in the construction of the building. Thirteen witnesses testified on behalf of the plaintiffs, and one more than that number for the defendant, and the record of this testimony has made a large transcript, which has been carefully read, but the testimony will not be set out in detail, as it would serve no useful purpose to do so.

The testimony very clearly establishes the fact that the plaintiffs furnished and the defendant received all the material charged for, and that all proper credits were allowed for material not used but returned, and there is much conflict as to the character of the material. There is no question that only the best material was ordered, as the owner contemplated the erection of a handsome home. The conflict is as to whether material of this character was furnished.

Complaint was made of the roof, which consisted of asbestos shingles. It was shown that the roofing was purchased from a standard company, and, whether the roof was defective or not, it was replaced without additional cost to the owner with a roof to which there appears to be now no valid objection.

It was insisted that material was furnished which was not properly seasoned, but was green and defective for that reason, and the principal conflicts in the testimony are upon this fact.

There was testimony on the part of the owner that the downstairs flooring was defective, and that this defect became apparent only after the floor had been put down, and that it should be replaced, and that the cost of so doing would be about $400. On the other hand, testimony was offered on the part of the plaintiffs to the effect that the flooring was not defective, and that the floors were in good condition after three years' use. Similar conflicts appear in the testimony in regard to other building material, but the court below found against the owner on these issues of fact, and we are unable to say that this finding is contrary to the preponderance of the evidence.

The testimony establishes the fact that much of the material ordered by the building superintendent, on the authority of the owner, during the last ninety days covered by the bill for the material was used in building a rock wall, a fish pond, and a chicken house. But it also appears that all of the material was used to improve the land which has been charged with a lien, and that all of it was furnished under what the plaintiff's manager called a "continuous account." According to this witness, there was never but one contract, and that was to furnish the material ordered by the owner's superintendent, and that the only account opened and kept against the owner covered these items, and that at least two of these items went into the construction of the residence.

In discussing a similar question it was said, in the case of *Planters' Cotton Oil Co.* v. *Galloway,* 170 Ark. 712, 280 S. W. 999, that the amount of the items furnished during the last ninety days covered by the builder's account is not the test as to whether they are embraced in the original contract, but that the test is whether the items fall naturally and ordinarily within the account. It was there also said that, if the items furnished during the last ninety days covered by the account were furnished

under the original contract, and were not furnished merely for the purpose of bringing that claim within the ninety-day statute, the lien would be enforced as to the entire account, although most of the items had been furnished more than ninety days before the lien was claimed.

It was said also, in the case of *Ferguson Lumber Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353, that § 6922, Crawford & Moses' Digest, contemplated that the items comprising the account will bear different dates; "in other words, that there will be items of debit and credit, and the requirement of the statute is that, within ninety days of the date of the last item debited, the account shall be filed." (Citing cases.)

We conclude therefore that the claim of lien was filed within the time provided by law.

It is insisted that excessive interest was charged, but the insistence is without merit. The material appears to have been sold and charged for on a cash basis, and the interest on each bill of material was charged from the last day of the month in which it was delivered. In the case of *Roberts* v. *Wilcoxson,* 36 Ark. 355, which was a suit to enforce the lien of a materialman, it was said that, in the absence of a showing to the contrary, the presumption is that building material was to be paid for on delivery, and that interest accrues on material so sold from the date the payment is due. The interest charged was so calculated, and is correct.

Upon a consideration of all the testimony, we are of the opinion that the finding and decree of the court below is not contrary to the preponderance of the evidence, and the decree will therefore be affirmed.

SEWER & WATERWORKS IMPROVEMENT DISTRICT NO. 1 *v.* MCCLENDON.

4-2923

Opinion delivered May 29, 1933.

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

E. F. McFaddin and *E. A. Upton,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment of $2,000 recovered by appellee from appellant in the circuit court of Lafayette County for damages resulting to his lands from the construction of a sewer or disposal plant in Lewisville in Lafayette County.

Appellee resided upon 116 acres of land, for which he paid $7,000, and upon which he expended $6,000 in constructing a dwelling and other improvements. This land was adjacent to an acre of ground which had been purchased by appellant and upon which it constructed

a septic tank through which to discharge the effluent from the plant into Battle Branch, which ran through appellee's land for 1000 feet.

It was alleged in the complaint that damages resulted to this land by pollution of the branch, and the land and dwelling from foul and offensive odors arising from the branch and disposal plant. These allegations were denied, and the cause was tried and sent to a jury upon the theory of whether appellee's lands were permanently damaged, and, if so, in what amount. The testimony introduced pro and con was conflicting on both issues.

Appellant first contends for a reversal of the judgment because the trial court admitted the testimony of A. M. Shirey and Howard McClendon relative to the amount appellant paid for the acre of land upon which to construct the septic tank. The specific objection interposed to the admission of their testimony was that the acre tract was not similar in location or topography to appellee's lands, and that it was purchased for a particular purpose. It is now objected that the testimony of both was inadmissible under the rule of evidence announced in the case of *Yonts* v. *Public Service Company of Arkansas,* 179 Ark. 695, 17 S. W. (2d) 886. The rule in that case is not applicable here because, in the instant case, the only objection made to the introduction of the evidence was that the two tracts were not similar in location or topography, and that the acre tract was purchased for a particular purpose. It is now argued for the first time that their evidence was inadmissible under the rule in the Yonts case because the district itself purchased the acre of land. This specific objection should have been made in the court below. It is too late to make it now. The only specific objection available in the Supreme Court against the evidence is the specific objection made in the trial court. *Arkansas Coal Company* v. *Dunlop,* 142 Ark. 358, 218 S. W. 839; *Missouri State Life Ins. Co.* v. *Fodera,* 185 Ark. 155, 46 S. W. (2d) 638. All other specific objections not made in the trial court are waived. *Kahn* v. *Lucchesi,* 65 Ark. 371, 46 S. W. 729.

The specific objection made in the trial court was without merit because the rule is that sales of other lands in the same locality is a fair criterion to aid in establishing market value. *Missouri Pacific Railway Company* v. *Green,* 172 Ark. 423, 288 S. W. 908.

Appellant next contends for a reversal of the judgment because the court permitted Zembra Everett to testify as to the value of his farm situated about seven miles from Lewisville. He testified as to the acreage of his farm and the character of improvements thereon and what he sold it for about the time the disposal plant was constructed. There were similarities detailed by him between his tract and appellee's land; so the testimony was admissible notwithstanding they were separated by a distance of seven miles. In these days of good roads and rapid means of transit, it cannot be said as a matter of law that the lands were in different localities. The description of the two tracts make the testimony of Everett admissible under the rule of evidence announced in the case of *St. Louis, Iron Mountain & Southern Railway Company* v. *Maxfield,* 94 Ark. 135, 126 S. W. 83.

Appellant next contends for a reversal of the judgment because the court refused to give each of its requested instructions Nos. 3, 4, 6 and 7.

Instructions 3 and 6 were requests to exempt appellants from liability if the odor from the sewer plant was caused by the negligence of its agent in not running enough water through the plant. No such issue was joined in the pleadings, and the testimony adduced had not presented any such issue, so the requests were abstract and properly refused.

Instruction No. 4 is as follows:

"The jury is told that defendant would not be responsible for any unusual or extraordinary rain storm or rainfall then and there prevailing, which caused an unusual amount of water to accumulate in Battle Branch, thereby overflowing its filtering bed and otherwise preventing the proper functioning of its disposal plant for the time, and any injury and pollution of said stream

resulting to plaintiff by reason thereof will not be considered by you as an element of damages in this case."

This instruction was requested on the theory that part of the time the odor was a result of a rise in the branch that could not have been anticipated and might be regarded as an act of God. The testimony however fails to reflect that there were any unusual floods. It appears that all rains of any consequence flooded the branch and that, a part of every winter, water stood over the particular lands through which the branch ran. This condition was not exceptional, but a common occurrence which might or should have been anticipated in constructing the plant. There was no evidence to warrant such an instruction, so it was properly refused.

Instruction No. 7 was to the effect that, if the jury found the odor was temporary or induced through the temporary pollution of the branch, then he could recover only the reduced rental value of his farm during such temporary period. No such issue was in the case. The suit was for alleged permanent injury to the farm, and the correct measure of damages was the difference in the market value of the farm before and after the construction of the sewer disposal plant. The instruction was properly refused.

Appellant next contends for a reversal of the judgment because the court refused to continue the case on account of the absence of its witness R. G. Scott. The motion filed by appellant for a continuance set out the testimony witness would give if present and was regular in form. Appellee admitted that, if present, he would testify to the facts contained in the motion, which motion was treated and read as a deposition of R. G. Scott in the case. The court followed § 1270 of Crawford & Moses' Digest in refusing to continue the case, and nothing appears in the record to show any abuse of discretion by the trial court in this regard.

Appellant lastly contends for a reversal of the judgment because the damages allowed by the jury were excessive and the result of passion and prejudice. The record does not reflect that the verdict was motivated

by either passion or prejudice or both, and there is nothing in the record from which such an inference might be drawn. According to the testimony introduced by appellee, sixteen acres of his pasture land adjoining Lewisville was practically destroyed for use as a pasture. The water of the branch was rendered unfit and dangerous for stock to drink on account of the effluent from the septic tank; and the odors from the branch and septic tank injured the $6,000 dwelling and other improvements for occupancy as a home. These were injuries suffered by him which were not suffered by the general public, and we do not think the amount awarded him was too much under all the circumstances.

No error appearing, the judgment is affirmed.

GORDON *v.* NEW YORK LIFE INSURANCE COMPANY.

4-3018

Opinion delivered May 29, 1933.

[redacted]

Edw. Gordon, for appellant.

W. P. Strait and *Rose, Hemingway, Cantrell & Loughborough,* for appellee.

KIRBY, J., (after stating the facts). It is urged that the court erred in directing the verdict against appellant, the beneficiary in the insurance policy sued on.

It is not contended, nor was any testimony introduced tending to show, that the money, the second premium, claimed to have been paid to R. H. Fiser, a former agent who solicited the insurance and collected the first premium, was ever paid to the insurance company or received by it. He was only a special agent with limited authority as shown for soliciting insurance and not a general agent within the meaning of that term.

The policy provides for the payment of all premiums on or before their due date at the home office of the company, "or to an authorized agent of the company, but only in exchange for the company's official premium receipt signed by the president, a vice-president, a second vice-president, a secretary or the treasurer of the company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt."

The testimony also tended to show that Fiser's authority to represent the company as a soliciting agent had been terminated by the company before the money for the payment of the premium was received by him; and, without regard to whether the testimony is undisputed that notice of the discharge of the agent who collected the second premium for the insurance was brought home to the insured before the payment thereof, there is no presumption that his authority to receive payment for premiums continued, since, after such first payment of said first premium, his authority was limited by the terms of the policy, or rather the insured had knowledge by its terms that premiums could be paid only at the home office or to an authorized agent of the company, "but only in exchange for the company's official receipt,

etc.," and, "No person has any authority to collect a premium unless he then holds said official premium receipt."

Of course, due payment of the premium might have been made without receiving such a receipt, but the burden of proof would be on the party claiming said insurance to show that it had been paid, when disputed; and there was no testimony showing the payment of this premium to an authorized agent or that the company itself ever received the money.

If it had been shown that the money was paid in fact to the insurance company, a different question would be presented, but there is no such question in this case of ratification or estoppel of the company to deny the payment.

In *United Friends of America* v. *Phillips,* 186 Ark. 70, 52 S. W. (2d) 628, cited by appellant, the facts are unlike those in this case, and it has no application here, being altogether different, the dues or premiums therein having been actually paid to and received by the secretary, which was a sufficient payment under the circumstances.

There was no issue to be submitted to the jury upon the undisputed proof herein, and the court did not err in directing a verdict, and the judgment must be affirmed. It is so ordered.

JEFFERIES *v.* WASSON.

4-3096

Opinion delivered May 29, 1933.

Fred A. Isgrig, for appellant.

Trieber & Lasley and *Sam Rorex*, for appellee.

McHaney, J. Appellants are depositors in the insolvent American Exchange Trust Company of Little Rock, hereinafter called the bank, now in process of liquidation by the Bank Commissioner, under the jurisdiction of the Pulaski Chancery Court. They filed an intervention in the liquidation proceedings pending in said court, seeking an order of sale of the remaining assets of said bank, in which they alleged that they were depositors therein when its doors were closed in November, 1930, and its affairs taken over by the Bank Commissioner for liquidation; that since said time dividends have been paid at irregular intervals, totaling 35 per cent.; that $428,000 has been borrowed from the Reconstruction Finance Corporation, and the bank's assets pledged to secure said loan, which is a prior lien and must be paid before any further dividends can be paid depositors; that, at the present rate of liquidation, it will require two or three years to repay said loan; that the interest and expense of liquidation amount to $5,000 per month; that an offer to purchase the remaining assets of said bank has been made on these terms. To pay the R. F. C. loan at once and an additional amount in cash equal to 5 per cent. of all deposits, and in one year an additional 5 per cent. or a total for depositors of 10 per cent., one-half in cash and the other half within one year, both of which would be paid before any further dividends could be expected under liquidation; that they believe this to be a fair offer and is the full value of the assets; and that to decline the offer would work injury and damage to the depositors. Other allegations of the intervention are: "That the Bank Commissioner has rejected said offer, and at the time thereof stated that he personally believed that the offer was fair and reasonable, and that it is to the best interest of depositors that same be accepted; that depositors would, in his opinion, receive more under said sale than they probably would receive under the liquidation; and that, if he personally owned said assets, he would be glad to accept

said offer; that, if he were an investor in that class of securities, he would not be willing to participate in the offer; that he had had an appraisal made of the assets of said bank by his assistants, and that the total value of said assets as shown by the appraisal was not in excess of the amount offered as stated above; and that his refusal to accept the offer is based entirely on the ground that the depositors, in his opinion, are opposed to the sale; that he had previously given notice in the newspapers that the offer had been made, and that he wanted the views of depositors, and that he would abide by the decision of the depositors, and in response to said notice had received many more letters against the sale than in favor of it, and that he therefore would reject the offer.

"That said statements of the Bank Commissioner are his views and findings as to the value of the assets of said bank. That the Bank Commissioner has wholly failed and refused to give the depositors the benefit of this information; that less than one per cent. of the total number of depositors and much less than one per cent. in amount of deposits have expressed their wishes to the Bank Commissioner on the subject; and that, if depositors had the benefit of the information that he had and which it is his duty to convey to them, petitioners verily believe that the depositors would by a great majority favor said sale.

"Your petitioners state that they have requested the Bank Commissioner of the State of Arkansas to approve of said sale, and that said Commissioner has failed and refused to do so, although the said Commissioner knows that the acceptance of the offer at this time is for the best interests of these depositors and all other depositors of said bank.

"Your petitioners further state that to delay the sale of the said bank will be to deprive the depositors and these petitioners of their *pro rata* part for a great length of time, and that it will continue the heavy expense of liquidating to such a point and time that the depositors will not receive anything upon their deposits.

"Wherefore your petitioners pray that the court enter an order of sale authorizing and directing the sale of the said bank and its assets, and that the funds received from said sale be immediately disbursed *pro rata* among the depositors, according to their deposits."

The Bank Commissioner filed the following motion to dismiss the intervention: "That all of the assets of said American Exchange Trust Company are now in possession, ownership and control of this movant for liquidation and are being liquidated by him under the authority vested in him by the statutes of the State of Arkansas with respect to the liquidation of the assets of insolvent banks; and said assets are not in any sense *in custodia legis.*

"This court has no jurisdiction of, power or control over a sale of said assets at the instance of said interveners and can only act with respect to a sale of said assets at the instance of and upon the petition of this movant, who has heretofore rejected the purported offer set out in said intervention, and now rejects the same."

The court sustained the motion and dismissed the intervention "on the sole ground that the court has no jurisdiction." This appeal followed.

It is the contention of appellants, based on our statutes as construed by this court, that the chancery court has plenary power and supervision over the liquidation of insolvent banks; "that it has the power, either on application of interested parties, or on its own motion, to require an advantageous sale to be made, and is not limited in its power to merely approving or rejecting recommendations for sale made by the Bank Commissioner." On the other hand, it is contended by appellee that liquidation proceedings are administrative in character; that the Bank Commissioner, being the person designated by statute as the administrator of insolvent banks, is charged with the duty of determining, at least in the first instance, whether a sale of assets should be made; that the chancery court also acts administratively and not judicially in approving or rejecting applications of the Bank Commissioner to sell assets; and that the

court may not substitute its discretion for that of the commissioner by directing a sale which is not recommended by him.

This latter contention is based on the theory that our statutes on the subject, beginning with act 113 of 1913, § 53, and ending with act 61 of 1933, § 1, were borrowed from the National Banking Act (USCA, Title 12, § 192), and that the construction given the latter by the Federal courts was necessarily adopted. The applicable part of our statute, § 1, act 61, of the Acts of 1933, provides: "Upon taking charge of any bank, the Commissioner shall proceed to liquidate its affairs, to institute, maintain and defend suits and other proceedings in the courts of this State or elsewhere, to enforce in this State or elsewhere if necessary the liabilities of the stockholders, and, upon the order hereby empowered to be made of the chancery court of the county wherein the said bank had its place of business, or of the chancellor thereof in vacation, to sell, compound or exchange any or all bad or doubtful debts of the said estate, and, on like order, to sell or exchange any or all of the property, real, personal or mixed, of the said estate, in such manner and upon such terms and considerations as to any such sale, composition or exchange as specified in the said order. Any such sale shall be public or private as specified in the order therefor, and any such sale or exchange of real property shall be subject to confirmation respectively by the said court or chancellor."

The applicable portion of the National Banking Act above mentioned reads as follows: "Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders."

Under this statute the Federal courts have held that the receiver of a national bank is not an officer or arm of the court, but is an officer of the Comptroller who appoints him, and that its assets are not *in custodia legis.* Also that the order mentioned under which the receiver may sell assets is merely a condition upon the receiver's power to sell. That "it is the exercise of the visitatorial power, given to the court by the statute and limited to that function. It is an administrative check upon the otherwise unconditional powers of the Comptroller," as said in *Hulse* v. *Argetsinger,* 18 Fed. (2d) 944. And as said in *Fifer* v. *Williams,* 5 Fed. (2d) 286: "There is no suit, no parties in the legal understanding of the term; no process must issue; no one is authorized to appear on behalf of the receiver or any one else, or to subpoena witnesses. It is an *ex parte* proceeding, and, though by the will of Congress put into judicial cognizance, it is not by its nature a judicial controversy."

While there is similarity of language used in both the State and National statutes, we cannot agree that the chancery courts of the State are so limited in the State Banking Act, as are the Federal courts under the National act, nor that they act in merely administrative capacities in the liquidation of insolvent banks. In other words, they are not mere rubber stamp courts, with authority merely to place the stamp of approval on the action or non-action of the commissioner. When we examine our State act, we find many provisions that lead to the contrary view. For instance, the Commissioner is impowered to appoint one or more special deputies to take charge of an insolvent bank, but he is required to file a copy of the certificate of appointment with the chancery clerk. Section 721, Crawford & Moses' Digest. The first thing required to be done on taking charge is to make an inventory of the bank's assets and file same with the chancery clerk, who shall thereupon give the administration of the affairs of said bank in said court a number on the court's docket; that the Commissioner shall make a complete list of all claims presented to him, whether allowed or rejected, and file same with said

clerk; and that each item of expense of liquidation shall be fixed by him, subject to court approval. Section 2, act 61, Acts 1933. Dividends can be paid to creditors, but only to such persons, in such amounts and upon such notice as the court may direct. Section 724, Crawford & Moses' Digest. The court has plenary power over the allowance and classification of claims, or the rejection of claims by the commissioner. And the allowance or disallowance by the court has always heretofore been considered to be a final order or judgment from which an appeal will lie to this court. Cases in this court involving claims in recent years are too numerous to mention. In *Taylor* v. *Moose,* 185 Ark. 856, 49 S. W. (2d) 1043, we held that a contract made by the Commissioner with an attorney fixing his compensation in advance for his services in the liquidation of a bank was void without the approval of the chancery court, a matter resting in its sound discretion, and a recovery for services based on such contract was denied. We there said: "The matter of fixing compensation for counsel finally rests in the sound discretion of the trial court, and we are of the opinion that the court did not abuse its discretion."

In *Citizens' Bank & Trust Co.* v. *Raines,* 125 Ark. 17, 187 S. W. 932, this court said: "It clearly appears that it was not to the best interest of those who were directly concerned in the manner of the disposition of the bank's assets to approve this sale. On the contrary, instead of husbanding the resources of the bank, so as to preserve and protect the interests of those who are directly concerned, the order of the court approving this sale would have precisely the opposite effect. The court therefore abused its discretion in confirming the report of the Commissioner with reference to the sale of the lands as a completed sale to the appellee." See also *Aber* v. *Maxwell,* 140 Ark. 208, 215 S. W. 389. In *Krumpen* v. *Taylor,* 183 Ark. 1046, 40 S. W. (2d) 775, we said: "The order of approval of the chancery court is a prerequisite before any sale of the assets of a bank in the hands of the State Bank Commissioner for liquidation can be made. The Commissioner may negotiate the terms of

sale, but it is the decree of the chancery court which gives effectiveness to the contract. In so far as the assets and property of the insolvent bank were concerned, the State Bank Commissioner must act under the order of the chancery court, and is, in this respect, the arm of the court as though acting as receiver under the appointment of the court."

Again, in the same case, it was said: "It was the duty of the chancellor to consider all the facts and circumstances attending the sale in order to determine whether it was a provident or improvident sale. Otherwise the whole matter might just as well have been placed exclusively in the hands of the State Bank Commissioner. If the approval of the chancery court was absolutely required for a valid sale of the assets and property of the insolvent bank, it necessarily follows that the chancery court is vested with some discretion in the matter. The Bank Commissioner may negotiate the terms of the sale, but it is the order of the chancery court which gives effectiveness to the contract."

It seems to follow as a necessary consequence that if the chancery court has the power and the duty to refuse to approve an improvident sale, even though made by the Commissioner (*Krumpen* v. *Taylor, supra*) it would have the like power to order a provident one, without the approval of the Commissioner, on the petition of creditors, or on its own motion, after a hearing on due and proper notice. Here the allegation in the petition is that the Commissioner thinks the proposed sale an advantageous one, and that he would approve it, but for the objection of certain depositors. If in fact it would be for the best interest of the depositors to make the sale, and if the court is powerless to act except at the request of the Commissioner who refuses to make the request for a captious reason, the depositors would suffer a grievous wrong and be without any remedy. We cannot agree that such is the law, for, as said in *Krumpen* v. *Taylor, supra,* the "Commissioner must act under the order of the chancery court, and is, in this respect, the arm of the court as though acting as receiver under the

appointment of the court." No substantial step may be taken by the Commissioner in the liquidation of insolvent banks, except on approval of the court. In all essentials he is the receiver of the court. The assets in his hands are *in custodia legis,* just as are the assets of an insolvent National bank in the custody of the Comptroller. *Yeargain* v. *Shull, Bank Comm.,* 149 Okla. 221, 300 Pac. 303; *Kidder* v. *Hall,* 113 Tex. 49, 251 S. W. 497.

We do not mean to hold that this sale should be made, or that the court should substitute its discretion for that of the Commissioner, but we do hold that the court has the power and jurisdiction to hear and determine the matter presented by the intervention of appellants.

The decree of dismissal will be reversed, and the cause remanded with directions to overrule the motion, and for further proceedings according to law and the principles of equity and not inconsistent with this opinion.

BUTLER, J., (dissenting). Article 12, § 6, of the Constitution provides: "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators."

Under the above provisions, ample authority is found for the action of the Legislature in passing the banking act (act No. 113 of the Acts of 1913) and subsequent statutes amendatory thereof. The argument is made that the statute, in attempting to authorize the Bank Commissioner to take charge of insolvent banks, is an invasion of the ancient jurisdiction of courts of chancery and therefore invalid. The answer to that is the section of the Constitution quoted above, and this court, in the case of *Greer* v. *Merchants' & Planters' Bank,* 114 Ark. 212, in answering a similar contention, said: "We

think that the original jurisdiction of the chancery court as preserved by our Constitution does not prevent the Legislature from entering upon the supervision of any matters which fall within the police power. This act does not attempt redistribution of judicial power, but it provides for a system of supervision which has nothing to do with the judicial function.

In the case of *State, etc.,* v. *Huxtable,* 178 Ark. 367, 12 S. W. (2d) 1, we said: "The police power of the State extends to the regulation of banking business and even to its prohibition except on such conditions as the State may prescribe." This doctrine was recognized in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 31 S. Ct. 186. Continuing in the Huxtable case, we said: "The business of banking is of a public nature and therefore is subject to statutory regulation for the protection of the public. The power to regulate the business necessarily carries with it the power to provide adequate machinery for winding up its affairs when insolvent."

It is clear, from the authorities referred to, that the Legislature had the power to provide for the organization and functioning of banks and for the method of their liquidation when insolvent without any reference to courts of equity or any other court, and the Legislature might provide an agency for the supervision of banks and banking and the liquidation of insolvent banks to act wholly independent of the courts.

Davis v. *Moore,* 130 Ark. 129, 197 S. W. 295, was a case construing our banking act, and in that this court held that language of the particular section under consideration as well as many other provisions were copied from the National Banking Act, and under settled rules of construction we adopted the statute with the interpretation placed upon it by the Federal courts. The section involved in that case was the one authorizing the assessment of the statutory liability on the stockholders of an insolvent bank and to bring suit to enforce the same; the claim being made that the commissioner could only bring such suit when ordered by the chancery court. This claim was by the court denied, which

held that, under the construction placed upon similar provisions in National Banking Act, the enforcement of the stockholders double liability was not dependent on the orders of the court. Continuing in that case, we said: "The further question is raised whether or not the action of the Bank Commissioner in levying the assessments for the stockholders is conclusive as to the necessity for the call and the amount thereof. * * * That question is, we think, concluded under the doctrine of the effect of borrowing a statute, with its interpretation, from another jurisdiction. The provisions of our statute are almost identical with the National Banking Act with regard to the enforcement by the Bank Commissioner of the double liability of the stockholders. Neither of the statutes provides in detail how the liability shall be enforced but each of them do provide that it shall be enforced, under our statute by the Bank Commissioner, and under the National Banking Law by the receiver appointed by the Comptroller."

In *Easton* v. *Iowa,* 188 U. S. 238, 23 S. Ct. 288, the court said: "Our conclusions, upon principal and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers that should be conferred upon said banks, and has the sole power to control and regulate the exercise of their operations; that Congress has directly dealt with the subject of the insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital."

In *Hulse* v. *Argetsinger,* 18 Fed. (2d) 944, the court said: "The receiver of a national bank, appointed by the Comptroller, is his officer, not an officer of the court. Nor are its assets while in his hands *in custodia legis;* they do not become such by an order confirming a composition of debts made by him. Such an order is merely a condition upon the receiver's power to compound the debt; it is not made in any suit, nor does it adjudicate any rights *inter partes.* * * * It is the exercise of the

visitatorial power, given to the court by the statute and limited to that function. It is an administrative check upon the otherwise unconditional powers of the Comptroller."

In the case of *Liberty National Bank* v. *McIntosh,* 16 Fed. (2d) 906, the court said: "Ample authority will be found to make clear the purposes of the National Banking Act, and to fully and clearly show the power and authority of those charged with its administration. His jurisdiction with respect to all matters properly within his discretion is exclusive, and he is in respect thereto in no manner amenable to any court, nor is his action subject to review therein."

The effect of these decisions is that the Comptroller of the Currency, acting through his receivers, has complete and exclusive direction of the liquidation of the assets of insolvent banks, subject only to the limitations placed upon his authority by the statute itself. He is not an officer of the court, nor are the assets of insolvent banks while in his hands *in custodia legis.* The entire proceedings are administrative in their nature and not judicial, including the duties imposed by the statute on the chancery court. Applying the same rule as the Federal courts, this court in *White* v. *Taylor, ante* p. 1, held in effect that the courts had no power to intervene where the Bank Commissioner had determined that it was necessary to levy an assessment on the stockholders of insolvent banks, and that the chancery court would have no jurisdiction.

In order to escape the effect of these decisions, it is necessary for the court in the case at bar to hold that the sections of our act involved and of the National Banking Act on the same subject are unlike, and therefore to that extent our statute is not a "borrowed one." These sections are set out in the opinion of the court. I believe that to all eyes except those of a casuist they are alike in all substantial particulars. Both provide that the officer named in the statute shall take charge of the insolvent institution, and both provide for sale by him of the assets under the supervision of the courts. It seems to me that under any just and reasonable inter-

pretation that the powers of the Commissioner and of the Comptroller are for all practical purposes identical as to the disposition of the assets of insolvent banks, and that the rules declared by the Federal courts and stated above, under the decision in *Davis* v. *Moore, supra,* govern in this case, and justify the conclusion reached by the chancellor.

I therefore respectfully dissent.

ROYAL ARCH BENEFIT ASSOCIATION *v.* TAYLOR.

4-3022

Opinion delivered May 29, 1933.

Scipio A. Jones, Sam Rorex and *Leon B. Catlett,* for appellant.

John Baxter, for appellee.

BUTLER, J. Beginning with the year 1919 the appellant association, acting through its treasurer D. R. Perkins, began to deposit a part of its funds in the Wilmot Bank, continuing its business with this bank until 1930 when it had on time deposit between fifteen and sixteen thousand dollars. Perkins was a resident of the town in which the bank was located and was authorized by the appellant to purchase with the funds on hand

aforesaid $10,000 of government bonds. A warrant was issued to Perkins by the association in the sum of $10,600 for that purpose and to pay whatever premium and other expenses necessary and incident to the purchase. Perkins surrendered to the bank time certificates of deposit, and the bank in turn placed the entire deposit to the checking account of the association in order to facilitate the purchase of the bonds, undertaking to obtain the bonds as speedily as possible. From time to time Perkins made inquiries regarding the purchase and finally informed the bank that the appellant was becoming impatient and contemplated obtaining the bonds through a bank in Forrest City where it maintained its home office. On being informed that negotiations for the purchase of the bonds were then in progress and would soon be consummated, Perkins was induced to defer this action for a time.

On October 8, 1930, the bank issued the following statement:

"WILMOT BANK
"Wilmot, Arkansas.

"Charge. Wilmot, Arkansas, 10/30/1930

"D. R. PERKINS, Treas.

"We today charge your account as follows: Advance payment on bonds $10,215."

This statement was delivered to Perkins at the end of the month and was noted on the bank's statement issued at the end of each month to the customer showing the items of debit and credit for the month then ending with vouchers attached. At this time Perkins was informed that the bonds had been purchased, that they were in Washington for the purpose of being registered, and would be received in some two or three weeks. Perkins did not receive the bonds within the time specified. He made inquiries at the bank and was put off by various excuses until the bank closed on December 11, 1930, when he discovered that the bonds had never in fact been purchased.

By proper proceedings the appellant sought to have its claim allowed as a preferred claim in the insolvency

proceedings, and from a decree of the chancellor denying the same this appeal is prosecuted.

The evidence is not in dispute, and we conclude it justified the appellant's contention.

Appellee cites and relies upon the cases of *Taylor* v. *Whaley,* 183 Ark. 598, 37 S. W. (2d) 702, and *Taylor* v. *Dierks Lumber & Coal Co.,* 183 Ark. 937, 39 S. W. (2d) 724, to sustain the decree of the lower court. Neither of these cases however is authority for the position assumed. In both cases there was nothing between the bank and the depositor to create a trust relationship, and there was no writing evidencing any such intention. In the case at bar the action of the bank in informing the depositor that it had set aside from the general deposit the sum of $10,215 for the purpose of procuring bonds and the issuance by it of the memorandum aforesaid constituted this sum a trust fund, and the memorandum was a sufficient writing to bring the transaction within subdivision 5, § 1 of act No. 107 of the Acts of 1927. "A prior creditor shall be * * * the beneficiary of an express trust * * * which was evidenced by a writing signed by the bank at the time thereof." The memorandum is not unlike the one under consideration in the case of *Albright* v. *Taylor,* 185 Ark. 401, 147 S. W. (2d) 579. In that case the collector had deposited a sum of money sent him by A. Guthrie & Company with which to pay their taxes, and the bank issued to him the following receipt:

"D. J. Nance, Col.
Spec. Acct.

"Held in escrow to cover 1930 taxes A. Guthrie and Company, St. Paul, Minnesota. Subject to check of collector upon issuance of 1930 tax receipts."

We there held that under the circumstances the deposit became impressed with a trust, and that the memorandum issued by the bank was "a writing signed by the bank at the time thereof," within the meaning of the statute.

In the instant case the memorandum is not ambiguous, but clearly indicates the purpose for which the money was accepted, and it does not alter the case that the

money set aside for the purpose indicated was already in the bank at the time of the direction given for its use by appellant and its purported application on the part of the bank. As was held in *Grossman* v. *Taylor,* 185 Ark. 64, 46 S. W. (2d) 12, the instrument issued by the bank was as effectual to create an express trust as though the money had been checked out and redeposited. There is no particular form of writing prescribed by the statute, nor any manner pointed out therein, in which the same shall be signed, and, while this might be called a "charge ticket," as contended for by the appellee, it was something more. It was both a charge ticket and a contract and entitled the appellant to a preference over the general creditors and to share with the other preferred or prior creditors *pro rata,* and to have the balance, if any, classed as a common claim.

The decree of the trial court is therefore reversed, and the cause remanded for further proceedings according to law and not inconsistent with this opinion.

GENTRY HARDWARE COMPANY *v.* GRAY.

4-3030

Opinion delivered June 5, 1933.

W. A. Dickson, for appellant.

JOHNSON, C. J., (after stating the facts). From the foregoing statement of facts it appears that appellant affirmatively pleaded that appellee had voluntarily surrendered the property in controversy to it in satisfaction of its debt. The testimony on behalf of appellant was amply sufficient to have sustained a verdict in its behalf on this issue, but the trial court refused to submit this issue to the jury under appellant's requested instruction No. 4, which has been copied in the statement of facts. We think this is reversible error. Appellant's instruction No. 4 was not covered by any other instruction given by the trial court, and the case must be reversed because of this error.

In view of the fact that this case must be remanded for a new trial, it is proper to express our views in reference to certain testimony offered on the trial of the case in behalf of appellee. This testimony was to the effect that his apple crop had been damaged because appellant had taken his spray rig away from him, and he was thereby deprived of spraying his orchard. This testimony was incompetent and inadmissible on the trial of this case and should not have been introduced.

Other errors are argued in appellant's brief, but we do not deem them of sufficient importance to discuss in this opinion, and they will probably not occur on a retrial of the case.

Let the judgment be reversed, and the case remanded.

WASSON *v.* STATE EX REL. JACKSON.

4-3104

Opinion delivered June 5, 1933.

Sam Rorex and *Leon B. Catlett,* for appellant.

J. M. Jackson, Lake, Lake & Carlton, Abe Collins, E. K. Edwards and *B. E. Isbell,* for appellee.

J. H. Black, George M. Gibson and *Walter L. Pope, amici curiae.*

HUMPHREYS, J. This is an appeal from a final order or judgment of the chancery court of Pulaski County, requiring appellant, State Bank Commissioner, to pay appellee, Sevier County, an unpaid balance due it of $16,-268.39 on a judgment it recovered against appellant for $33,649.69 as a preferred claim on June 21, 1932, which was affirmed on appeal by this court on December 5, 1932.

At the time of the rendition of said judgment and the affirmance thereof, all claims which might have been filed in the insolvency proceeding against the American Exchange Trust Company, the assets of which were being administered by appellant Bank Commissioner, had been filed, and most of them allowed as general or preferred claims.

When the American Exchange Trust Company closed its doors, there was sufficient cash in the bank which was received by appellant to pay all preferred

claims, including appellee's claim. The time for filing claims against said bank had then expired under the provisions of § 54, act 113, of the Acts of 1913, as amended by § 5, act 627, of the Acts of 1923, which is as follows:

"No claim shall be allowed unless proof has been presented to the commissioner within one year from date on which commissioner takes over the assets of the liquidated bank."

The only defense interposed to the payment of the balance due Sevier County on its preferred judgment claim is act 277 of the Acts of 1933, which, omitting formal parts, is as follows:

"Section 1. In all cases where banks in the State of Arkansas are being liquidated by the Bank Commissioner and the one year given by § 54 of act 133 of the Acts of 1913, as amended by act 627 of the Acts of 1923, for presenting claims to the commissioner has expired, the time for filing claims with said Commissioner is hereby extended to all persons having claims of any character until July 1, 1933, unless the liquidation of such banks should be closed before said date; provided that no claims can be presented after the liquidation of such bank is closed."

The purpose of this act was to revive and validate claims which had been barred for failure to file same within the time required by law. This purpose and intent rendered the act void. The general rule of law applicable is well stated in 6 R. C. L., p. 309, as follows:

"In most jurisdictions it is held that, after a cause of action has become barred by the statute of limitations, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the Legislature has power to divest that right and revive the cause of action. Where title to property has vested under a statute of limitation, it is not possible by an enactment to extend or revive the remedy since this would impair a vested right in the property."

The rule announced above was approved by this court in *Rhodes* v. *Cannon*, 112 Ark. 6, 164 S. W. 752.

No error appearing, the decree is affirmed.

OLIVER *v.* WESTERN CLAY DRAINAGE DISTRICT.

4-3050

Opinion delivered June 5, 1933.

Oliver & Oliver, for appellant.

J. L. Taylor, for appellee.

MEHAFFY, J. The Western Clay Drainage District was formed by special act of the Legislature in 1907. The

directors were authorized to divide the territory included in said district into subdistricts, and it was divided into five subdistricts. Subdistrict five began suit in Clay County against numerous persons to foreclose its lien for annual assessments.

G. B. Oliver, one of the appellants, owned considerable property in subdistrict 5, and the partnership of Oliver & Oliver, composed of G. B. Oliver, Sr., and G. B. Oliver, Jr., owned one-half of a judgment which was rendered against the district April 29, 1929, the other half of said judgment having been settled. Nothing had ever been paid on the half of the judgment belonging to Oliver & Oliver, and there was a balance due them of $10,018.53 at the time the suit was filed.

The appellants filed a cross-complaint, alleging that they owned the judgment against the district, and asked that the amount of taxes due the district from Oliver be credited on the judgment.

They alleged in the cross-complaint that one W. R. Brown, doing business as Clay County Dredge Company, entered into a contract with subdistrict 5 for the construction of drains and levies in said subdistrict; that, under the contract, estimates of the work done were to be made from time to time as the work progressed, and that Brown was to be paid the amount of estimates, less 15 per cent. until the work was completed. When the work was completed, this 15 per cent. was to be paid to Brown.

On the completion of the work, the district refused to pay Brown, giving as a reason that the work had not been completed within the time prescribed. Brown assigned his cause of action to W. D. Polk. Polk brought suit and recovered a judgment for Polk and Brown for $16,559.67, with interest at 6 per cent. from April 29, 1929, to date of judgment.

Appellants further alleged in their cross-complaint that one-half of the judgment had been sold by the receiver who had been appointed to take charge of Polk's property, and that, under an order of the chancery court, one-half of the judgment was assigned to the appellants,

and that nothing has been paid on said judgment; that the subdistrict sold bonds of the face value of $110,000, receiving therefor $106,000 in cash; that $140,000 of benefits was assessed against the property in the subdistrict. The act authorized the subdistrict to sell bonds for the purpose of the construction of the improvements, and it is alleged that they sold bonds sufficient to pay for the construction work and all incidental expenses, but that the district, without the knowledge of appellants, or their privies, wrongfully and unlawfully transferred $10,679.44 of the funds received for construction, and wrongfully and unlawfully used the same to make payments to the bondholders of subdistrict 5; that the amount of taxes collected from the lands in subdistrict 5 amounted to $107,380.56, but that the subdistrict paid to the bondholders $118,060, and the district has paid for construction, maintenance, and all expenses only the sum of $91,000; that they also collected by lending the proceeds of the sale of its bonds a large sum of money; that said district has no means with which to pay the judgment of appellants, except from the annual taxes collected.

They ask that the taxes due from G. B. Oliver, Sr., to the district be credited on the judgment owned by appellants; that the treasurer and directors of the district be restrained from receiving in payment of taxes anything except money until appellants have been paid in full, and that the directors be ordered to restore to the construction fund and pay to appellants all money received until their judgment is fully satisfied, and that they be restrained from paying any money to the bondholders until said judgment is paid.

Appellees demurred to the cross-complaint of appellants, and the court sustained the demurrer, except he found that the taxes due on the lands should be credited on the judgment. The case is here on appeal.

The appellees contend that the bondholders should be made parties. This question was not raised in the court below, and § 1189 of Crawford & Moses' Digest provides that the defendant may demur to the complaint

where it appears on its face that there is a defect of parties plaintiff or defendant.

Section 1190 provides: "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so, it shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action."

The appellees filed a general demurrer, but did not specify, as required by the statute, the grounds of objection to the complaint, except to state that the cross-complaint did not state facts sufficient to constitute a ground for the relief prayed. *Sullivan* v. *Arkansas Valley Bank,* 176 Ark. 278, 2 S. W. (2d) 1096; *Fitzhugh* v. *First National Bank of Batesville,* 177 Ark. 328, 6 S. W. (2d) 308.

A general demurrer to a complaint admits the facts properly pleaded therein. *Ritchie Grocer Co.* v. *Texarkana,* 182 Ark. 137, 30 S. W. (2d) 213; *Tyler* v. *Citizens' Bank,* 184 Ark. 332, 42 S. W. (2d) 385; *Boone County Bd. of Ed.* v. *Taylor,* 185 Ark. 869, 50 S. W. (2d) 241.

The act creating the Western Clay Drainage District authorizes the directors of the district to contract for the construction of the improvements provided for in the act, and authorizes the district to borrow money, and issue its interest-bearing certificates of indebtedness for any of its current obligations, and also authorizes the district to issue bonds in order to make present payment of all expenses authorized by this act. Section 12, act 368, of the Acts of 1907.

Bonds could not have been sold by the district for any other purpose, and it was therefore known by the district at the time it sold the bonds, and also by the purchasers of the bonds, that the money received from the sale of the bonds was to be used for the payment of the expenses authorized by the act. It could not be lawfully used for any other purpose.

The act also provides for the assessment of benefits annually for the purpose of paying the bonds, and the act pledges to the payment of any bonds issued all unpaid installments of the assessments.

In other words, the act authorizes the sale of bonds for the special purpose of paying for the improvements authorized, and pledges the assessments for the purpose of paying the bonds. The act does not pledge any other property of the district to the payment of the bonds.

The money received from the sale of bonds is a special fund for the purpose of paying for the improvements authorized to be made, and the purchasers of the bonds had no lien or claim on this fund. On the contrary, the purchasers knew that this fund was to be used to pay for the improvements, and their debt was secured by a mortgage on the assessments.

Bonds and contracts authorized by statute and executed as required by the statute, are to be construed, as respects the rights of all parties to such contracts, as though the law requiring and regulating them were written in them.

The statute becomes a part of the bond and a part of the contract for the improvements the same as if written into the contract, and the statute provides, among other things: "The said corporation may issue bonds in order to make present payment of all expenses authorized by this act."

Therefore the money received from the sale of the bonds was to make payment for all expenses authorized by the act, and neither the purchasers of the bonds, nor any other person, had any right to this fund except in payment of the expenses incurred under the provisions of the act.

Appellees call attention to the case of *Kochtitsky* v. *Mercantile Trust Co.*, 16 Fed. (2S) 227. The statute construed by the court there, however, contained the following provision:

"To the payment of both the principal and interest of the bonds to be issued under the provisions of this act, the entire revenue of the district arising from any and all sources, and all the real estate, railroads and tramroads subject to taxation in the district, are by this act pledged; and the board of directors are hereby required to set aside annually, from the first revenues col-

lected from any source whatever, a sufficient amount to secure and pay the interest on said bonds, and a sinking fund." Crawford & Moses' Digest, § 3634.

The court, in commenting on this provision of the statute, said in substance that no discretion was left the officers of the district; that they were required to make the specific disposition annually of the funds. The court also said that this provision applied without exception or qualification to the payment of interest on such bonds. The court also said, to make such assurance more complete, that requirement attaches to revenues collected from any source whatever.

There is no such provision in the statute creating the Western Clay Drainage District, nor is there any such provision in the amendment of 1909.

The law construed by the federal court in the case above mentioned of course became a part of the contract. Our attention has not been called to any case that would authorize a district to take a fund specially provided by the sale of bonds to pay for the improvement and apply it to the payment of bonds. It would be manifestly unjust and inequitable to procure a fund for the payment of the improvement and permit the purchasers of the bonds, who held a mortgage on all the assessments, to take the fund provided for paying the expenses and then take all the assessments on which they had a lien and prevent the contractors from being paid at all.

Taking a sufficient amount of the assessments to replace the money wrongfully taken from the construction fund and paid to the purchasers of the bonds will not prevent the bondholders from getting their money. It will simply be taking from the assessments the amount of money paid to them that should have been paid to the contractors, and will not deprive them of anything to which they were entitled under the law. They still have a lien on all the assessments, and there is ample provision in the law to compel the collection of the assessments.

Taking this fund out of the assessments collected will simply be returning to the construction fund the

amount wrongfully taken from it, and will in no way reduce the amount that the bondholders are entitled to under the law.

Numerous authorities are referred to by the parties, but we think the statute itself is plain and unambiguous.

Appellees prosecute a cross-appeal to reverse the decree of the chancellor giving credit to appellants for the amount of taxes due on Oliver's land. What we have already said disposes of this question.

It follows also that the holders of bonds cannot defeat appellant's claim by paying the taxes in past-due bonds.

The only real question in the case is whether the cross-complaint states facts sufficient to constitute a cause of action, and we hold that it does.

The decree of the chancellor is therefore affirmed on cross-appeal and reversed on appeal and remanded, with directions to overrule the demurrer.

JOHNSON, C. J., and SMITH and MCHANEY, JJ., dissent.

EDWARDS *v.* EDWARDS.

4-3028

Opinion delivered June 5, 1933.

Martin, Wootton & Martin, for appellant.

Leo P. McLaughlin and *William G. Bouic,* for appellee.

McHaney, J. This is an appeal from an order of the Garland Chancery Court refusing to set aside and vacate a divorce decree in appellee's favor, on the motion of appellant, charging fraud practiced upon the court in procuring said decree by him. Appellee established a residence in Garland County, Arkansas, more than 60 days prior to the 18th day of January, 1932, on which date he filed in said court an action for divorce, in which he alleged that appellant abandoned and deserted him on the 14th day of April, 1926, and had continued to abandon and desert him without any reason whatever since that date. He further alleged that appellant was guilty of such personal indignities toward him as to render his condition intolerable. Appellant being a nonresident, warning order was issued and published for the time required by law. An attorney *ad litem* was appointed, who made a report, stating that he mailed a notice by registered letter to her notifying her of the pendency of the action at her last known place of residence, at Huntington, West Virginia, and that said letter was returned to him by the postal authorities marked "unclaimed," and that he appeared as such attorney at the taking of depositions on behalf of appellee and cross-examined the witnesses. He attached to his report the envelope in which the letter was sent bearing the stamp of the post office authorities "unclaimed," as also a copy of the letter addressed to "Mrs. Ida May Edwards." The letter reads as follows: "Your husband, C. F. Edwards, has instituted suit against you for divorce in the chancery court of Garland County, Arkansas, and I have been appointed attorney *ad litem* therein. You are hereby notified that said suit has been filed and is now pending." It was signed by Geo. P. Whittington. A divorce decree was granted appellee on the 23d day of February, 1932, on testimony amply sufficient to warrant the court in granting the decree. Appellee married again in March following, and on April 30, 1932, appellant filed her petition and motion in Garland Chancery Court to vacate and set aside the decree of divorce granted, appellee alleging that fraud had been practiced

by him in the procurement thereof as follows: That she had no knowledge or information regarding the institution, pendency or adjudication of this cause prior to the decree of divorce; that appellee knew that she was in attendance on their daughter in Rye, N. Y., who had been seriously injured in an automobile accident; that she had written him regarding the condition of their daughter; that he had written to said daughter indicating that he knew her whereabouts and where any communication addressed to her would reach her; that the letter addressed to her in the name of "Ida May Edwards" by the attorney *ad litem* was not the name under which she was well and familiarly known in Huntington, W. Va., but was so known under the name of "Mae McCormick Edwards" and was never known by any other name since their marriage; that for several years she has been living at 1680 3d Ave., Huntington, W. Va., which fact was also well known to appellee; that if said communication by the attorney *ad litem* had been addressed to said number or to her in care of their daughter, she would have received it; that he failed and refused to give either of said addresses for the purpose of practicing a fraud upon the court and upon her; and that appellee and his witnesses were guilty of perjury in testifying that she deserted him without cause, whereas they well knew that appellee had been living in adultery with one Esther Watson for several years and knew that this fact was the cause of their separation. Other allegations are made in the petition, but we do not deem it necessary to set them out, including the allegation that she has a good and meritorious defense to the complaint of the plaintiff which she set up in detail in an answer which she sought by leave of the court to file if her petition were granted. Appellee filed an answer or response to the motion to set aside the decree in which he denied all the allegations thereof. He denied that her name is "Mae McCormick Edwards" and not "Ida May Edwards," or that he knew that she was at the bedside of their daughter during the pendency of this suit. He admitted that he knew that she was in New York, but did not know the

duration of her visit there or that at all times he knew her whereabouts. He alleged that he had every reason to believe that she would receive any letter addressed to her at Huntington, W. Va., under the name of "Ida May Edwards," same being her last known place of residence. He further alleged that she was christened under the name of "Ida May," and that he married her under that name.

After hearing the testimony of both parties, the court refused to set aside the decree and dismissed appellant's motion. This appeal is from that order.

The parties to this lawsuit are not strangers to the divorce courts of the State of West Virginia. It appears from a reading of the case of *Edwards* v. *Edwards,* 145 S. E. (W. Va.) 813, that they were married the first time in 1903, were subsequently divorced, and were remarried in 1908. Their domestic difficulties resulted in a separation in April, 1926, when the appellant here sued the appellee for divorce and alimony on a charge of cruelty, desertion and adultery. He filed an answer and cross-complaint seeking a divorce from her on the ground of desertion and adultery. Trial in the lower court resulted in a decree in her favor for a divorce and substantial alimony. An appeal to the Supreme Court of Appeals of West Virginia resulted in a reversal of the judgment granting her a divorce and alimony on the ground that the proof showed her to be guilty of adultery also, and that the courts would leave them where they found them. Other and more recent litigation related to the allowance made in appellant's favor by the trial court in West Virginia for separate maintenance and on his cross-complaint for divorce. Relief was denied him on his cross-complaint, from which no appeal was prosecuted. She appealed from the inadequacy of the allowance made her, which was raised by the Supreme Court of Appeals, reported in 167 S. E. (W. Va.) 97.

The testimony presented on the motion in this case is in hopeless conflict. Appellant testified to facts and circumstances which, if believed by the trial court, were sufficient to justify it in setting aside the decree. As to

her name, the undisputed facts show that her real name is "Ida May." She was married to appellee in that name. She did not like the name "Ida" nor the spelling of "May," so, when she moved to town, she apparently dropped the name of "Ida" and assumed that of "Mae McCormick Edwards," McCormick being her maiden name, under which name she was known to many of her friends. The litigation she had with appellee was under the latter name. Other undisputed facts are that, in October, 1931, she went to the bedside of her daughter in Rye, N. Y., to the knowledge of appellee, and that she was there to his knowledge as late as the Christmas holidays. He knew, however, that her visit there was temporary in character and that her permanent address was Huntington, W. Va. A disputed fact is that he knew her street address in said city. For six years the parties had not lived together, and the whole record shows them to be very unfriendly. He testified positively that he did not know her street address in Huntington, W. Va., or that she was in Rye, N. Y., at the time suit was filed; that he furnished the attorney *ad litem* all the information he had regarding her address; that he knew that she had lived at a certain hotel in Huntington, but knew that she had left that hotel some years ago; that he had never communicated with her at the address mentioned and that he had sought on all occasions to avoid contact with her because of the enmity existing between them.

We think appellee properly sued appellant in her real name, caused the warning order to be published in her real name, and caused the attorney *ad litem* to communicate with her under her real name. The matter that has given us most concern is whether he furnished to the attorney *ad litem* a sufficient address. Huntington, W. Va., was her permanent residence. If in fact he did not know her street address, he gave the attorney *ad litem* her last known address. The trial court has found on disputed evidence that no fraud was practiced on the court in the procurement of this decree, and we are unable to say that his finding is against the clear preponderance of the evidence. Another matter that ap-

pears to be undisputed and is not without weight in determining this matter is that appellant knew, immediately after the divorce was granted, that it had been granted. She took no step at that time to have the decree set aside, but waited for more than 60 days, until after appellee had married again, before taking any action in the premises. She gave no explanation as to why she thus delayed.

Assuming, for the sake of argument, that false testimony was introduced in the procurement of the decree, that would not be sufficient to warrant the court in setting aside the decree. Failure to notify the attorney *ad litem* of her address, if it were known to him, would amount to fraud sufficient to warrant the court in setting aside the decree. *Stewart* v. *Stewart,* 101 Ark. 86, 141 S. W. 193.

Having reached the conclusion that the action of the court in refusing to set aside the decree is not against the clear preponderance of the evidence, the decree must be affirmed. It is so ordered.

SMITH, MEHAFFY and BUTLER, JJ., dissent.

PYLES *v.* HOLLAND.

4-3029

Opinion delivered June 5, 1933.

Hughes & Davis, for appellant.

C. M. Buck, for appellee.

BUTLER, J. On July 3, 1931, the appellees filed their petition in the chancery court for the Chickasawba District of Mississippi County, Arkansas, alleging that the appellants were indebted to them for an attorney's fee which had been earned and refused to be paid. Judgment was prayed for the amount of the fee, that the same be declared a lien on certain lots in the city of Blytheville, and that, if the judgment was not paid within a time to be fixed by the court, the property be sold to satisfy the judgment. Summons was duly issued on this petition and served upon the appellants upon said July 3d.

On the 19th day of November following, the petition came on for hearing, but the defendants (appellants here) filed no answer or other pleading, and the cause was thereupon submitted on the petition, proof of service thereon, and oral testimony. The court found that the petitioners were entitled to the sum prayed and to a lien on the lots, and that, if the judgment was not paid within the time specified, the lots be sold to satisfy the same. The judgment remained unpaid, and the commissioner appointed by the court proceeded to sell the property on the notice, manner and terms prescribed by the court, and on the 26th day of September, 1932, reported said sale to the court for confirmation.

The appellants filed exceptions to the sale on the ground that the decree on which the sale was based is void because the petition and decree show on their face that the petitioners had no lien, in that there was no recovery of property in the cause. The appellants had also in July, 1932, preceding filed a bill to review the proceedings resulting in the decree, the allegation which is the basis of the relief prayed being practically the same as that contained in the motion.

To the bill of review the appellees filed a general demurrer, which was sustained by the court, and the bill and motion dismissed by the court for want of equity.

It appears that the motion and bill were treated as one proceeding, and on appeal it is the contention that error is apparent in that the petition of the appellees and the decree based thereon show on their face without

the aid of evidence that there was no recovery of the lots for the appellants, but only a successful defense interposed in the proceeding out of which the claim for attorney's fee grows, and that in that state of case a decree fixing a lien on the lots was improper and void.

The appellees present three reasons why the decree of the lower court should be affirmed: first, that the bill of review was not filed in apt time; second, that, before obtaining a review of the decree adjudging a lien for the attorney's fee, the appellants must have offered to do equity by paying, or securing the payment of, the attorney's fee adjudged to be due, and that this had not been done; and, third, that there is no error apparent upon the face of the record.

We deem it unnecessary to set out in detail the petition of the appellees and the decree based thereon which is sought to be set aside or discuss the second and third points, for the reason that, in our opinion, the bill of review was not filed in apt time. In *Jacks* v. *Adair,* 33 Ark. 173, this court held that bills of review were not abolished by the Code, and might still be invoked in a proper case. We have no statute limiting the time in which a bill of review may be filed. The bill under consideration is for error apparent, and the rule is that "a bill of review for error apparent on the record must be brought within the time allowed for an appeal or writ of error except in case of plaintiff's disability." 3 Ency. Plead. & Prac., p. 583, § 6, note 1, and cases cited therein.

"In a bill of review brought for error of law, the rule is that the error must be apparent on the face of the record, that is, in this country, upon the bill, answer and other pleadings and proceedings and the decree. It is not allowable to look into the evidence to establish it; that can only be done by appeal. But errors on the record in matter only of form or abatement are not considered sufficient grounds for reversing a decree.

"A bill of review for error apparent may be brought without leave of court, but it will not lie after the time when a writ of error could be brought, or an appeal taken, or in some jurisdictions when a new trial could be

had if the decree were a verdict in an action at law. In a few States the codes set a definite time limit within which bills of review must be brought." Whitehouse, Equity Practice, vol. 1, p. 280, § 144.

"The period within which a bill of review may be brought to reverse a decree for error apparent on the face of the record is ordinarily limited to the time allowed by statute for the taking of an appeal, or the bringing of a writ of error. Very generally this limit is not fixed by statute, nor by any of the equity rules, but it has been adopted as proper on equitable principles, and is based on the analogy of the statute limiting the period of appellate relief." 10 R. C. L., p. 572, § 360.

The reason for the rule stated in the cases on this subject is that courts of equity, as originally constituted, had no legislative authority, and no time of bar could be fixed by positive rule of law; but these courts, acting on the maxim, "Equity follows the law," adopted as a bar to proceedings before them the period of limitation fixed in similar cases arising at law. This reason applies with peculiar emphasis in this State to bills of review because the Legislature has fixed the limit of time within which appeals may be taken in causes of equity, thus creating an analogy between the two remedies, as is said in *Thomas* v. *Brockenbrough,* 10 Wheat. 146, "so apparent that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former." In that case the court pointed out that, if the rule were otherwise, and if a bill of review to reverse a decree on the ground of error apparent on its face might be filed at a period of time beyond that limited for an appeal, it would follow that an original decree might in effect be brought before the Supreme Court for re-examination after the period prescribed by law for an immediate appeal from such decree by appealing from the decree of the court below upon the bill of review. In other words, the party complaining of the original decree would, in this way, be permitted to do indirectly what the statute has prohibited

him from doing directly. We have made diligent search and have been unable to find any decision holding contrary to the rule announced by the authorities *supra*.

An appeal or writ of error shall not be granted beyond six months after the rendition of the judgment order or decree sought to be reviewed, except as to persons under disability. Section 2140, Crawford & Moses' Digest. We therefore hold that, since the proceeding by which the decree sought to be reviewed was filed beyond six months from the date of the decree, the rule above announced applies, and the lower court properly sustained the demurrer and dismissed the complaint, although its decision was based on other grounds.

The decree is accordingly affirmed.

HIXON *v.* SCHOOL DISTRICT OF MARION.

4-3107

Opinion delivered June 5, 1933.

R. H. Berry, for appellant.

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

CHAS. T. COLEMAN, Special Chief Justice. Act No. 271 of the Acts of 1933 creates an old age pension com-

mission, composed of the Governor, the Auditor of State and the Treasurer of State, and appropriates $3,000,000 for old age pensions during the current biennium. To provide a fund for the payment of such pensions, the act requires the State Treasurer and the county treasurers to deduct one per cent. of the face value of all warrants paid by them, and deposit the amounts so deducted in the State treasury to the credit of the Old Age Pension Fund. The validity of the act, in so far as it levies a tax on warrants, is challenged on constitutional grounds.

Section 5 of article 16 of the Constitution provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

The tax imposed by the act is not levied on all property subject to taxation, but only on the particular species of property represented by State and county warrants. If therefore it is a tax on property, it obviously violates the uniformity requirement.

The tax is plainly not a privilege tax. The right to collect debts, whether from municipalities or from individuals, is not a privilege in the legal acceptation of the term. Moreover, the power to tax privileges implies the power to destroy them, and, since the Constitution prescribes no limit on privilege taxes, the tax levied by this act, if it were a tax of that character, could be increased to any per cent. of the face value of the warrant without encountering constitutional restriction.

A tax on warrants has none of the characteristics of an excise tax. There is no exact definition of excises, but ordinarily they are duties laid on the manufacture, sale or consumption of commodities, or upon certain callings or occupations, and are generally referable to the police power of the State. *Pollock* v. *Trust Company*, 157 U. S. 429, 15 S. Ct. 673.

In substance and in legal effect, the tax is a tax on property.

No definition of property can be framed which does not include the right of ownership. Property therefore, in its broad and legal sense, is not only the physical thing which may be the subject of ownership, but is the ownership itself. The essential attributes of ownership are the rights of dominion, possession, enjoyment and disposition (1 Blackstone, Com. 138; *Buchanan* v. *Warley,* 245 U. S. 60, 38 S. Ct. 16; *Braceville* v. *People,* 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206); and these rights are included within the protective provisions of the Constitution to the same extent as the physical things to which they pertain. *Terrace* v. *Thompson,* 263 U. S. 197, 44 S. Ct. 15. A tax on one of these essential attributes is therefore a tax on ownership, and a tax on ownership is a tax on property. *Thompson* v. *Kreutzer,* 112 Miss. 165, 72 So. 891.

A warrant represents a certain value in money. Ownership of the warrant involves the right to receive and possess the money. This right is an attribute of ownership, and therefore of property; and a tax on its exercise or enjoyment is a tax on property.

When a State or county warrant is paid in money, the money itself is subject to the ordinary taxes applicable to all other property. If the right to convert the warrant into money is taxed, and the money itself is also taxed, the ownership of the warrant is subjected to an unequal burden, and uniformity of taxation is destroyed. *Barnes* v. *Jones,* 139 Miss. 675, 103 So. 773; *City of Brookfield* v. *Tooey,* 141 Mo. 619, 43 S. W. 387; *Malin* v. *County,* 27 N. D. 140, 145 N. W. 582; *Fatjo* v. *Pfister,* 117 Cal. 83, 48 Pac. 1012; *Cook County* v. *Fairbank,* 222 Ill. 578, 78 N. E. 895; *Spokane Company* v. *County,* 70 Wash. 48, 126 Pac. 54; *Reser* v. *County,* 48 Ore. 326, 86 Pac. 595.

The tax sought to be imposed by the act contravenes § 5 of article 16 of the Constitution, and is void. Judgment affirmed.

Basil Baker, S. Brundidge, C. M. Buck, S. M. Casey, O. A. Graves and J. D. Head, Special Justices, concur.

MISSOURI PACIFIC RAILROAD COMPANY *v.* ENGLISH

4-3033

Opinion delivered June 12, 1933.

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

Partain & Agee, for appellee.

JOHNSON, C. J., (after stating the facts). The principal cause of complaint is that the court erred in refusing to direct a verdict in behalf of appellant. This is based upon the theory that Lydia English was a trespasser or at most a licensee, and the case of *Barnett* v. *St. L. & S. F. Ry. Co.,* 140 Okla. 19, 282 P. 120, is relied upon to sustain this theory.

The facts in the Barnett case were that plaintiff was walking along a pathway near the track of the defendant which had been used by the public for a long number of years with the knowledge and acquiescence of the railroad company, and that while he was on this pathway the defendant wrongfully backed one of its trains against the plaintiff and thereby injured him. On the trial of the case, plaintiff abandoned this theory and introduced testimony only to the effect that he was a deputy United States marshal and rightfully upon the premises. This testimony was objected to at the time of its introduction, and the trial court sustained a demurrer to this evidence, which was affirmed by the Supreme Court of Oklahoma. It will thus be seen that the Barnett case, cited *supra,* is no authority for the position here assumed by appellant under the laws of Oklahoma.

It is next insisted on behalf of appellant that this case is ruled by *Texas O. & E. R. Co.* v. *McCarroll,* 80 Okla. 282, 195 Pac. 139. The facts in this case were that appellant was riding on the pilot step of an engine by invitation of the watchman. The undisputed testimony showed that the watchman had no authority to invite appellant to ride upon the pilot step. The Supreme Court of Oklahoma held that appellant was neither a licensee or invitee but a trespasser, and therefore plaintiff could not recover. Certainly it cannot be seriously contended that this case is authority for the position here assumed by appellant.

It is next insisted that this case is ruled by *A. T. & S. T. Ry. Co.* v. *Cogswell,* 23 Okla. 184, 99 Pac. 923, 20 L. R. A. (N. S.) 837. The facts in this case were that plaintiff went to the depot of the defendant to meet a passenger and while upon the platform he stepped through a hole in the platform and was injured. Plaintiff had no business with the company, but went there merely to meet a passenger on private business. In this case the company contended that plaintiff was a mere licensee, but the Supreme Court of Oklahoma held that under these facts the jury was warranted in finding that there was an implied invitation on the part of the rail-

road company and that the jury was warranted in finding in favor of the plaintiff.

No Oklahoma case has been cited on this appeal which should control, as a matter of law, the finding of the jury in this case.

The doctrine applicable to the facts of this case is stated concisely in the case of *Bennett* v. *L. & N. Ry. Co.*, 102 U. S. 577, 26 Law Ed. 235, wherein the court held: "That the owner or occupant of land who by invitation, expressed or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons, they using due care, for injury occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist without timely notice to the public or to those who were likely to act upon such invitation."

Again, in 20 R. C. L., par. 57, page 64, the rule is stated as follows: "While an invitation to go upon premises will not be implied, ordinarily, from the fact that the owner or occupant has acquiesced in or tolerated trespasses thereon, many decisions have recognized an exception in case of a way across lands or structures thereon. If the owner or occupant has permitted persons generally to use or establish a way under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon premises by invitation."

In the recent case of *Louisville & N. Ry. Co.* v. *Snow*, 235 Ky. 211, 30 S. W. (2d) 85, the Kentucky Court held: "The decedent was not an invitee in the technical sense that one going upon the premises of another to their mutual advantage is an invitee, but the facts of this case bring it within the class of cases in which the doctrine has been recognized and applied that, when the owner, by his conduct, has induced a party to use a private way in the belief that it is open for the use of the public, the duty is imposed upon him of maintaining the way in a reasonably safe condition. Where one by his conduct has in-

duced the public to use a way in the belief that it is a street or public way, which all have a right to use, and where they suppose they will be safe, the liability should be co-extensive with the inducement or implied invitation."

The doctrine, as announced in the case cited *supra,* has been applied by this court in the case of *St. L. I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561, 92 S. W. 789, wherein the court held: "The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But, if he expressly or impliedly invites, induces, or leads them to come upon his premises, he is liable in damages to them (they using due care) for injuries occasioned by the unsafe condition of the premises, if such condition was the result of his failure to use ordinary care to prevent it, and he failed to give timely notice thereof to them or the public. This principle is applicable to the case before us. If the appellant constructed the steps and expressly or impliedly invited, induced or let persons to cross the same, it is liable in damages to them for injuries occasioned by the unsafe condition thereof, if it was the result of the failure to use ordinary care to keep the same in safe condition. If it was unwilling to incur this liability, it could have avoided it by removing the steps or giving timely notice of the condition to such persons or the public."

The rule as announced in the Dooley case cited, *supra,* is supported by the great weight of American authority. No Oklahoma case has been cited announcing any different rule. The jury in the instant case was fully warranted in finding that the maintenance of the foot bridge by the appellant for a long number of years and its constant and perpetual use by the public, as a way, with full knowledge and tacit acquiescence of appellant, was an implied invitation for its continued use, and that appellant was required to use ordinary care in keeping and maintaining same for such purpose. Therefore, we conclude that the case was properly submitted to the jury

for its consideration, and its findings that Lydia English was an invitee is supported by the evidence.

The jury returned a verdict in favor of Lee English, the father of Lydia English, for $200; it also returned a verdict in favor of appellee, Lydia English, for $3,000. It is insisted on this appeal that these awards are excessive. We cannot agree. The testimony shows that Lee English expended for doctor's bill, medicine, etc., almost $100; therefore, unquestionably, a verdict for $200 in his behalf would not be excessive. The testimony in behalf of appellee, Lydia English, was to the effect that her injury was serious and probably permanent. We cannot say, as a matter of law, that $3,000 was an excessive award.

Let the judgments be affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* CURLIN.

4-3119

Opinion delivered June 12, 1933.

S. V. Neely, for appellant.

A. B. Shafer and *R. V. Wheeler,* for appellee.

JOHNSON, C. J., (after stating the facts). The sole question presented on this appeal for determination is, will mandamus lie to compel a collector to accept school district warrants in payment of past-due district school tax due to the district issuing the warrants? Appellant insists that it will, and appellees deny the right.

Section 10,045 of Crawford & Moses' Digest reads as follows: "The collector shall receive county warrants in payment of county taxes, the orders or warrants that may be payable on presentation of any town, city or school district for their respective taxes, and the state treasurer's certificate of indebtedness, of date not prior to July 23, 1868, for State taxes, levied to defray the general expenses of the State. Provided, this section shall not be so construed as to compel the acceptance of any order or warrant that by the laws of this State was required to be funded."

Appellant insists that this section affords the authority. Appellees insist that § 10,045 of Crawford & Moses' Digest was impliedly repealed by amendment No. 11 to the Constitution of 1874 adopted in 1927, wherein it was provided:

"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."

This court in construing Amendment No. 11, in the case of *Horne* v. *Paragould Special School Dist. No. 1,* 186 Ark. 1000, 57 S. W. (2d) 568, held:

"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."

Since, under the amendment, the voters of a school district may or may not vote a tax; since the voters of such district may appropriate any part of the levy which they may desire to either of three purposes set forth in the amendment, and since the Legislature and the courts have no power or control over such appropriations so made by the voters, it necessarily follows that § 10,045 of Crawford & Moses' Digest was impliedly repealed by the amendment. This, because, if appellant can coerce the collector to accept the warrants in payment of past-due taxes, it would nullify and destroy the constitutional mandate giving to the voters the right to make appropriation of the tax levy.

It is insisted in this case that no appropriation of the tax levy was made by the voters, therefore mandamus in the instant case would not nullify or destroy the right of the voters to appropriate. This argument is beside the question. If in any event the statute conflicts with the constitutional mandate, the Constitution must prevail. This is perfectly evident because, had the voters made the appropriations as they had the right to do, and should mandamus issue to give effectiveness to § 10,045, Crawford & Moses' Digest, it would destroy and nullify the constitutional mandate.

Judgment affirmed.

SMITH and MCHANEY, JJ., dissent.

PERIMAN *v.* ROGERS.

4-3015

Opinion delivered June 12, 1933.

Robert Bailey, for appellant.

Ward & Caudle and *R. F. Smith,* for appellee.

SMITH, J. J. G. Butler & Sons executed to J. G. Rogers a written lease of a filling station in the city of Russellville for the term of five years, for a rental of $6,000, to be paid in monthly installments of $100 each. The date of the contract is August 17, 1925.

There was executed on the same day in connection with this contract a guaranty which reads as follows:

"We, the undersigned, by these presents bind ourselves to pay any damages lessors may sustain during the first five year period of this lease resulting to lessors by reason of the failure of lessee to comply with its provisions in the payment of the rent stipulated therein. Witness our hands this the 17th day of August, 1925.

"J. A. Rankin,
"Jerome Wright,
"Hedge McClanahan."

Rogers became ill after occupying the premises for some months and went to a hospital. The leased property was taken possession of by one Ladd, who was in possession when the leased property was sold by the lessors to C. W. Hays and John H. Periman. The testimony is in conflict as to the authority under which Ladd took possession, whether as tenant of Butler & Sons or as tenant of Rogers. Ladd defaulted in the payment of rent, and Hays and Periman brought suit against Rogers and his guarantors to recover the arrears of rent. Rogers and Rankin filed no answer, and judgment for the want of an answer was taken against them. Answer was filed by McClanahan and the administratrix of Wright, who had died, the cause having been revived against Wright in the name of his administratrix. Upon the final submission of the cause against McClanahan and the administratrix of Wright's estate, judgment was rendered in their favor by the court sitting, by consent of parties, as a jury, and from that judgment is this appeal.

The guaranty here sued on is, in our opinion, special, and not general, and inured to the benefit of the lessors, and to no other person. Its obligation is "to pay

any damages lessors may sustain," and does not run to their heirs or assigns.

At § 52 of Stearns on Suretyship (3d ed.), page 64, it is said: "A guaranty is special when it is addressed to a particular person, firm or corporation, and, when so addressed, only the promisee named in the instrument acquires any rights under it." Numerous cases are cited in the note to the text quoted which support the author's statement of the law.

At § 16 of the chapter on Guaranty in 28 C. J., page 897, it is said: "A special guaranty is one which is addressed to a particular person who alone can take advantage of it, and to whom only the guarantor can be held responsible; it usually, but not necessarily, contemplates a trust or reposes a confidence in the person to whom it is addressed."

See also Brandt, Suretyship & Guaranty, vol. 1 (3d ed.), § 133, page 282; Childs, Suretyship & Guaranty, page 258; Pingrey on Suretyship & Guaranty, (2d ed.) § 340, page 350.

Our case of *Killian* v. *Ashley,* 24 Ark. 511, is cited as holding to the contrary, but we think this is not its effect. The writing there sued upon, referred to in the opinion as "a writing obligatory," was evidently a negotiable promissory note. The instrument was executed by W. B. Easley to the order of J. O. Ashley, and assigned by the latter to J. B. Keatts, who in turn assigned to Killian, the plaintiff. It was indorsed in blank before assignment by W. E. Ashley. Suit was brought against J. O. Ashley as indorser and W. E. Ashley as guarantor.

The opinion recites that "W. E. Ashley is declared against as guarantor; and, as the indorsement was made in blank, without date, it is not certain whether he should have been declared against as security or guarantor," and it was there also said that: "By indorsing the obligation in blank, he (W. E. Ashley) gave to the payee or assignee an implied power to write above it the most absolute terms of guaranty." What these terms of guaranty were do not appear, but the opinion does state

that: "If William E. Ashley had desired to limit or qualify the terms of his guaranty, he should have done so when he made the indorsement; but when he sent forth the instrument with his name upon it, he is held to have given his implied consent to be bound by such terms as the holder of the obligation might fix upon him, in his character as guarantor."

It was there contended that, although W. E. Ashley was liable as guarantor to the payee named, the contract of guaranty did not pass by the assignment of the writing obligatory to the plaintiff for lack of privity between those parties, and that consequently the plaintiff had no right of action against the indorsing guarantor. The court said that, while there were authorities to that effect, there were other and later decisions "which hold differently upon reason and authority, which accord with the rights of parties, holders of negotiable paper," and that: "It was evidently the intention of the Legislature to facilitate their circulation, as a species of exchange, by vesting in the assignee the same interest which the assignor had." In other words, one who indorsed a negotiable promissory note in blank was liable upon such indorsement to any one acquiring title to the paper. The facts here recited make plain the distinction between that and the instant case.

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

GENERAL TALKING PICTURES CORPORATION *v.* SHEA.

4-3031

Opinion delivered June 12, 1933.

Zeiger & Berliner, George D. Hester and *Coleman & Riddick,* for appellant.

J. G. Williamson, Lamar Williamson and *Adrian Williamson,* for appellee.

SMITH, J., On May 8, 1930, the General Talking Pictures Corporation, hereinafter referred to as the company, instituted a replevin suit against T. A. Shea, to recover the possession of a talking motion picture machine, which the latter had operated at McGehee, Arkansas, under a lease contract from the company. The company had leased the machine to Shea for a period of ten years, under a license contract dated February 4, 1929. The license fee for the ten years period was $5,680, payable as follows: $1,250 when the lease was signed; $750 when the machine was ready for shipment; $3,180 in twelve monthly payments of $265 each, beginning April 20, 1929, and $50 on the 1st day of January of each year during the term.

The lease was executed on a printed form, by filling in the blank spaces for the date, the name of the lessee, the place of installation of the talking picture machine which was the subject-matter of the contract, the approximate date of installation, and the amounts and time of payments.

Motion talking pictures had not come into general use when the lease above referred to was executed. Shea

had for some time been in the moving picture business before executing the lease, and had a place of business used for that purpose, but he was required by the lease contract to make numerous changes in his building to adapt it to the exhibition of talking moving pictures. The lease contract required Shea, at his own cost and expense, to make these changes and alterations, and these were made under the supervision of the company's representative.

The contract provided that "The company will service the equipment from time to time at the expense of the exhibitor," and, further, that: "The exhibitor shall not obtain any additional, renewal or spare or assembled parts for the equipment otherwise than through the company."

The lease contract was divided into paragraphs, which were numbered, and opposite each paragraph there was printed, in capital letters, the subject of the particular paragraph. Paragraph 11 was entitled: "PRIVATE SHOWING," and reads as follows: "No public showing of any sound-film on the EQUIPMENT shall be had until a private test shall have been made in the THEATRE to insure satisfactory adjustment and operation thereof and the EXHIBITOR agrees to telegraph the COMPANY immediately if the EQUIPMENT fails to operate satisfactorily at that time, in the absence of which notification satisfactory functioning shall be conclusively presumed."

Paragraph 15 was entitled: "LIABILITY FOR INJURY, ETC.," and reads as follows:

"The company shall not be liable for

"(A) Any breakdown, defect or change of condition in the THEATRE or EQUIPMENT, any interruption of service, any loss or damage to any persons or property in or about the THEATRE or elsewhere nor for any damages direct, special or consequential, for any reason whatsoever. The EXHIBITOR agrees to indemnify the COMPANY and save it harmless from any liability or injury to workmen or others resulting from negligence or otherwise or arising out of the installation or use of the EQUIPMENT.

"(B) Any loss, damage or delay caused by strikes, riots, fire, insurrection, war, elements, embargoes, failure of carriers, inability to obtain transportation facilities, acts of God, or of the public enemy, or any other cause beyond the COMPANY's control, whether or not similar to the foregoing."

The concluding sentence of the lease was that it should be construed in accordance with the laws of the State of New York.

The complaint in the replevin suit alleged that Shea had made default in his payments, and had thereby forfeited the right to retain possession of the machine. There was a prayer for the recovery of the machine, and for damages for its detention. Shea had, before the institution of the suit, abandoned the use of the machine, and did not resist the recovery of its possession, but he filed an anwer and cross-complaint, in which he prayed damages in a large sum against the company.

Upon the allegation that the company was a foreign corporation and had done business in this State without complying with the laws thereof authorizing it so to do, the trial court heard only the testimony offered by Shea upon the allegations of his cross-complaint, and there was a verdict and judgment in his favor for $12,500. Upon an appeal to this court, it was held that the lease contract was interstate commerce, and that the company had the right, although it had not been authorized to do business in this State, to maintain a suit to recover the machine and damages for its detention. Upon remanding the cause, it was said: "Appellee argues, however, that, if the court erred in dismissing the complaint of appellant, it was not prejudicial error. The contention of appellee that the only issues in the case were covered by the cross-complaint and the answers thereto is not sound. The issue tendered by appellant's complaint that appellee had breached the contract, and that by reason thereof it was entitled to the balance of the rentals and to $1,000 damages, was not included in the cross-complaint and answer thereto. Had appellant's contract been treated as valid, it might have proved that same

was breached by appellee, and recovered the balance of the rents and any damages on account of the breach, and have set off them against any damages appellee might have recovered." *General Talking Pictures Corporation* v. *Shea,* 185 Ark. 777, 49 S. W. (2d) 359.

Upon the remand of the case there was a trial anew in the court below, which resulted in a verdict and judgment for the identical amount of the first judgment which Shea had recovered. The testimony upon the issues raised in the answer and cross-complaint was substantially the same at both trials.

It was alleged by Shea in his pleadings that, while there was no express warranty in the lease contract of the fitness of the machine for the use for which it was intended, there was a warranty implied by law to that effect, and that there had been a breach thereof. There was an allegation also that there had been a breach of the company's obligation to "service the machine," that is, to make it operate, and that, for these reasons, Shea had sustained a large loss, the items of which will be later discussed.

The company sent its representative to install the machine after the building had been altered in accordance with the directions of its sound expert, and a preliminary or private test of the machine was had which the contract required. Shea testified that he was not present at that time, but that he was present when the first public exhibition of the pictures was given. After this exhibition Shea sent the following telegram to the company: "Open tonight to sell-out business. We find Phonofilm all that you represent it to be and more. Regards." In answer to this telegram, the company sent the following reply: "We thank you for your very encouraging wire of April 1 advising us that you opened to a sell-out business, and that the DeForest Phonofilm has met with your every expectation. Pass the good word along to your fellow exhibitors. If we can be of further service to you, please command us."

It is very earnestly insisted that, under the provisions of paragraph 11 of the lease contract, copied above, the

telegram furnished and is conclusive evidence of the satisfactory functioning of the machine, but that, if not so, the failure to immediately advise the company that the machine had not functioned and did not function satisfactorily raised a conclusive presumption that it did function satisfactorily.

Numerous cases are cited upon the question of the failure to send the telegram as required by paragraph 11 of the lease contract, our own case of *Carle* v. *Avery Power Machinery Co.,* 185 Ark. 799, 49 S. W. (2d) 599, being among the number. The effect of the Carle case, *supra,* and of the other cases cited, is that a warranty in a sale (and the rule would be the same in a lease), conditioned upon a test of the machine sold or leased, and giving notice of any defects within a time specified for that purpose, if the machine proved defective, is binding, and the purchaser or lessee of the machine who fails to give the notice of defects as required by the contract will not be entitled to resist the payment of the purchase money or rent on account of defects. The rule is not different in New York, according to the laws of which State the contract must be construed.

The telegram from Shea to the company set out above, read by itself or unexplained, would appear to be conclusive that the machine, upon test, had functioned satisfactorily. But the testimony, while conflicting, abundantly supports the finding that the machine did not then or at any later time function saisfactorily. The testimony on the part of Shea was to the effect that the sound was harsh and grating and not easily understood, and that there was a lack of co-ordination of sound and motion, the result being that the exhibition excited the derision of the spectators, and that the continued attempt to use the machine and make it function resulted in an almost total loss of patronage and destroyed the remunerative business which Shea had built up with his motion pictures.

Shea's explanation of the telegram was to this effect. The test was not satisfactory, even to Levy, who had charge of the installation of the machine for the com-

pany, but Levy represented that adjustments would make it so, and that he would remain until the adjustments had been made, and that he could and would make the adjustments. Levy explained, so Shea testified, that the telegram was desired by the company for advertising purposes, and that the representation as to the pictures would be made truthful in a short time. The representation as to the size of the audience was true when made. The testimony on the part of Shea was to the further effect that Levy endeavored for several days thereafter to make the machine function, as he had said he could and would do, but, failing to do so, Levy left without advising Shea that he was going.

Shea also testified that promptly after Levy abandoned the attempt to make the machine function he wrote the company at its New Orleans office, where the contract had been negotiated, asking the attention of Mr. Harrison, who had represented the company in making the contract, requesting that a service man be sent him to make the machine function, and that he wired and wrote the New York office to the same effect, and that he finally wrote a personal letter to an executive vice-president of the company, whom he had previously met, but nothing came of these notices and requests in the way of making the machine function.

There was a conflict in the testimony as to the time and manner in which notice was given to the company; but this issue of fact was submitted to the jury in the instructions on behalf of the company, one of which reads, in part, as follows: "If you find from the evidence therefore that the machine, when installed, privately tested and publicly shown, did not operate satisfactorily, and was unsuitable for the exhibition of talking pictures, and that the defendant did not immediately, that is, within a reasonable time, notify the company that the machine failed to operate satisfactorily, or that it was unsuitable for the exhibition of talking pictures, the court charges you, as a matter of law, that the defendant is not entitled to recover any damages on the ground of an alleged breach of an implied warranty of fitness."

The verdict of the jury, under the above and other instructions, is conclusive of this issue of fact.

One of the points most strongly urged for the reversal of the judgment of the court below is that the court erred in instructing the jury that there was an implied warranty of the fitness of the machine for the use intended. This question must, of course, like all others relating to the construction of the contract, be decided according to the laws of the State of New York, as the parties had agreed that it should be.

Upon the question of the existence of an implied warranty, numerous cases are cited to the effect that, in order to imply a warranty from the language of the contract, an intention to warrant must be found in the contract, and it is argued that, not only is such intention absent, but that the paragraphs 11 and 15, set out above, when read together, expressly exclude that intention, and that these provisions negative an implied warranty, because they leave no field in which it could operate.

From what has already been said, it will appear that the jury was warranted in finding that there was no conclusive presumption that the machine had functioned satisfactorily arising out of the failure of Shea to notify the company to the contrary; nor do we think it was the purpose of the first section of the first subdivision of paragragh 15, set out above, to accomplish that result. This entire paragraph must be read together to correctly interpret any portion of it.

The title of the paragraph, as has been said, is: "LIABILITY FOR INJURY, ETC." In the first sentence of the first subdivision of paragraph 15, after first contracting for an exemption to itself against any breakdown, defect or change of condition in the theatre or equipment, or through any interruption of service, there follows an exemption from liability "to any persons or property in or about the theatre or elsewhere" for any reason whatsoever. Further and more conclusive effect is attempted to be given to this exemption of liability in the sentence following, where the obligation is imposed upon

the exhibitor "to indemnify the company and save it harmless from any liability or injury to workmen or others resulting from negligence or otherwise or arising out of the installation or use of the equipment."

Subparagraph (B) of paragraph 15 deals with the liability of the company to the exhibitor, the other contracting party, and contains certain exemptions from liability to him, to which there would be no point and for which there could be no necessity, if the company had, in the previous subparagraph, exempted itself from liability "for any damages direct, special or consequential for any reason whatsoever."

We think a fairer and more reasonable construction of subparagraph (A) is that it relates only to the subjects mentioned and has no purpose to exempt from liability for a breach of warranty implied by law.

This appears to be an appropriate place to say that, under the laws of New York, as we understand them, there was an implied warranty of the suitability and fitness of the machine, unless the parties have contracted against a warranty, which, as we have said, they did not do.

The case of *Hoisting Engine Sales Co.* v. *Hart,* 237 N. Y. 30, 142 N. E. 342, is extensively annotated in 31 A. L. R. 536. A headnote in that case reads as follows: "A warranty of fitness is implied in leasing machinery for performance of specified work for which it was designed." In the opinion in that case by the Court of Appeals of New York, Justice CRANE, who delivered the opinion of the court, quoted with approval from Halsbury's Laws of England (vol. 1, § 1117) the following statement of the law: " 'The owner of a chattel which he lets out for hire is under an obligation to ascertain that the chattel so let out by him is reasonably fit and suitable for the purpose for which it is expressly let out, or for which, from its character, he must be aware it is intended to be used; his delivery of it to the hirer amounts to an implied warranty that the chattel is, in fact, as fit and suitable for that purpose as reasonable care and skill can make it'."

It must be remembered that the contract related to a machine about which Shea had no knowledge whatever, but for the use of which he was required to pay $2,000 before its installation was commenced, and that he was also required to incur expense preparatory to the installation of the machine, which, if it did not satisfactorily display talking moving pictures, was valueless. Under these circumstances we think it would not be a fair and reasonable construction of the contract to say that there was no implied warranty of the fitness and suitability of the machine for the purpose for which it had been leased, this being the only thing which gave it any value at all, when the contracting parties had not stipulated that there was no warranty, either express or implied.

We conclude therefore that the court did not err in telling the jury, as a matter of law, that there was an implied warranty of the suitability of the machine for its intended use.

It is insisted very earnestly that the judgment of the court below should be reversed because of error in an instruction on the measure of damages given to the jury at Shea's request and over the objection of the company. It has been said that the cross-complaint alleged, as a basis for recovering damages, that there had been both a breach of an implied warranty of the fitness of the machine and a breach of the obligation to service the machine by making it operate and perform the functions for which it was intended.

The instruction on the measure of damages, given at the request of Shea, apparently does not distinguish the damages resulting from one cause or the other, and many cases are cited to the effect that the same rule to measure the damages cannot be applied in both cases. As an abstract proposition, the company appears to be correct in this contention; but we think the error was not prejudicial, for reasons which we proceed to state.

According to the testimony on Shea's behalf, he did not rescind the contract, as he had the right to do, but he continued, for more than two months, in an en-

deavor to operate the machine. During all this time he was insisting that the company "service it" and make it operate. He bought from the company new parts and equipment, and paid two of the $265 notes. The number of admissions dwindled rapidly until finally there was no appreciable patronage. Shea testified that he repeatedly warned the company that he would refuse to pay additional notes and would discard the machine unless it was made to function, and finally Mr. Buch, a representative of the company, was sent to McGehee. But this representative was a collection agent, and not an engineer. Shea testified that he asked Buch if he could make the machine function, and Buch said he could do so, and Shea said to him, "There won't be any question about your money if you will put the equipment in condition to function." This conversation appears to have occurred over the telephone, Shea being in Louisiana and Buch in McGehee. Shea left Louisiana at 11 P. M. Saturday night, driving to McGehee, where he arrived early Sunday morning, but he found later that morning that, instead of fixing the equipment, Buch had wrecked it by removing the optical system, which action put the machine entirely out of commission. Later this suit was brought to recover the machine.

Numerous instructions submitted the question whether this action of Buch was authorized on the part of the company, this right being made dependent on the question whether Shea had failed to comply with his obligations under the contract.

One of these instructions reads as follows: "On the issue of whether or not the plaintiff breached the contract by a failure to furnish service requested by the defendant, the court charges you that, if you find from the evidence that prior to such request the defendant himself had breached the contract by a failure to pay any note at its maturity, without a prior and unwaived breach by plaintiff, and that such default existed at the date of the request for service, the plaintiff was not required to furnish service while such default continued,

and would not be liable to the defendant for damages on account of such failure to service the equipment."

The instructions on the measure of damages permitted a recovery, if warranted by the testimony, of the following items: (a) The consideration paid for leasing the machine; (b) money paid the company for spare parts and replacements; (c) expense for labor and material in the installation of the machine. From this last-named element of damages the jury was directed to exclude the items which were or could have been utilized in connection with the installation of another and different talking motion picture machine which Shea later installed; (d) expense incurred in a reasonable effort to make the machine function properly, together with (e) such additional amounts, if any, "as you may find from the preponderance of the evidence that the defendant lost in the operation of his motion picture business in the city of McGehee due to failure of such machine to function properly, while defendant was, in good faith, acting as a reasonable and prudent person, trying to use said machine for the purpose for which it had been leased"; and also (f) such net profits as the jury might find had been shown with reasonable certainty that Shea would have earned, "but did not earn because of plaintiff's breach of contract relative to installation, or breach of implied warranty of the reasonable fitness of said machine for the purpose for which it was intended." The net profits, if any, were limited "to the period from the time said machine was installed in defendant's theatre in McGehee to the time when you find from the evidence the defendant could and should, as a reasonable and prudent man, have discarded said machine," and have secured another "to perform the function for which said machine was leased."

Numerous instructions were given, which we do not set out, but, when read together, required the jury, before finding for Shea in any amount, to find that the company had first breached the contract by furnishing a defective machine, which it later refused and failed to put in working order, and the verdict of the jury reflects

that this finding was made. This being true, inasmuch as the machine had been repossessed by the company, we think there was no prejudicial error in failing to have the jury find, separately, the damages accruing under each cause of action; indeed, under the facts of this case the causes of action appear to coalesce.

There was testimony sufficient to support a recovery on the items of damage enumerated in the instruction on the measure of damages far in excess of the damages recovered. These items included the original and subsequent payments, expenditures for spare parts and replacements, for labor and material and other costs of installation, for expenses in attempting to make the machine function, and for loss of profits.

It is insisted that the instruction permitted Shea to recover profits earned, and also expenses incurred in earning the profits. But the instruction does not appear to be open to that objection. A recovery of only net profits was authorized. The items above mentioned are not operating expenses, but were necessary expenses incurred in the attempt to make the machine operate and which would not have been incurred had such a machine been furnished as the contract contemplated.

The case of *Beeman* v. *Banta,* 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779, was a suit for damages for breach of warranty to construct a refrigerator, and the Court of Appeals of New York there said that "Gains prevented, as well as losses sustained, are proper elements of damage" in suits of that character.

In our own case of *Harmon* v. *Frye,* 103 Ark. 584, 148 S. W. 269, in which a building and apparatus for operating a moving picture show were leased for the purpose of operating the picture show, the lessee was wrongfully evicted from the building and deprived of the picture machinery. It was there held that the lessee was entitled to recover as damages the amount of profits of which he had been deprived and which had been established by the proof.

We think no element of damage was submitted to the jury which was not warranted by the testimony, and,

upon a consideration of the entire record, we find no prejudicial error. The judgment must be affirmed, and it is so ordered.

MOON *v.* GILLIAM.

4-3024

Opinion delivered June 12, 1933.

F. M. Pickens and *J. N. Hout, Jr.*, for appellant.

Hawthorne, Hawthorne & Wheatley and *Erwin & Erwin*, for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Jackson County approving and allowing a claim of $3,725.88 against the estate of Joseph Leroy Moon, which had been presented to and allowed by the probate court of said county. The appellee herein was the mother and appellant the widow of the deceased.

In September, 1917, appellee executed a deed to deceased for certain real estate in Jackson County, in which she owned the dower and homestead right. The deceased owned the fee therein by inheritance from his father. The consideration recited in the deed was $1.

Appellee and other witnesses in her behalf testified that the real consideration for the deed was an oral agreement by the deceased to pay appellee $50 a month during her lifetime. The amount of the claim is based upon her expectancy according to the mortuary tables.

The testimony is conflicting as to what the real consideration was.

(1) The court found against appellant on this issue, and she is bound by the verdict unless the oral

testimony was inadmissible to establish the real consideration or contract. A deed cannot be defeated by evidence of this character, but oral evidence is admissible to show the entire contract or real consideration. *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *St. Louis & North Arkansas Ry. Co.* v. *Crandall,* 75 Ark. 89, 86 S. W. 855; *Carwell* v. *Dennis,* 101 Ark. 603, 143 S. W. 135.

(2) Appellant contends, however, that, if such a contract was made, it was within the statute of frauds and void. This contention is contrary to the rule announced by this court in the case of *Hampton* v. *Caldwell,* 95 Ark. 387, 129 S. W. 816, in the following language:

"The death of the obligor within a year might have brought the contract to an end; therefore it might have been fully performed in a year."

Likewise, the contract in the instant case might have been performed within a year and does not come within the statute of frauds.

(3) Appellant also contends that reversible error was committed in allowing appellee to testify to statements made by deceased to her concerning the contract made the basis of her claim against the estate, and in support of the contention cites § 4144 of Crawford & Moses' Digest. An examination of the record discloses that the court sustained the objection made by appellant and excluded statements made by deceased to her. There was ample evidence to sustain the verdict without these statements. The verdict is warranted under the law and the evidence.

No error appearing, the judgment is affirmed.

MORGAN *v.* JOHNSON COUNTY.

4-3008

Opinion delivered June 12, 1933.

Robert Bailey, for appellant.

KIRBY, J., (after stating the facts). It is not disputed that the county judge had told the advance agent of appellant upon his inquiry that the license for the exhibition would cost $50; that advertisement of the show had been extensively made throughout the adjacent territory before the show arrived; and that the county judge had then, on his own motion, told the agent the license fee would be $100 per day when it was too late to arrange for an exhibition at any other place. The appellant insists that the county court was without authority to fix the license or require the payment of it, and that it was an unwarranted exaction wrongfully imposed, which she was entitled to recover.

The statute, § 9833, Crawford & Moses' Digest, provides: "* * * Third. The county court of each county shall fix the amount of county tax for each and every

public exhibition given by any person or persons in any county in this State, any part of the proceeds of which is for his or personal profit, and such licenses may be fixed for each exhibition, or monthly, quarterly or annually, in the discretion of the county court. Provided, that this section shall not apply to theatres and opera houses in cities of the first and second class and incorporated towns where no liquor is sold by the management or on the premises. Provided further, that in cities of twenty thousand inhabitants and over the license for theatres and opera houses where no liquor is sold on the premises shall be one hundred dollars for county purposes. The exceptions in this act shall not be construed to apply to what is generally known as theatres comique or variety theatres."

The county court made the order fixing the license under authority of this statute, and appellant claims that there is no authority for his fixing the license, insisting that any authority granted under the statute had been abrogated by the later statute called "The Omnibus Bill," act 63 of 1929, § 4 of which required that shows and exhibitions of the same kind as that of appellant shall pay a license of $25 per day, etc., which act was later repealed by act 119 of 1929, no provision being made therein for the levy and collection of such tax.

The statute grants the county court authority to fix the amount and require the collection of licenses for such exhibitions and performances as were made by appellant, and such grant of power was not withdrawn by the Legislature in enacting a general statute covering the subject and fixing the amount of the license fee to be paid for exhibitions of the kind made by appellant, nor by the later repeal of such general statute, no such provision being made in either statute.

It is true that when a statute is repealed and the repealing statute is afterwards repealed, the first statute is not thereby revived unless by express words (§ 9757, Crawford & Moses' Digest), and that there are no such express words of revival in the last statute; but neither was there an express repeal of the first grant of authority

nor one necessarily implied, but only a fixing of the amount of the licenses by the Legislature which it could do without any withdrawal of authority already granted to the county court, the exercise of such authority by it being only limited to conform to the later statutes made so long as they were in force.

The county court had the authority to fix and require the license paid, and could do so without regard to the county judge's apparent bad faith in telling the appellant's agent on the street what the amount of the license fee would be and misleading him to his injury in putting him to the expense of the advertisement of the show and later disregarding his agreement and fixing the fee at a much greater amount. The court, of course, was in no wise estopped to fix the fee under the statute at any sum without regard to what the judge might have told the agent of appellant on the street would be done. The fact that other courts in other counties had fixed smaller or different fees for licenses required paid for exhibitions of such nature as that of appellant affords no ground of objection to the fee fixed by the Johnson County judge, it not being a regulatory charge for a particular service rendered as in some cases requiring inspection but a tax authorized to be levied in accordance with the statute.

No error was committed in denying the claim of appellant, and the judgment is accordingly affirmed.

WALKER *v.* MCMILLEN.

4-3109

Opinion delivered June 12, 1933.

House & Moses and *W. H. Holmes,* for appellant.

Geo. A. McConnell and *Shields M. Goodwin,* for appellee.

KIRBY, J. The question involved in this appeal is whether the circuit court at the suit of the Attorney General under the direction of the Commissioner of Insurance has the exclusive right or jurisdiction to appoint a receiver for an insolvent insurance company.

Appellant was appointed receiver for the Southern Surety Company of New York by the Pulaski Circuit Court on the 7th day of June, 1932, on the application of the Attorney General under the direction of the Commissioner of Insurance of the State, the corporation being insolvent.

Appellee had previously been appointed receiver for the company by the chancery court of Pulaski County on March 25, 1932, on the petition of a general creditor of the Southern Surety Company. The company was insolvent, and the question to be determined is which of the two receivers should be recognized for liquidating its assets.

Appellant, after being appointed receiver and proceeding with the duties, was enjoined by the Pulaski Chancery court from continuing to act as such, and he then filed a petition asking that the chancery court dis-

solve the injunction, to which appellee filed a reply and appellant demurred thereto. The chancery court overruled the demurrer, and this appeal was taken from such order.

In *Franklin* v. *Mann,* 185 Ark. 993, 50 S. W. (2d) 606, this court held that a proceeding to dissolve an insolvent insurance company should be brought in the circuit court by the Attorney General under direction of the Insurance Commissioner under the statute providing therefor, § 5951, subdivision 8, Crawford & Moses' Digest, holding such proceeding an exclusive remedy, and that no creditor or policyholder was authorized to bring suit anywhere in the State for the purpose of taking charge of an insolvent insurance company. It was further said there:

"It was manifestly the intention of the Legislature, in creating the office of Commissioner of Insurance and prescribing his duties, to protect all the policyholders and persons interested in an insurance company, and for this reason provided a State officer whose duty it is to supervise all insurance companies in this State, and to see that all laws are faithfully executed, to the end that every one interested in an insurance company may have protection.

"It was evidently thought that this would be a greater protection to the policyholders and interested persons than to permit any creditor or policyholder to bring suit anywhere in the State for the purpose of taking charge and management of an insolvent insurance company. * * *

"This is a special proceeding provided for by statute for the purpose, among other things, as we have said, of protecting the interests of policyholders and the property of the company."

It is insisted for appellee that under the statute, which was adopted from the State of New York, that it should not exclude the rights of a creditor to have a receiver appointed by the chancery court, which, having acquired jurisdiction by such proceedings, would have the right to continue to administer the affairs of the corporation for the purposes for which the suit was brought.

His chief insistence, however, is that the statute has no relation to anything but life and fire insurance companies, and does not affect the jurisdiction of the chancery court to appoint a receiver for winding up the affairs of an insolvent casualty and surety company organized under the laws of the State of New York, and duly authorized to do business in the State of Arkansas.

In adopting this statute, it was made general, its provisions applying to "any insurance company of this State, etc.," and has been construed to include all insurance companies authorized to do business in the State. *Franklin* v. *Mann, supra.*

Appellee insists, however, that the Southern Surety Company of New York was not an insurance company within the meaning of this statute, but sets up in his written petition for appointment as receiver upon which the chancery court acted that the Southern Surety Company of New York is a casualty and surety company organized and doing business under the laws of the State of New York and duly authorized to do business under the laws of the State of Arkansas, etc., and that it had filed a bond with the Insurance Commissioner and otherwise complied with the laws of this State with reference to casualty and surety companies. It was doing both a casualty insurance business and a surety bond business, and comes within the regulatory power of the State under the terms of the statute providing that "when any insurance company of the State is insolvent, etc."

It is argued that the statute applies only to life and health insurance companies, since such was the case in the State of New York, from which it was adopted and where it had received such construction in the courts of that State, but such construction had not been given to said act before its adoption here, and our statute is broader and more comprehensive than that of New York relating to any insurance company, as already said; and the fact that it was copied exactly from the New York statute, so far as providing for determination of the question of insolvency of the insurance company by the Supreme Court, or a judge of the Supreme Court, was

evidently inserted inadvertently and has no effect to confer jurisdiction on our Supreme Court for that purpose. Where a court exercising a general jurisdiction under the Constitution has been given special statutory jurisdiction in certain matters and the manner in which such jurisdiction is to be exercised is pointed out in the statute, the record of such court must show the jurisdictional facts, the statute in such cases must be strictly pursued, and the jurisdiction must be made to appear in the manner pointed out in the statute. *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699; Freeman on Judgments, § 119.

The chancellor erred in holding that the Pulaski Chancery Court had jurisdiction to appoint a receiver herein, and the cause will be reversed and remanded with directions to sustain the demurrer to the response of appellee, dissolve the injunction against appellant receiver and leave him to proceed with the winding up of the affairs of the insolvent insurance company without any interference from the receiver wrongfully appointed by the chancery court who should be directed to make immediate final settlement of the receivership and turn the assets over to the appellant receiver. It is so ordered.

JOHNSON, C. J., (dissenting). The majority opinion gives to the circuit court of Pulaski County exclusive jurisdiction to determine and wind up the affairs of insolvent life, fire, casualty and all other insurance companies doing business in this State. This is done without any authority of law cited in the opinion or that I have been able to find on my own investigation. The only semblance of authority cited is subdivision 8 of § 5951 of Crawford & Moses' Digest, which reads as follows:

"Whenever the Insurance Commissioner shall have reason to believe that any insurance company of this State is insolvent or fraudulently conducted, or that its assets are not sufficient for carrying on the business of the same, or during any noncompliance with the provisions of this chapter, he shall communicate the fact to the Attorney General, whose duty it shall then become to apply to the Supreme Court or the circuit court, or,

in vacation, to any of the judges thereof, for an order requiring said company to show cause why their business should not be closed; and the court or judge, as the case may be, shall thereupon hear the allegations and proofs of the respective parties, or appoint some suitable person as examiner to perform such duty and report upon the facts to said court or judge. If it appear to the satisfaction of said court or judge that such company is insolvent, or that the interests of the company so require, the said court or judge shall decree a dissolution of such corporation, and a distribution of its effects; but, in case it shall appear to said court or judge that said corporation is able to comply with the provisions of this act, and that it is not insolvent, a decree shall be entered annulling the act of the Insurance Commissioner in the premises and authorizing such company to resume business."

The majority opinion upholds the authority of the Pulaski Circuit Court to displace a receivership theretofore determined in the Pulaski County Chancery Court after insolvency adjudged. It will be noted that the subdivision of the statute heretofore quoted does not authorize the appointment of any receiver by the circuit court. The fact is, this subdivision of the statute only authorizes the circuit courts of Pulaski County or any judge thereof in vacation or any member of the Supreme Court in vacation, to make an investigation and determine whether or not the insurance company is in fact insolvent. When this adjudication is made, the jurisdiction of that tribunal ends, so far as the statute is concerned. Not only is the majority opinion in this case without statutory law to support it, but it is in direct violation of the ancient jurisdiction of courts of equity.

Just how the circuit court of Pulaski County, or any member of this court under like circumstances, would wind up and finally settle the affairs of an insolvent insurance company is not pointed out in this majority opinion. I do assert without fear of contradiction that whatever orders and judgments may be entered by the Pulaski Circuit Courts or the judges in vacation, referred to in the statute, will be without authority of law

and in strict violation of the jurisdiction of chancery courts.

The majority opinion cites *Franklin* v. *Mann,* 185 Ark. 993, 50 S. W. (2d) 606, in support of its present position. This case is like the one here decided. It has no authority to support it. The section of the statute cited to support the present opinion was cited in the Franklin case and no other authority was cited. It is not necessary to undertake to argue the merits or demerits of the case of *Franklin* v. *Mann,* because it has no statutory or common-law authority to support it and should be overruled. The proposition of the circuit courts of this State, or the judges of the Supreme Court, appointing receivers had never been heard of until the announcement in *Franklin* v. *Mann,* and just how the court reached the conclusion that any such authority was granted under subdivision 8 of § 5951 is beyond my power of comprehension.

Just how this circuit court receiver is expected to perform his duties is not divulged in the opinion. Receivers appointed by courts of equity in this State are subject to the rules, orders and directions of the courts of chancery.

Section 8600 of Crawford & Moses' Digest, provides in part: "Whenever it shall not be forbidden by law and shall be deemed fair and proper in any case in equity, the court, judge or chancellor shall appoint some prudent and discreet person as receiver, etc." This section of the statute grants an exclusive remedy in the appointment of receivers and the manner in which they may and shall operate.

Section 8601 of Crawford & Moses' Digest, provides in effect: "When it appears to the court, judge or chancellor, that such appointment should be made additional bonds may be required in behalf of the receiver."

Section 8603 of Crawford & Moses' Digest provides in effect that, after this statutory receiver shall have taken the oath of office and filed a bond, "he shall possess all the powers which a receiver in a court of chancery can possess, unless otherwise provided in this act."

Section 8604 of Crawford & Moses' Digest provides that he may institute and maintain suits subject to the orders of the court, judge or chancellor, etc.

Section 8606 of Crawford & Moses' Digest provides, in effect, subject to the further order or decree of the court, judge or chancellor, such receiver shall have full possession, custody and control of all property in his hands.

Section 8609 of Crawford & Moses' Digest provides in effect, that receivers may be removed any time by the court, judge or chancellor.

Section 8610 of Crawford & Moses' Digest provides, in effect, that receivers shall make reports of their proceedings every six months or oftener, if required by the court, judge or chancellor.

It will thus be seen that all the statutory law in this State in reference to receiverships vests the jurisdiction thereof exclusively in the courts of equity or the chancellor thereof in vacation. These positive statutory laws are nullified and destroyed by the receivership herein created. There is no rule of conscience, law or equity that will circumscribe the performance of his duties after he once gets possession of the property.

A serious mistake has now been made in judicial procedure in this State. This court has now read into a statute, wherein no such language is employed, that the circuit courts in this State may appoint receivers, but it has prescribed no rules for such receiver to be guided by after he shall have taken the oath of office. No limitation is prescribed on his authority. I take it, he can sell the property, with or without notice, which may come into his hands. He may account for the proceeds or he may not at his election. Certainly, he is not required to report to any court in reference to his actions. This circuit court receiver is not an officer of any court and is not required to pay allegiance to any forum.

It must be admitted by all that this circuit court receiver is a hybrid, so far as law and the rules of equity are concerned.

Since when, and until now, was it ever dreamed by the most idealistic judicial tribunal that the great Story would be desecrated on the altar of judicial legislation?

"The appointment of a receiver is a part of the jurisdiction of equity, etc." So says § 3, article "Receivers," 23 R. C. L., page 9, and up to the opinion of this court in *Franklin* v. *Mann* it was thought by the profession to state a universal rule of law in reference thereto—but, alas, there seems to be no end to this unwarranted desecration.

This court, in the early case of *Hempstead* v. *Watkins,* 6 Ark. 317, held that the Legislature of this State was without authority to limit or abridge the powers or authority of courts of chancery. This rule has been adhered to by this court without exception until the pronouncement in *Franklin* v. *Mann.*

It must be seen, therefore, that under our statutory laws, when construed according to their plain language, the circuit courts of this State have no semblance of authority to appoint receivers and wind up insolvent corporations. On the other hand, had the Legislature passed a statute, as held by this court in *Franklin* v. *Mann,* such statute would be absolutely null and void as limiting and abridging the ancient jurisdiction of chancery courts. Taking either horn of the dilemma, the majority opinion in this case is without authority to support it.

The statute cited as authority gives the same jurisdiction to a judge of the Supreme Court that it gives to the circuit courts. Can it be imagined a judge of this court having half a dozen receivers operating under his direction and control throughout the State? Would any lawyer in the State believe his eyes and ears were he to see a receiver operating under the direct jurisdiction of the Supreme Court?

A construction of this kind would absolutely nullify and abrogate the plain mandate of the Constitution, wherein it vests the Supreme Court of this State with appellate jurisdiction only. The fallacy of the argument and logic sufficiently appears without further elaboration.

I therefore respectfully dissent.

PETTY *v.* OZARK GROCER COMPANY.

4-3010

Opinion delivered June 12, 1933.

Williams & Williams, for appellant.

Karl Greenhaw, for appellee.

MEHAFFY, J. The Ozark Grocer Company, a corporation with its principal place of business in Fayetteville, Arkansas, and a branch house at Siloam Springs, Arkansas, between September 17th and October 9, 1931, sold to the appellant, R. M. Petty, merchandise, the total amount of which was $921.01.

On October 27, 1931, the appellant gave to Gene Trahin, a representative of the Ozark Grocer Company, two checks, payable to the Ozark Grocer Company, for the sum of $921.01. One check was drawn on the Producers' State Bank of Siloam Springs, for $308.99, and the other check was drawn on the Hutchings First National Bank of Siloam Springs for $612.02.

The check on the Producers' State Bank was paid, but the check drawn on the Hutchings First National Bank was not paid. It was given on October 27, and the Hutchings bank was insolvent and closed on October 30, 1931.

Thereafter, in May, 1932, the appellee began this suit in the Benton Circuit Court, alleging that the merchandise sold to appellant was $921.01, and that appellant had paid thereon $308.99, leaving a balance due of $612.02.

The appellant filed answer, admitting the purchase of merchandise, and the amount thereof, and alleging that Gene Trahin was the agent and manager of appellee, and that appellant expressly told him that it did not make any difference about the $308.99 on the Producers' State Bank, but that he wanted the check on the Hutchings First National Bank cashed immediately.

It was also alleged in the answer that the appellee did not cash the check as Trahin was instructed to do at once, but mailed the check to Fayetteville for deposit; that the appellee, being notified that appellant desired the check to be cashed at once, and under the circumstances surrounding the banks of Siloam Springs, the appellee was negligent in not cashing the check as instructed; that at the time the check was given the bank was open, and appellee was told to cash it at once, and agreed to do so, being notified by appellant that he desired said money be drawn from said bank.

It is then alleged that the bank closed on October 30th, and that, if appellee had used due diligence under appellant's instructions, it would not have suffered loss. He alleges that the appellee carelessly and negligently refused and failed to cash the check, and held the same until the failure of the bank, and that by reason thereof the appellee is not entitled to recover because the loss was occasioned solely by its negligence.

The appellant's evidence tended to show that he told Trahin, the representative of the appellee, he wanted him to get the check cashed immediately. This testimony was contradicted by the agent. The undisputed evidence

shows that Trahin had no authority to indorse the check. The undisputed evidence also shows that appellant's children had money deposited in the Hutchings National Bank, and that appellant had approximately $80 of his own money left, and he made no effort to withdraw any of this before the bank closed.

The only question in the case is whether the appellee was guilty of negligence in presenting the check to the Hutchings First National Bank for payment.

The appellant's first contention is that the evidence did not warrant the finding of the verdict. It was a question of fact as to whether the appellee was guilty of negligence, and this was submitted to the jury under proper instructions, and the jury found against appellant.

The next contention is that the court erred in refusing to instruct the jury in the three instructions offered by the appellant, and refused by the court. These instructions are as follows:

"No. 1. The court instructs the jury that a check must be presented for payment within a reasonable time, and what is a reasonable time will depend upon the circumstances in each case. In the absence of special circumstances excusing delay, the reasonable time for presenting a check, when the person receiving the same, and the bank on which it is drawn are in the same place is not later than the next business day after it is received, and when they are in different places, reasonable diligence requires the check to be forwarded to the place of payment not later than the next business day after it is received by the payee, and presented not later than the day after it is thus received. Inexcusable delay may discharge the drawer from liability if he is injured by the delay."

"No. 2. You are instructed that it was the duty of the plaintiff on the next day after receiving the check to forward the check for presentation to a suitable agent in the town where bank is located upon which the check was drawn, and if you find that the plaintiff failed to do so, and that, if plaintiff had done so, that said check would have been paid, and that, if plaintiff's failure to

do so, and the defendant was injured thereby, you will find for the defendant."

"No. 3. You are instructed that, if you find that Gene Trahin was the agent of the plaintiff, that knowledge of the agent is knowledge of the principal."

The first instruction, among other things, tells the jury that a reasonable time for presenting a check, when the person receiving the same and the bank on which it is drawn are in the same place, is not later than the next business day after it is received, and when they are in different places, reasonable diligence requires the check to be forwarded to the place of payment not later than the next business day after it is received by the payee.

Section 7952 of Crawford & Moses' Digest reads as follows: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Section 7763 of Crawford & Moses' Digest provides: "In determining what is a 'reasonable time' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case."

But these facts are to be determined by the jury, and not by the court. The appellant's defense is based wholly on negligence, and whether the appellee was negligent was a question of fact to be determined by the jury.

It would have been improper for the court to have told the jury that reasonable diligence required the check to be presented on the day after it was given. It was not a question of law for the court, but a question of fact for the jury.

There is another reason, however, why the instruction was properly refused in this case. The instruction says that when a person receiving the check and the bank are in the same town, it shall be presented for payment on the following day. The person receiving this check was not the payee, and had no authority to indorse the

check. The payee received the check at Fayetteville, and it was drawn on a bank in a different town. The one receiving the check in this instance properly sent it to the payee, and the payee sent the check immediately to the Federal Reserve Bank in St. Louis, which was the usual custom in handling checks drawn on banks outside of Fayetteville.

Instructions numbers 2 and 3 requested by appellant were properly refused for the reason that whether the appellee exercised diligence was a question of fact for the jury, and not a question of law for the court.

The court instructed the jury at length, and the instructions given by the court fairly submitted the only issue in the case to the jury, and the jury's finding is conclusive here.

The judgment is affirmed.

LEONARD *v.* LUXORA-LITTLE RIVER ROAD MAINTENANCE DISTRICT No. 1.

4-3118

Opinion delivered June 12, 1933.

Jesse Taylor and *W. Leon Smith,* for appellant.

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

MEHAFFY, J. This is an appeal from a decree of the Pulaski Chancery Court finding and holding that act 159

of the Acts of the General Assembly of the State of Arkansas for the year 1933 is a local law and therefore unconstitutional and void, and perpetually enjoining the State Treasurer from enforcing or attempting to enforce said law.

Section 1 of act 159 reads as follows: "That paragraph 'F' of § 1 of act No. 63 of the Acts of the General Assembly for the State of Arkansas for the year 1931 be amended to read as follows: 'F.' On January 1, April 1, July 1, and October 1 of each year, it shall be the duty of the State Treasurer to divide all revenue in the 'county highway funds' among all counties of the State; one-third on a population basis, based on the most recent Federal census; one-third on a car license revenue basis, based on the amount received from each county for the previous year from motor vehicle license fees; one-third based on area of the various counties of the State; provided, however, that in the counties having more than one judicial district and a population of not less than 65,000 as shown by the most recent United States census, the funds allowed to those counties shall be divided between the judicial districts on the basis of the mileage of the county maintained roads."

The act provides that in counties having more than one judicial district and a population of not less than 65,000 as shown by the most recent United States census, the funds allowed to those counties shall be divided between the judicial districts on the basis of the mileage of the county maintained roads.

There are 75 counties in the State of Arkansas, and only 12 counties that have more than one judicial district, and of these 12, only one, Mississippi County, has a population of 65,000, as shown by the most recent United States Census. This act therefore applies to Mississippi County only.

Amendment 14 to the Constitution of the State of Arkansas provides: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."

Act 159 of the Acts of 1933 is clearly violative of this amendment to the Constitution because it is a local act applying to Mississippi County alone. The fact that it applies to counties having more than one judicial district and a population of 65,000 or more is arbitrary, and a county having two judicial districts and 65,000 population has no reasonable relation to the purposes and object to be attained by the statute.

"The rule is that a classification cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation or circumstances of the municipalities placed in the different classes. There must be some reasonable relation between the situation of municipalities classified and the purposes and objects to be attained. There must be something which in some reasonable degree accounts for the division into classes." *Street Imp. Dists. Nos. 481 and 485* v. *Hadfield,* 184 Ark. 598, 43 S. W. (2d) 62; *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. (2d) 991.

In the present case, there is no reason given and none is apparent to us for the distinction in legislation of this kind between counties having two judicial districts and 65,000 population, and those counties that have only one judicial district and have more than 65,000 population.

There is nothing in the terms of the act to distinguish Mississippi County from other counties in the State that have either a greater or less population, and have one or more judicial districts. There is no reason in the nature of things why an act of this kind should apply to Mississippi County and not to other counties in the State. It is therefore an arbitrary and unnatural classification, and there is no natural connection between counties having more than one judicial district and 65,000 population, and the division of the county highway funds. The act therefore cannot be upheld on the ground of classification.

This court has repeatedly held, since the adoption of amendment No. 14 to the Constitution, that an act which exempts one county is a local act. It would serve

no purpose to review the authorities so holding. As we have already said, this act is clearly in violation of amendment No. 14, because it is a local act.

There is no change in the law except as it applies to Mississippi County. Section 1 of act 159 is a copy of paragraph "F" of § 1 of act No. 63 of the Acts of 1931, except the part that applies to Mississippi County.

The decree of the chancery court is therefore affirmed.

SUN LIFE ASSURANCE COMPANY OF CANADA *v.* COKER.

4-3016

Opinion delivered June 12, 1933.

Hays & Smallwood and *Pryor & Pryor,* for appellant.

R. M. Priddy and *Sam T. & Tom Poe,* for appellee.

McHaney, J. Appellee recovered a verdict and judgment against appellant in the sum of $1,864.36 with interest from January 4, 1933, at 6 per cent., 12 per cent. penalty and attorney's fee of $250, alleging a breach of a certificate of insurance issued to him and a group policy issued to his employer, Missouri Pacific Railroad Company, dated November 1, 1931, by which he was insured against total and permanent disability, in which event appellant agreed to pay him $36 per month for 60 months. The sum recovered was the then present value of the sum agreed to be paid monthly over said period.

A number of errors are assigned and argued for a reversal of the judgment as follows:

(1). That if appellee were disabled within the meaning of the policy, his disability accrued before and existed at the date of the policy, November 1, 1931, and that, therefore, he had no health or ability to be insured. In other words, that a fraud was practiced on appellant in obtaining insurance, since no physical examination was required. This argument is based on the fact that appellee suffered an amputation of his right leg between the ankle and knee in 1926, and that he has had considerable trouble with the stump thereof since that time, and on the testimony of his physicians that for a number of months prior to April 28, 1932, the date he finally quit work, and from which he claims total disability, he should not have done heavy work. On the other hand, the undisputed proof shows that appellee did actually work and was engaged in a gainful occupation for a long period of time prior to the issuance of the policy in this case and subsequent to the loss of his leg in 1926, as also since November 1, 1931. Under this state of facts, the

court submitted this question to the jury in instruction No. 8, requested by appellant, which told the jury that the burden was on him "to prove by a preponderance of the evidence that he became disabled under the terms of the insurance contract 'while such assurance was in full force and effect' and not before or after the term of insurance coverage," and if he failed to do so, the jury should find for appellant. The jury found that he had discharged this burden, and we cannot say there is no substantial evidence to support the finding. Generally, it is a question for the jury to determine whether the insured is disabled, the nature of the disability, when it commenced and its duration, whether total and permanent or otherwise. *Mutual Ben. H. & Acc. Ass'n* v. *Hunnicutt,* 181 Ark. 892, 28 S. W. (2d) 703; 29 C. J. 284.

(2). It is next argued that appellee failed to prove a breach of the contract of insurance, and that he cannot maintain this action for a breach thereof. This argument is based on the fact that suit was begun on September 30, 1932, a date less than six months from the date of alleged total disability, April 28, and that under the contract the first monthly payment of $36 was not due to be paid until the expiration of six months from date of total disability, or three months from date of satisfactory proofs, whichever is the later date. A sufficient answer to this argument is that appellant denied liability within that time, and we think did so within the rule announced in *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433. When demand was made on appellant to pay and perform the contract, it declined to do so, and in two letters to counsel for appellee stated that their records showed the coverage to be canceled on April 30, 1932, or had lapsed. This was tantamount to a denial of liability. Furthermore, it was shown that a representative of appellant called upon counsel for appellee and had a conversation with him in which he declined to pay. Moreover, it filed an answer in this case long after the expiration of the six months' period denying liability. All of which amounted to a renunciation of the policy. *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark.

98, 254 S. W. 335. And, as we said in *National Life & Acc. Ins. Co.* v. *Whitfield,* 186 Ark. 198, 53 S. W. (2d) 10: "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." So, when appellant denied liability because lapsed and refused to perform, a present right of action arose as for breach, and it was not necessary to await the expiration of the six or three months' period. This issue was also submitted to the jury, and its finding is against appellant.

(3). It is next contended that there is no proof that appellee's employer, the railroad company, had paid the premium to appellant on the group or master policy. It is not disputed that appellee's premium was paid to his employer who deducted it from his wages, and two premiums were paid by him after April. Without entering into a discussion of the question of whether the employer was the agent of appellant in this regard, we are of the opinion that this assignment is without merit; that failure of the employer to pay is a matter of defense, and no such defense was interposed or suggested. Appellee's certificate was in good standing on April 28, 1932, and appellant does not suggest that it lapsed or was canceled until two days later. Nor can we agree that the insurance contract was not established. The certificate itself stated the terms and conditions of the group policy in this regard, and the original policy was never in his possession, nor had he access to it.

The only other error assigned for reversal which we deem of sufficient importance to discuss is that of the allowance of penalty and attorney's fee. It is argued that this is not a suit on the contract, but for damages for breach, and that, therefore, the statute, § 6155, Crawford & Moses' Digest, does not apply. We have frequently held that the statute is highly penal and should be strictly construed. *National Fire Ins. Co.* v. *Knight,*

185 Ark. 386, 47 S. W. (2d) 576. We are of the opinion, however, that the statute applies, and that the court did not err in assessing penalty and attorney's fees. By its denial of liability appellant made it possible for appellee to sue for the present value of all the monthly payments agreed to be paid, instead of suing for the past-due installments. The measure of damages in either event is based on the contract. It is only the remedy that is changed by the breach. The appellee sustained a loss covered by the policy which appellant agreed to pay monthly. When it refused to perform the contract by making payment monthly, the law provides a remedy based on the contract to avoid a multiplicity of suits. In either event the statute applies; else the power would lie with the insurance companies in such cases to nullify the statute by refusing to pay and breaching the contract. As said by the late Chief Justice HART in *American Liberty Ins. Co.* v. *Washington,* 183 Ark. 497, 36 S. W. (2d) 963: "The statute becomes a part of the contract of insurance, and is cost to reimburse the plaintiff for expenses incurred in enforcing the contract."

Other assignments are argued which we have carefully considered, but find them without substantial merit. We think no useful purpose could be served by discussing them, and to do so would unduly extend this opinion. The complaints made of the giving and refusing to give instructions are covered in what we have already said.

Affirmed.

BLAYLOCK *v.* STATE.

Crim. 3838

Opinion delivered June 12, 1933.

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

BUTLER, J. The appellant was indicted, tried and convicted for selling alcoholic liquors. The testimony on behalf of the State was to the effect that about two and a half miles from a small town was a cedar thicket near the road in which it was the custom of those coming to town and having liquor, to hide it. On a certain day two officers went into the thicket and hearing voices approached to a place where two men were in conversation, who upon seeing the officers began to run but were halted and captured and found to have liquor in their possession. The appellant was not with them at this time.

The two men who were arrested testified that on the day of their arrest they saw the appellant in town and asked him if he knew where they could get any liquor, and he told them he thought he did. They got into appellant's car with him and started out toward the cedar thicket, and when they had gone about half way some car trouble developed. They got out and went on foot to the thicket leaving the appellant at the car. They began to look for whiskey and found some behind a rock. They did not know to whom this whiskey belonged but took possession of it or a part of it just before the officers appeared. They did not purchase the liquor from the appellant and did not tell the officers that they had.

The appellant testified that he had been told that people peddling liquor would hide it in the cedar thicket and when he was asked if he knew where any liquor was he started with the two men to the thicket, but that he had not placed any liquor there and did not in fact know that there was any at that place.

One of the officers was called in rebuttal by the State and, without any objection being interposed, testified to the effect that the two men who were arrested by the officers and who testified in the case told him that they had bought the liquor from the appellant.

The only evidence which tends to establish a sale of the liquor by the appellant was the rebuttal testimony of this officer and in this state of case the Attorney General has confessed error on the ground that no evidence of a substantive nature was introduced at the trial of the case tending to establish the guilt of the appellant. We have examined the record and are of the opinion that the position of the Attorney General is well taken. The rebuttal testimony was admissible for the purpose of testing the credibility of the witnesses by showing that they had made contrary statements, but was admissible for no other purpose. Although there was no request made by the defendant, the court should have so cautioned the jury, and in the state of the evidence should have directed a verdict of acquittal. The rebuttal testimony was a purely hearsay statement and was in no sense substantive proof of the fact charged. The cases cited by the Attorney General sustain his position. *Thomas* v. *State*, 72 Ark. 582, 82 S. W. 202; *Doran* v. *State*, 141 Ark. 442, 217 S. W. 485; *Murray* v. *State*, 151 Ark. 331, 236 S. W. 617; *Burgess* v. *State*, 179 Ark. 785, 18 S. W. (2d) 336.

Reversed and remanded.

HADEN *v.* HADEN.

4-3034

Opinion delivered June 12, 1933.

L. A. Hardin, for appellant.

Roberts & Stubblefield, for appellee.

BUTLER, J. Prior to July 2, 1928, the legal title to a small farm situated near Little Rock known as the Valley View Farm was in the appellant, Mrs. Nannie Haden, the mother of the appellee, H. M. Haden. On that day Mrs. Nannie Haden conveyed this farm to her son by warranty deed for the express consideration of $1, reserving however in the habendum clause for herself and assigns "the full possession, benefit and use of the above-described property as well as the rents, issues and profits thereof for and during my natural life."

This suit was instituted by the appellant to cancel the above deed and revest the fee in her. The allegation upon which her prayer for the relief named is grounded is that she was induced to execute the deed because of an agreement made by her son, the grantee, at that time to the effect that he would support her during the remainder of her life; that he had breached this agreement by failing to provide anything for her maintenance, and that he at the time still refused to pay her anything therefor; that he had taken possession of, and was then occupying, the farm and was refusing to pay to her any of the rents and profits arising therefrom. She further alleged that the appellee was not financially able to carry out his contract with her, and that "if he was ever able to do so his wife would not permit him to carry the same out."

The appellee answered denying some of the allegations of the complaint which we deem it unnecessary to set out and denied that the consideration for the execution of the deed was that the defendant should furnish a home and support and maintain the plaintiff during her natural life. but that the defendant, due to his love for the plaintiff, his mother, has in the past furnished, and does now, and will in the future, furnish a home for the plaintiff and maintain and support her.

By agreement of the parties the testimony in the case was taken orally at the bar of the court, and, after having considered the case on the pleadings and testimony adduced, the court found that a certain other deed

executed on July 2, 1928, was executed and recorded through error and mistake, but that the deed first mentioned ought not to be canceled, but that according to its tenor and effect the plaintiff was entitled to the possession and to the rents and profits arising therefrom for the year 1932 for which defendant was required to account. The court further found that as to the rents preceding the year 1932 the defendant had accounted to the plaintiff except for balance due on a rent note, which note was ordered delivered to the plaintiff or to her attorney, and possession of the premises decreed to her, and as to all other matters the complaint was dismissed for want of equity.

The appellant insists on appeal that a preponderance of the testimony establishes, first, the consideration for the execution of the deed as alleged in her complaint, and, second, that the same has failed because of the refusal of the defendant (appellee) to support and maintain her as he had agreed.

Another question arose incidentally during the progress of the trial which has been discussed somewhat by counsel for the respective litigants, namely, that as a part consideration there was a promise by the appellee made to the appellant, his mother, that he would not marry. It seems however, from a careful analysis of the testimony of Mrs. Haden, the mother, that this was not any part of the alleged consideration for the execution of the deed, and, while the chancellor did not make any finding of fact regarding what was indeed the consideration for the conveyance, the conclusion reached by him necessarily carries with it the finding that the question of appellee's marriage was not in the mind of either party at the time of the conveyance, or that it was a moving cause therefor. We therefore will discuss this phase of the case no further.

The real questions are, was the consideration as alleged by Mrs. Haden, and, if so, has it failed? As stated, the chancellor made no finding of fact, but his decree necessarily results from the findings that either the consideration was not as alleged or that the promise had

not been broken. We think the findings of the chancellor in the negative on both of these questions is not against the preponderance of the testimony.

As contended by appellant, under the settled rules in this jurisdiction, where land is conveyed upon the consideration that the grantee will support, maintain and care for the grantor during his life and the grantee neglects or refuses to comply with the contract, a court of equity will cancel the conveyance and reinvest the grantor with title to the estate. *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286; *Owen* v. *Owen,* 185 Ark. 1069, 51 S. W. (2d) 524. The facts do not warrant the application of this rule.

The facts established by the proof in the case are that the grantor in the conveyance was at the time of its execution, about seventy-four or five years of age. The grantee was her youngest son, and had never been married. He and his mother had lived together since 1918, in which year the husband and father died. Their association had been of the most intimate and affectionate nature. Appellee was admittedly a dutiful son and manifested for his aged mother great love and solicitude. She, on her part, adored her son. In the summer of 1928 they were both taken sick at about the same time and required the services of a professional nurse. During the convalescence of the mother the question came up as to the situation in which the son would have been left had the mother died, and she told her son to request a Mr. Britton who was in the employ of the Central Bank in its real estate department, and an old friend of hers, to come to see her. Mr. Britton did so, and they discussed the question of what provision she should make for the appellee. She told Britton of the kindness of her son, that what they had was the result of their joint efforts, and that she wanted him at her death to have all she had. She suggested the making of a will to that effect. After some discussion, it was decided between the two that, instead of making a will, she would convey the property to her son by deed. In furtherance of this, Mr. Britton on his return to the bank, drafted a warranty

deed conveying the Valley View Farm to the appellee for the express consideration of $1. In the meantime the appellee had been discussing the question with the trust officer at the bank informing him of his mother's intention, and caused Mr. Britton to draw the deed first mentioned in this opinion, the one in which there was a reservation to the mother of the possession and income derived from the farm during her life. Both of these deeds were taken or sent, by Mr. Britton to Mrs. Haden and read to her and explained and left in her possession for some two or three weeks, when Mr. Britton's secretary, who was a notary public, accompanied by Mr. Britton, visited Mrs. Haden, and she then signed and acknowledged both deeds and both were placed of record. This seems to have been done by some one connected with the bank, but it is clear that it was not the intention of the son for the mother to convey the present possession and revenue of the farm to him during her lifetime. During the year preceding the execution of the deed and until the latter part of 1929, the mother and son lived on the Valley View Farm, and she supposed that during 1929 he was still unmarried, but discovered sometime in November of that year that her son had married without her knowledge, and that he had been married for about nine months.

It is quite evident that this fact, when learned by the mother, grieved and angered her very much. It is not very clear when the son brought his wife home, but at any rate the mother determined to move to Kentucky where she had been born and reared, and where two of her sisters lived at a little town called Bandana. Just about this time the son wrote to one of his aunts at Bandana indicating to her the trouble in which he found himself. The mother remained with her sister in Kentucky for three or four months during which time the son converted a house he owned in the city into two apartments making out of it what is called a "duplex." It was his intention that he and his wife should occupy one apartment and his mother the other. When his mother returned, this arrangement was made and proved

satisfactory for a while, but the mother was not happy, and a sister came to visit with her for a time. The mother complained of neglect on the part of her son and of her daughter-in-law. She decided to go again to Kentucky where she remained until sometime in the year 1932, when she returned and instituted this suit.

At the time of her testimony she lacked but two months of being seventy-eight years old. Her son at that time was about forty-five. She testified at considerable length to the effect that before the execution of the deed her son promised to provide a home for her and to support her as long as she lived; that this was one of the reasons for the execution of the deed. She also stated that her son had failed to provide for her and had made it so disagreeable for her at home that she could live with him no longer, and that since her removal he had failed to provide for her maintenance. During the times the mother was in Kentucky the son wrote to her from time to time and these letters, appellant's counsel insist, corroborate her testimony and show of themselves that the appellee had virtually driven the appellant from his home and had refused to further support her.

On the question of whether or not there was a promise made by the son for future support, and that this was the inducing cause for the execution of the deed and contradictory of the testimony of the appellant, is the testimony of the appellee corroborated by that of Mr. Britton and one other witness and also by the recitals in the deed itself. The appellee testified that there was no mention made as to the support of his mother in the future because that was taken for granted; that he had done this since the death of his father, and that his mother knew that he would always do so.

Mr. Britton testified that, in discussing the question with the mother, nothing was said about the support that her son was to give her, but that the reason, as expressed by her for the act on her part, was that her son had been faithful to her, and that her present property was the result of his thrift and industry. It is also

clear that the reservation in the deed was occasioned by the forethought of the appellee to protect his mother in the event of some financial misfortune occurring to him in the future. This, of itself, tends to negative the idea that the consideration was the promise of the son to support his mother in the future.

On the question of the son's support of the mother and how the Valley View Farm was acquired, there is but little substantial conflict in the testimony. In 1918, when Mr. Haden, the father, died, Mrs. Haden's sole property was a small farm of eighty acres about sixty of which were in cultivation and on which there was a poor farm house. Appellee owned forty acres of land adjoining this farm which also had a small house upon it and about fifteen acres in cultivation. With the consent of his mother he traded the entire 120 acres of land for property in Memphis worth about $3,500. The value of the eighty acres was about $2,500 and of his forty acres about $1,000. At this time he was a bookkeeper drawing a salary, and he remained constantly employed until about the time of the beginning of the disagreement between him and his mother. During these years he made frequent trades, improving each property as he acquired it with his own resources, and at all times keeping enough property in his mother's name to represent the value of the land owned by her in the beginning. During this time they lived together, she keeping house and he providing for all the necessary expenses. The title to the Valley View Farm was taken in the mother, and upon it the son expended a great deal in improvements making it much more valuable than when he purchased it. He stated, and the testimony warrants the conclusion, that, although the title was in the mother, in reality he owned a considerable interest in it. About the time the conveyance in question was made to the appellee the Valley View Farm was leased to a tenant for $500 a year for a period of five years. This tenant kept the farm about three years, but when values fell he found it impossible to continue and so abandoned his lease. For a part of the time after the mother left for

Kentucky, the appellee sent to her each month about $40. This was approximately the rental value of the farm for each month. About the time the tenant abandoned his lease the appellee lost his position and suffered in common with the community at large great financial reverses. For a while he sent his mother $30 a month. While they were in the apartments living together he furnished the apartment and the groceries for his mother and gave her $20 a month. After his mother left he found it necessary to reduce her remittance to $15 a month. She was boarding with her sister in Bandana and paying $10 a month board which appears to have been sufficient to take care of her part of the expense.

The mother complains that there was not enough furnished her to live on, but the fact remains that out of the sums furnished she was able, through a short period of time—whether it was one or two years is not clear—to save $200 which sum she brought back to Arkansas and had at the time she began this lawsuit. The letters that were written and which counsel contend fortify the appellant in her contention that she was virtually driven away from home, that appellee ceased to maintain her and refused to support her longer, were not so interpreted by the chancellor, nor do we thus construe them. The appellant, vexed by the intrusion of another woman in the affections of her son, dethroned from the supreme position she had long maintained in the household, and unable to comprehend the great losses sustained by her son and the decrease in his earning power, was hurt, angry and dissatisfied. The letters to us seem to express a plea for patience and understanding, and all the implications justly to be drawn from them are assurances to the mother of continued love of the son and an avowal of the purpose to provide for all her wants to the utmost extent of his ability.

Therefore, in any view of the case, we are of the opinion that the evidence justifies the judgment and decree of the chancellor. It is not to be doubted from the character of the appellee, as disclosed by this record,

that he will continue to do everything in his power to make the life of his old mother happy and easy.

The decree is affirmed.

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

4-3130

Opinion delivered June 19, 1933

J. R. Crocker, J. Sam Rowland and *J. B. Ready*, for appellant.

JOHNSON, C. J., (after stating the facts). It is first sought to uphold the order of the chancellor directing a resale of the property because of act 21 of 1933. This act in effect authorizes the respective chancery courts of the State to refuse to confirm commissioner's sales, irrespective of fraud or inequitable conduct in effecting the sale.

Section 4 of act 21 of 1933, cited and relied upon by appellee, reads as follows: "Section 4. Before confirming a sale, the court shall ascertain whether or not, on account of economic conditions, or the circumstances attending the sale, a fair price with reference to the in-

trinsic value of the property was obtained. If it is made to appear to the court that a better price could be obtained at a resale, or if any one agrees to bid a substantially higher amount at a resale, the court shall order a resale on such terms as the court may require." This act was approved February 9, 1933.

On December 22, 1932, the date on which this sale was effected, act 21 of 1933, had not been passed, therefore, if it has application to this sale, it must be construed as retroactive in scope.

This court held in *Smith* v. *Spillman,* 135 Ark. 279, 205 S. W. 107: "A purchaser at a drainage tax sale, even before confirmation, acquires a vested right to the land purchased which cannot be affected by a statute passed before confirmation extending the power of redemption." Therefore, it seems that this court is committed to the doctrine that a purchaser at a commissioner's sale takes a vested interest by reason of the purchase, and confirmation follows as a matter of right, unless it be found that fraud entered into the transaction or else the price bid and offered was so grossly inadequate as to shock one's sense of justice.

Since appellant took a vested interest in the property by reason of its bid and purchase on December 22, 1932, the Legislature was and is without authority to pass a statute impairing its vested right. Therefore, the provisions of act 21 of 1933 cannot be given a retroactive effect so as to impair appellant's vested interest in the property.

Since the provisions of act 21 of 1933 have no application to the facts in this case, the chancery court's power to refuse to confirm the report of sale and to order a resale, as was here done, must be measured by the rules of law in force and effect in this State on December 22, 1932.

Up to the passage and approval of act 21 of 1933 the rule in reference to the confirmation or rejection of reports of sale for inadequacy of price was as follows: "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 aside the sale and refusing confirmation thereof." *Southern Grocery Co.* v. *Merchants' & Planters' Title & Investment Co.* 186 Ark. 615, 54 S. W. (2d) 980.

A great preponderance of the testimony introduced on the exceptions to the report of sale establishes the fact that $5,000 was the fair market value of the mortgaged lands on December 22, 1932, and the chancellor's findings otherwise is against the preponderance of the testimony.

The order of the Marion County Chancery Court refusing to confirm the sale of the mortgaged land to appellant is reversed, and the cause remanded with directions to approve and confirm the sale.

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

4-3140

Opinion delivered June 19, 1933

L. F. Monroe, for appellant.

E. F. McFaddin, for appellee.

Trieber & Lasley, amici curiae.

SMITH, J. Appellants owned a tract of land, which was ordered sold under a decree of the Hempstead Chancery Court foreclosing a mortgage thereon which they had given to appellee. There was a sale of the land as

directed by the decree, and the report of the commissioner who had made the sale came on for confirmation at the ensuing term of the court. Appellants filed objections to the confirmation of the report reading as follows:

"The defendants admit the indebtedness, and admit the foreclosure decree was validly rendered, and the sale validly conducted, and that the plaintiff bid the full debt, interest and costs, and that there is no deficiency judgment, and that the property brought its fair value.

"But the defendants except and object to the approval of this sale at this time because of act 21 of the Acts of the General Assembly of the State of Arkansas of 1933, which act was duly and validly passed, and had a due and valid emergency clause, and became the law of Arkansas immediately upon its passage and approval, and signing by the Governor; and that the said law was validly passed, approved, and signed by the Governor of Arkansas on the 9th day of February, 1933.

"These defendants state that under the said act of the Legislature it is provided in § 2 that decree confirming sales shall only be rendered during the first three days of the regular term of court as fixed by law; that the regular term of the Hempstead Chancery Court was on the first Monday in March, 1933, which day was the 6th day of March, 1933; and that the Hempstead Chancery Court was duly in session that day, and on that day duly adjourned until May 5, 1933, and was not in session in Hempstead County on March 7th or March 8th, 1933; and that now this sale comes on to be approved on the 5th day of May, 1933, which is an adjourned day of that court; and therefore the sale should not be approved at this time.

"Wherefore, defendants except and object to the approval of the sale."

Section 2 of act 21, above referred to, reads as follows: "Section 2. On account of the congestion of court dockets by foreclosure suits, and to provide time for trying other cases, foreclosure decrees, and decrees confirming foreclosure sales shall only be rendered during

the first three days of the regular term of the court as fixed by law."

Upon hearing the objections to the confirmation of the report of sale, the following facts were made to appear: The regular March, 1933, term of the Hempstead Chancery Court convened on the first Monday in March, which was March 6, 1933, and the day appointed by law for the convening of that term of court. After being in session the day of March 6th the court adjourned until May 5, 1933. On March 7th the chancellor of the district held an adjourned session of the Nevada Chancery Court, and on March 8th an adjourned session of the Clark Chancery Court was held. On May 5th the court returned to continue the March term of the Hempstead Chancery Court, pursuant to the adjourning order above mentioned, and on that day the commissioner's report of the sale of appellant's land was heard and confirmed, over the objections and exceptions of appellants.

For the reversal of this decree, it is insisted that May 5th was not one of the first three days of the regular term of the Hempstead Chancery Court within the meaning of § 2 of act 21 of the Acts of 1933. Appellee insists, for the affirmance of the decree, not only that May 5th was one of the first three days of the regular term, but it is insisted also that it is immaterial whether this is true or not, for the reason that the entire act, of which § 2 is a part, is unconstitutional, as impairing the obligation of the contract evidenced by the mortgage which the decree had ordered foreclosed.

Very interesting and able briefs were filed on the question of the constitutionality of the act by opposing counsel; but we do not find it necessary to decide that question to dispose of this appeal. It has long been the rule of this and other courts not to pass on a constitutional question unless a decision on that point is necessary to a determination of the case. The rule and the reason therefor was stated in the case of *Smith* v. *Garretson*, 176 Ark. 834, 4 S. W. (2d) 520, as follows: "In *Ry. Co.* v. *Smith*, 60 Ark. 221-240, 29 S. W. 752-754, Judge Battle, speaking for the court, quoted from Judge

Cooley on Constitutional Limitations, p. 231, paragraph 2, as follows: 'Neither will a court as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both proper and more respectful to a coordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra judicial disquisition is entitled. In any case therefore where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable.' Such has been the unvarying practice of this court. See also *Martin* v. *State,* 79 Ark. 236, 96 S. W. 372; *Sturdivant* v. *Tollett,* 84 Ark. 412, 105 S. W. 1073; *Road Imp. Dist. No. 1* v. *Glover,* 86 Ark. 231, 110 S. W. 1031."

It is not essential to the decision of the question presented on this appeal to determine whether act 21 of the Acts of 1933 is valid and constitutional, for the reason that there has been no violation of its provisions in the confirmation of the report of the commissioner's sale. May 5, 1933, was one of the first three days of the session of the March term, 1933, of the Hempstead Chancery Court, being the second day thereof. March 7th the court was in session in other counties in that chancery district on those days.

Appellants cite § 1208, Crawford & Moses' Digest, as sustaining their contention that May 5, 1933, was not

a day of the regular March term of the court. This section reads as follows: "The defense to any complaint or cross-complaint must be filed before noon of the first day the court meets in regular or adjourned session after service:

"First. Where the summons has been served twenty days in any county in the State.

"Second. Where the summons has been served thirty days outside of the State.

"Third. In the case of constructive service, where publication of the warning order has been made as required by law and thirty days has elapsed since the making of the order and the appointment of the attorney *ad litem.*"

We do not interpret this statute as furnishing any support to appellants' contention. This section provides the time within which service becomes complete, depending upon the manner of service, the obvious purpose thereof being to permit the court to hear any cause in which the service has ripened and become complete, whether before a regular or an adjourned *session* of a term of court. Section 2112, Crawford & Moses' Digest, reads as follows: "Special adjourned sessions of any court may be held in continuation of the regular term, upon its being so ordered by the court or judge in term time, and entered by the clerk on the record of the court."

The record in this case shows affirmatively that the court ordered a session of the March term to be held on May 5th, and that day was the second day of the term. We do not interpret the phrase, "first three days," appearing in § 2 of act 21 to mean the first three calendar days, but, rather, to mean the first three days the court is in session.

It was held in the case of *Dunn* v. *State,* 2 Ark. 229, (to quote a headnote in that case) that: "All courts unless restrained by some statutory provision, have the right of adjourning their sittings to a distant day; and the proceedings had at the adjourned session will be considered as the proceedings of the term so adjourned."

In the subdivision, "Terms and Sessions," of the chapter on Courts in 15 C. J., page 875, it is said at § 219 thereof: "Terms of court are very generally classified into regular terms and special terms. A regular term of court is one held at a time and place fixed once and for all; and a special term is one called or appointed for a particular purpose, being a term separate and distinct from the regular term and not a continuation thereof after adjournment. A special term is distinguished from the regular or general terms only in the date or time that it is convened or held, unless the expression has some other local significance. As a general rule, when a statute speaks of terms of court, the terms constituted by law, and not special terms, are meant, although it has been held that a statutory provision requiring issues of fact in criminal actions to be tried at a 'regular term' did not intend to discriminate between a regular term and a special or called term at which a jury was convened."

Numerous definitions of the phrase "Regular Term" appear in Words and Phrases, First, Second and Third Series, and, among others, the following: "A regular term of court is 'a term begun at the time appointed by law, and continued at the discretion of the court to such time as it may appoint, consistent with the law.' *Wightman* v. *Karsner,* 20 Ala. 446." Words and Phrases, First Series, volume 7, p. 6040.

"When the court reconvenes after a recess of a few days or weeks, it is a regular, and not a special, session, distinct from the regular term. *Carter* v. *State,* 80 S. E. 533, 534, 14 Ga. App. 242.

" 'Regular' terms of court are those beginning at certain dates fixed by law, or by the judge in conformity with authority of law, as distinguished from 'special terms,' which are held at other times than those fixed by law, or which may be called by the judge in his discretion. *Glebe* v. *State,* 183 N. W. 295-296, 106 Neb. 251." Words & Phrases, Third Series, volume 6, page 650.

We conclude therefore that May 5, 1933, was the second day of the March, 1933, term of the Hempstead

Chancery Court, and that there was and is no inhibition in § 2 of act 21 prohibiting the court from hearing and confirming a commissioner's report of sale at that time.

The decree must therefore be affirmed, and it is so ordered.

AMERICAN COMPANY OF ARKANSAS *v.* WILSON.

4-3046

Opinion delivered June 19, 1933

Roberts & Stubblefield, for appellant.

Sam Rorex and *Owens & Ehrman,* for appellee.

SMITH, J. This appeal questions the action of the Pulaski Circuit Court in setting aside default judgments which appellant recovered against appellees, the order appealed from having been made after the expiration of the term at which the judgments were rendered.

Appellant filed suit on August 12, 1932, to collect an account alleged to be due it by appellees as partners under the firm name of Wilson & Currie. Summonses were served on each defendant, but no answer was filed, and on September 7, 1932, judgment was rendered against Wilson, and on September 12, 1932, judgment was also rendered against Currie. More than twenty days had expired after service of summons upon the respective defendants.

The testimony shows that Wilson had stated to Currie, his partner, that he would attend to the case, and the latter relied on the former to do so, and gave the matter no personal attention. The testimony is conflicting as to whether Wilson had employed and directed an attorney

to file an answer in the case, but it appears certain that Wilson was under the apprehension that he had done so and that he was relying on the attorney to file the answer. The attorney in question testified that he did not understand that he had been employed and directed to file the answer, but on September 14, 1932, which was prior to the adjournment of the term of court at which the judgments had been rendered, the attorney conferred with the judge who had rendered the judgments, and the following statement of the judge as to this conversation appears in the record: "Court. As I recall it, he (the attorney) came over here, a short time after the default judgment was rendered, all out of breath—he was excited about it, and I told him he had better file his motion (to vacate the judgment) in the regular way and take it up."

On the following day, which was still prior to the adjournment of the court for the term, Wilson and his attorney conferred with the attorney for the plaintiff in regard to the judgments, and there is an unfortunate but irreconcilable conflict in the testimony as to the agreement then reached. There was clearly a misunderstanding as to the agreement then made. According to the testimony of both Wilson and his attorney, the representation was then made that Wilson did not owe any part of the account, which involved shipments of calcium arsenate in carload lots extending over a period of years except the shipment made in the year 1929. That the transactions had been handled by a Mr. Anderson, representing the plaintiff, and that Anderson would so testify. Anderson had left the State, and his whereabouts were then unknown, and a few weeks' time was asked and given for Wilson to get in touch with Anderson, who could and would explain the transaction and make it appear that Wilson & Currie owed for only one shipment, which had been closed by a note to the plaintiff's order, which the defendants offered to pay.

No motion was filed to vacate the judgments during the term at which they were rendered, because Wilson and his attorney relied upon this agreement; believing

that time had been given to make a showing to plaintiff that an error had been made.

Plaintiff's attorney admitted that he had a conversation with Wilson and Wilson's attorney before the expiration of the term, but testified that the extent of his agreement was that he would postpone the issuance of an execution for a few weeks for Wilson to make the suggested investigation and to make report thereof to the plaintiff, but that he did not agree that the judgments themselves might be vacated.

Testimony was offered in support of the motion to vacate the judgments to the effect that Wilson & Currie did not owe the account, or any portion of it, except the shipment in the year 1929, and that the account had been closed by the execution of a note for the shipment made that year, which Wilson offered to pay. He renewed this tender of payment with his motion.

The judgments were vacated by the presiding judge who rendered them, and his statements, appearing in the record, indicate that this action was induced, in part, at least, by the judge's own recollection of the facts. The court made, among others, the following findings of fact: "6-a. That this understanding caused the plaintiffs and their attorney to think that they were to have two or three weeks after September 14th in which to file some kind of a proceeding to have the judgments set aside, which time ran over the expiration of the term, and the court is therefore treating this proceeding to set aside the said judgments as if it were filed during the same term the judgments were rendered."

The court found, and the testimony establishes very clearly, that no fraud was intended or was practiced by the plaintiff's attorney, but the testimony also establishes the fact, as found by the court, that, at a time when a motion could and would have been entertained to vacate the judgments, an agreement was reached, as understood by Wilson and his attorney, that the judgments would be vacated for the purpose of filing an answer putting in issue the liability of the defendants for the debt sued for, and that because of this agreement, as

understood by Wilson and his attorney, a motion to vacate was not filed until after the expiration of the term at which the judgments had been rendered.

The case is sufficiently like that of *Wrenn* v. *Manufacturers' Furniture* Co., 172 Ark. 599, 289 S. W. 769, to be governed by it. That case, like this, was one in which a motion was made to vacate a judgment after the expiration of the term at which it had been rendered. It was there said: "In a recent case, where a defendant relied on conversations and statements of attorney for plaintiff, this court said: 'There was such a misunderstanding as constituted unavoidable casualty or misfortune which prevented the defendant from appearing and defending. There is no room to suspect—and the lower court did not find—that plaintiff's attorney had intentionally misled the defendant, but the defendant and her husband, who was her representative in the matter, did testify that they were misled, and, because of that fact, had not arranged with the attorney they intended to employ to file an answer presenting a defense which, if true, would defeat a recovery, and had not furnished the attorney the information needed to prepare the answer.' *McElroy* v. *Underwood,* 170 Ark. 794, 281 S. W. 368."

We think the showing made was sufficient to justify the court, under the seventh paragraph of § 6290, Crawford & Moses' Digest, to find that an unavoidable casualty or misfortune had prevented the defendants from appearing and defending when they might and would otherwise have done so.

The judgment of the court vacating the original judgments is therefore affirmed.

COMMONWEALTH BUILDING & LOAN ASSOCIATION
v. McHUGH.

4-3051

Opinion delivered June 19, 1933

John Sherrill, for appellant.

Gladish & Young, for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellee in the chancery court of Mississippi County, Osceola District, to cancel two certificates of investment stock issued and delivered to him by appellant, one for $500 and the other for $300, with alternate prayers that appellee be required to pay $800 for them or for their return. It was alleged in the complaint that appellee had not paid for the stock.

Appellee filed an answer admitting the delivery of the two certificates of stock to him, but denying that he had failed to pay for same.

The cause was submitted to the chancery court upon the pleadings and testimony, from which the court found that appellee had paid for the stock, and, based upon that finding, rendered a judgment dismissing appellant's complaint, from which is this appeal.

The facts responsive to the issue of payment are undisputed and, in substance, are as follows:

On December 12, 1931, appellee made written applications through appellant's agent, W. W. Prewitt, to appellant for the paid up certificates of investment stock and drew his check in favor of appellant on the Bank of Osceola, where the agent and appellee resided, for $800 and delivered same to the agent. The agent had no authority to indorse or cash the check, so he attached the check to the applications and mailed them on the same day to appellant in Little Rock. Appellant received the check on the 14th and immediately issued the stock certificates to appellee and mailed them to its agent, who delivered them to appellee on the 15th. On the same day, it deposited the check in the Bankers' Trust Company at Little Rock for collection and took credit for same on

its account. The Bankers' Trust Company forwarded the check directly to the Bank of Osceola, on which it was drawn, for payment, there being no other bank in the city of Osceola. The Osceola bank received the check on December 15, stamped same "Paid" on that date, and charged same to the account of appellee. The Bank of Osceola remained open and transacted all kinds of business until December 18. On the 17th it forwarded its draft to the Bankers' Trust Company for the amount of $800 to cover the item it had charged appellee's account on the 15th. The Bankers' Trust Company received the draft for $800 drawn on the Union Trust Company, where the Bank of Osceola had sufficient funds on deposit to pay same, but it refused to cash the draft because it was reported on the morning of the 18th that the Bank of Osceola had closed its doors. Appellee had on deposit in the Bank of Osceola more than enough to pay the check it drew on said bank to appellant in payment of the stock certificates, and, when the check was charged to his account and stamped paid, it still left a balance in the bank in his favor. After the Bank Commissioner took charge of the Bank of Osceola, the Bankers' Trust Company returned the draft to him, and he returned the check to the Bankers' Trust Company and reversed the entry of payment and charged the check back to the account of appellee. The Bankers' Trust Company reversed its entries on its books and returned the check to appellant.

Under the law, appellant became a creditor of the Bank of Osceola and the Bank of Osceola, a debtor to it, because the Bankers' Trust Company did not send the check to the Bank of Osceola for collection but for payment out of the account of appellee. The check was promptly paid, and the relationship of creditor and debtor was established between them. It was a closed transaction between the Bank of Osceola and appellee. He passed out of the picture, his only duty being to have money in the Bank of Osceola to pay the check if it arrived within a reasonable time. The principle thus announced and applicable to the facts in the instant case

may be found in the cases of *Taylor* v. *Dermott Grocery & Commission Company,* 185 Ark. 7, 45 S. W. (2d) 23, and *Bank of Conway* v. *Hiegel, ante* p. 313.

No error appearing, the decree is affirmed.

HULL *v.* HULL.

4-3027

Opinion delivered June 19, 1933

[redacted]

[redacted]

Festus O. Butt, for appellant.

Claude A. Fuller and *A. J. Russell, Jr.,* for appellee.

KIRBY, J., (after stating the facts). It is insisted that the chancellor's findings and decree are contrary to the preponderance of the testimony. Although the court incorrectly announced in its findings that the burden of proof was upon appellant, he having failed to produce the original deeds in evidence when demanded, to show the alleged forged deeds were genuine (*Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524; *Miles* v. *Jerry,* 158 Ark. 314, 250 S. W. 34), it is also true that such failure to produce the original deeds created a presumption that such deeds, if produced, would favor the claim of

plaintiff. *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. (2d) 84; *Lynch* v. *Stephens,* 179 Ark. 118, 14 S. W. (2d) 257.

Appellant's explanation of his failure to produce the deeds when demanded was evidently not satisfactory to the court, nor sufficient to overcome the presumption.

The majority is of opinion, after a careful examination and analysis of the testimony, in which the writer does not concur, that the chancellor's findings and decree are supported by the preponderance of the testimony; and no useful purpose would be served by setting out the testimony more fully as the matter is largely a question of fact, which has been found in the appellee's favor upon testimony sufficient to support the decree.

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

MEYERS STORE CO. *v.* COLORADO MILLING & ELEVATOR CO.

4-3041

Opinion delivered June 19, 1933

W. P. Smith and *G. M. Gibson,* for appellant.

H. L. Ponder, for appellee.

MEHAFFY, J. On June 23, 1930, the appellee, Colorado Milling & Elevator Company, sold to the appellant, Meyers Store Company, 2,000 barrels of flour. The flour purchased was shipped to the appellant in three shipments, on October 13th, October 16th and October 21st. They were shipped to shipper's order with bill of lading and directions to notify Meyers Store Company at Walnut Ridge, Arkansas, a draft for the amount of each shipment being attached and payable to Planters' National Bank of Walnut Ridge, Arkansas, and being drawn through that bank.

The purchaser was permitted to take the bill of lading and get possession of the flour without paying the drafts.

On May 8, 1931, the Colorado Milling & Elevator Company filed its complaint in the chancery court for the Eastern District of Lawrence County against Meyers Store Company for $2,121.66, the amount due on the flour together with protest fees and interest.

It was alleged in the complaint that the bank officials and the Meyers Store Company conspired to defraud the Colorado Milling & Elevator Company by surrendering the bills of lading without the drafts being paid; that on November 7, 1930, the appellant knew or had reasonable cause to believe that the bank was insolvent, and drew its check on said bank for the sum of $2,121.71, payable to the Planters' National Bank, purporting to be given for the amount of the drafts covered by the shipments; that the check was stamped "Paid" November 5th, but was not actually made or stamped until November 7th. The appellant, knowing the insolvency of the bank, knew it would not be paid, and fraud-

ulently dated the check November 1, 1930; that the appellant was at that time engaged in transferring the greater portion of its deposits to a bank in St. Louis, believing that the Planters' National Bank was about to fail; that the Planters' National Bank drew its draft on the Franklin-American Trust Company of St. Louis in the sum of $2,118.41. This draft was mailed direct to the appellant and received by the St. Louis bank on November 8th, the Planters' National Bank having closed its doors on November 7th. The draft was not paid, and the protest fees were $3.25. The appellant had designated the Planters' National Bank as the collecting bank. The prayer of the complaint was for judgment against the Meyers Store Company for $2,121.66, with interest.

The appellant filed demurrer, which was overruled; and then filed answer in which it denied the allegations of the complaint, except as to purchasing the flour, and the amount of the indebtedness.

As a defense, appellant alleged that the Planters' National Bank should be made a party, and be required to pay said money to the appellant or appellee, as a preferred claim. Thereafter it filed an amendment to its complaint, alleging the giving of its check in payment of the amount due appellee. It asked that J. W. Armstrong, receiver of the Planters' National Bank, be made a party. The receiver was made a party and filed petition and bond for removal to the Federal court, and the cause was removed to the Federal court.

In the Federal court the receiver filed his answer, in which the allegations in the complaint against him were denied. The Colorado Milling & Elevator Company filed motion in the Federal court to remand the cause, and the Meyers Store Company also filed motion to remand the cause to the Lawrence Chancery Court. The Colorado Milling & Elevator Company did not sue the receiver of the Planters' National Bank, and did not ask that he be made a party, and no judgment was asked against him.

The appellant asked that he be made a party, but did not ask any judgment against him. It alleged that

the money was a trust fund, and that the receiver be required to hold it as a trust fund to be paid either to the appellant or appellee, as the court might decide.

After the case was remanded, the receiver moved that the cause be dismissed as to him, and this motion was granted, and the cause as to him dismissed. This appeal is from the order dismissing the cause as to the receiver, and no other questions are presented for our determination.

Where a cause is removed from a State court to the Federal court, and remanded by the latter court, the order of the Federal court remanding the cause is final, and will not be reviewed by the State court. *K. C. Sou. Ry. Co.* v. *Wade,* 132 Ark. 551, 201 S. W. 787; *St. L., I. M. & S. R. Co.* v. *Neal,* 83 Ark. 591, 98 S. W. 958; *Mo. Pac. Rd. Co.* v. *Tompkins,* 157 Ark. 16, 247 S. W. 54; *German National Bank* v. *Speckert,* 181 U. S. 405, 21 S. Ct. 688; *Pac. Livestock Co.* v. *Lewis,* 241 U. S. 440, 36 S. Ct. 637; *M. P. Rd. Co.* v. *Fitzgerald,* 160 U. S. 556, 16 S. Ct. 389; *McLaughlin Bros.* v. *Hallowell,* 228 U. S. 278, 33 S. Ct. 465; Lewis on Removal of Causes, 499.

When a case has been remanded, it is the duty of the State court to proceed as though no removal had ever been attempted. Lewis on Removal of Causes, 503.

When the cause was remanded and reached the Lawrence Chancery Court, it was the duty of the court to proceed just as if no petition for removal had ever been filed, and the chancery court had jurisdiction of the person of the receiver, and not only had the authority, but it was its duty, to dismiss the cause against the receiver unless the receiver was a necessary party. The plaintiff in the case would have had the right to sue the receiver and the Meyers Store Company, or either of them, and if either had been sued by the plaintiff, the other could not complain.

Our statute provides that the defendant may file a cross-complaint against persons other than the defendant when the defendant has a cause of action against a codefendant or a person not a party to the action and affecting the subject-matter of the action, when he may

make his answer a cross-complaint against the defendant or other person. Section 1204, Crawford & Moses' Digest.

In the suit against the appellant, it either owed the appellee or it did not, and no cause of action that the appellant may have against the receiver in any way affects the subject-matter of the original action in this case.

"Where two or more persons are jointly bound by a contract, the action thereon may be brought against all or any of them at the plaintiff's option." Section 1100, Crawford & Moses' Digest. That is, the plaintiff in a suit may sue one person or all that are bound, but the plaintiff himself determines whether he will do this, and the defendant cannot bring in another party defendant unless the defendant files a cross-complaint against such party and states facts showing that the cause of action against such third party affects the subject of the original action. *Lamew* v. *Wilson-Ward Co.*, 106 Ark. 340, 153 S. W. 261; *Fluhart* v. *W. T. Rawleigh Co.*, 126 Ark. 307, 190 S. W. 118.

A plaintiff not only has the right to sue any one or all of the persons signing a contract, but he also has the right to proceed against any one or all of joint tortfeasors. *McCulla* v. *Brown*, 178 Ark. 1011, 13 S. W. (2d) 314; *Coats* v. *Milner*, 134 Ark. 311, 203 S. W. 701.

"In the absence of statute, it is not permissible to amend at the instance of the defendant, by adding new plaintiffs or defendants, although it is permissible for plaintiff to add them after objection by the defendant. Under statutes, however, a defendant may cause one against whom he has a right of action to be made a party." Standard Ency. of Procedure, vol. 20, 956. The statute above cited requires the third person against whom the defendant files a cross-complaint to have an interest affecting the original suit.

In the case at bar, it was not claimed that the receiver had any interest affecting the original suit. If the original defendant had a defense, it was complete, and he could avail himself of it without making the receiver a party.

One cannot be made a defendant who has no interest in the cause of action sued on, and against whom no relief is sought. Whatever defense the appellant may have had in this case was available to it without making any other person a party. Therefore the receiver was not a necessary party.

The decree of the chancery court is affirmed.

ADAMS *v.* SPILLYARDS.

4-3087

Opinion delivered June 19, 1933

Rowell & Rowell, for appellant.

Coy M. Nixon, for appellee.

J. R. Crocker, amicus curiae.

Trieber & Lasley, amici curiae.

McHaney, J. Appellants are the owners and holders of certain past-due promissory notes executed by appellees, secured by a deed of trust on certain real estate in Jefferson County. Suit was filed April 6, 1932, to foreclose, which was met by demurrer. The court overruled the demurrer January 31, 1933, and thereafter an answer was filed, admitting the execution and delivery of the notes and deed of trust. There was no dispute as to the facts. On February 25, 1933, act 57 of the Acts of 1933 became a law, and its provisions were invoked by appellees. The court, in accordance with the requirements of § 2 of said act, refused to enter a decree of foreclosure to which he found appellants were entitled, unless and until they would enter into and file a stipulation that they would bid at the sale the amount of the judgment, interest and costs. Appellants refused to do this, and filed a motion to have the decree entered without such requirement. The court overruled the motion, and this appeal followed.

We think this was a final order from which an appeal lies.

The only question presented is the constitutionality of said act 57 of 1933. We copy it in full as follows:

"Section 1. In any foreclosure, in any court in the State of Arkansas in which real estate is involved, the real estate securing the loan sought to be foreclosed shall be considered to be the value of the loan made, irrespective of the amount which may be realized from the sale of such real property.

"Section 2. When any such foreclosure suits are brought, the plaintiff shall not be entitled to a decree of foreclosure until and unless said plaintiff shall file a stipulation in said cause that he will bid the amount of the debt, interest and costs.

"Section 3. Where any such suits are now pending and sale of said property has been made under decree of courts foreclosing same, and the sale has not been confirmed by the court, the chancellor is hereby directed and it is made his duty to inquire into the amount that said property sold for, and hear testimony thereon in order to ascertain whether or not the purchaser bid the fair market value of said property, and said sale shall not be confirmed until after said hearing, and the Supreme Court of this State shall review the findings of said chancellor on appeal, even though no fraud or inequitable conduct is attributed to any person conducting said sale or any party interested therein.

"Section 4. Where any such suits are filed after the effective date of this act and real property is sold under foreclosure decree, said sale shall not be confirmed by the court until and unless said court has inquired into the amount that said property sold for, and hear testimony thereon in order to ascertain whether or not the purchaser bid the fair market value for said property, and said sale shall not be confirmed until after said hearing, and the Supreme Court of this State shall review the findings of said chancellor on appeal, even though no fraud or inequitable conduct is attributed to any person conducting said sale or any party interested therein.

"Section 5. When any suit seeking the foreclosure of real estate is filed and application is made for the appointment of a receiver, the court shall have the power to appoint the owner of said property as such receiver, and the fact that he is the owner in itself shall not disqualify him to serve in such capacity.

"Section 6. If any part, sentence, section, or paragraph of this act is held to be unconstitutional, the remaining valid parts shall not be affected."

The attack made on the validity of the act is based on art. 1, § 10, Constitution of the United States, and art. 2, § 17, Constitution of Arkansas, both prohibiting the State from passing any law impairing the obligation of contracts. It is of course well settled that the Constitution of this State is "not an enabling, but a restraining act (*Straub* v. *Gordon*, 27 Ark. 629), and that the Legislature may rightfully exercise its powers subject only to the limitations and restrictions of the Constitution of the United States and of the State of Arkansas," as we said in *Bush* v. *Martineau*, 174 Ark. 214, 295 S. W. 9, and that an act of the Legislature is presumed to be constitutional and will not be held by the courts to be otherwise unless there is a clear conflict between the act and the Constitution, and that all doubt should be resolved in favor of the act. *Bush* v. *Martineau, supra,* and cases there cited. It is equally well settled that, if an act runs counter to the plain provisions of the Constitution, the courts should not hesitate to so declare and hold the act invalid. Another rule which is not open to dispute and is well settled both in this court and the Supreme Court of the United States is thus stated in *Robards* v. *Brown*, 40 Ark. 423: "The laws which are in force at the time when, and the place where, a contract is made and to be performed enter into and form a part of it. This is only another mode of saying that parties are conclusively presumed to contract with reference to the existing law." And in *Walker* v. *Whitehead*, 16 Wallace (U. S.) 314, it is said: "The laws which exist at the time of the making of a contract and in the place where it is made and to be performed enter into and make a part of it. This embraces those laws alike which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. The obligation of a contract 'is the law which binds the parties to perform their agreement.' Any impairment of the obligation of a contract—the degree of

impairment is immaterial—is within the prohibition of the Constitution."

It becomes material then to inquire as to the rights of mortgagees of real estate at the time and prior to the effective date of said act 57 in foreclosure proceedings in chancery courts. They had the right under existing law to have a judgment on the obligation in default after service and issue joined after 90 days or any day court was in session after default in pleading, and a condemnation of the real estate covered by the mortgage to be sold and applied to the payment of the debt, interest and costs. If not sold for a sufficient sum to cover, there was a deficiency judgment upon which execution could issue as at law. Foreclosure sales of real estate could not be set aside and confirmation refused for mere inadequacy of consideration, but only for fraud or other inequitable conduct in the matter of the sale, coupled with gross inadequacy of consideration. Nor could sale be postponed more than six months. There was no provision of law declaring that "the real estate securing the loan sought to be foreclosed shall be considered to be the value of the loan made, irrespective of the amount which may be realized from the sale of such property," nor that the plaintiff should "file a stipulation in said cause that he will bid the amount of the debt, interest and costs," until act 57 was enacted. It frequently happens, though not the general custom, that loans are made and real estate security taken when both parties know that the security is of less value than the loan, and it frequently happens that loans are made on both real and personal property as security. In either event, under act 57, in order to foreclose on the real estate in the chancery court, the mortgagee would have to relinquish the personal responsibility of the mortgagor as well as the personal property covered by the mortgage, for "the real estate * * * shall be considered to be the value of the loan made," and he must file a stipulation that he will bid for it the full amount of the judgment, interest and costs. This too in the face of the fact that the loan was made more on the moral risk than on the real estate security

in the one case, and more on the personalty securing the loan than the real estate in the other. The undisputed effect of §§ 1 and 2 of the act is to prohibit deficiency judgments in mortgage foreclosures in chancery courts, a legal possible right inherent in all existing Arkansas mortgages at the effective date of the act, which was a part of the mortgage contracts themselves. This personal liability was a part of the contract because authorized by law at the time of execution and in the place of performance. The principal object of act 57 was to take away from the mortgagee that right, and of necessity violates the obligations of all existing mortgage contracts. Sections 3 and 4 undertake to change the rule many times announced by this court, and of long duration, that the court cannot refuse to confirm a judicial sale for mere inadequacy of consideration except for fraud, unfairness or some other inequitable conduct of the sale. See *Marten* v. *Jirkovsky,* 174 Ark. 417, 295 S. W. 365; *Free* v. *Harris,* 181 Ark. 647, 27 S. W. (2d) 510. This was the law as to all existing mortgages, became a part of them, and related to a substantial remedy to collect the debts for which they were given. Section 5 attempts to make the owner or mortgagor eligible for appointment as receiver, in the event a receiver is sought. Such was not the law theretofore. By § 8613, Crawford & Moses' Digest, "No party or attorney, or person interested in an action shall be appointed receiver therein." This section has long been the law for a time the memory of man runneth not to the contrary, for this court held in *Cook* v. *Martin,* 75 Ark. 40, 87 S. W. 625, that it was declaratory of the common law. We think this section, as well as §§ 3 and 4, would not have been adopted without §§ 1 and 2, and the act is therefore not severable, and we cannot sustain any part thereof, as provided in § 6.

We think this case is ruled by that of *Robards* v. *Brown,* 40 Ark. 423. In that case Scott and wife and Robards and wife in 1874 executed to one Ward as trustee a deed of trust on lands to secure the payment of sundry debts. Power was given the trustee in the instru-

ment to sell the lands and distribute the proceeds on certain contingencies. In 1880 the trustee advertised and sold the lands under the power contained in the deed of trust to Brown who paid his bid and received his conveyance. The sale was made without regard to the act of March 17, 1879, which provided that at such sales the property, real or personal, should not be sold for less than two-thirds of the appraised value; provided it should not apply to sales of property for the purchase money thereof; and if real property was not sold at the first offering, another offering might be made twelve months thereafter, and sold to the highest bidder without reference to the appraisement; and provided further that real property so sold might be redeemed by the mortgagor at any time within one year from the sale by payment of the sale price with 10 per cent. interest and costs of sale. It also provided for appointment of appraisers. Within one year from the date of sale Robards sought to redeem by tendering the amount required by the act. Brown refused the money tendered, Robards withheld possession, and Brown brought ejectment. Robards defended under the act of 1879 on the ground that it was not appraised and sold in compliance therewith, and that he had the right thereunder to redeem. This court denied the right as did the lower court. It was there said: "As this raises a federal question, the interpretation which the Supreme Court of the United States has placed upon that clause of the Constitution which prohibits the States from passing laws impairing the obligation of contracts is of controlling influence with us. And we find that in *Bronson* v. *Kinzie,* 1 Howard 311, this precise question was presented. It was there decided, after the most mature deliberation, Chief Justice TANEY delivering the opinion of the court, that both the appraisement and the redemption clause of a similar act, passed by the Legislature of Illinois, were unconstitutional, as applied to mortgages previously executed." *McCracken* v. *Haywood,* 2 Howard 608; *Gantly's Lessees* v. *Ewing,* 3 Howard 707; *Howard* v. *Bugbee,* 24 Howard 461, were cited to the same effect.

The court in the Robards case continued: "The Constitution forbids all laws alike which affect the validity, construction, discharge and enforcement of contracts. The State may change legal remedies, forms of action, of pleading and of process, the times of holding courts, etc., and may shift jurisdiction from one court to another. And such changes may have the incidental effect of delaying the collection of debts. But the Legislature cannot, under the guise of legislating upon the remedy, in effect, impair the obligation of contracts. The idea of right and remedy are so intimately associated as often to be inseparable. Now any legislation which deprives a party of a remedy substantially as efficient as that which existed at the making of the contract does impair its obligatory force." Citing a number of cases from the Supreme Court of the United States.

We cannot see any distinction in principle between that case and this. There the subsequent statute required appraisement and sale for two-thirds the appraised value; whereas here the statute arbitrarily says the land shall be considered to be the value of the loan, without regard to sale price, although it might in fact be many times more or less than the loan. In that case the land must be sold for two-thirds the appraised value; whereas here it is required to bring the amount of the loan regardless of all other considerations. In that case one could finally, after one year from the first offering, if it failed to bring the required amount, have a sale to the highest bidder without regard to appraisement; whereas, here, if the mortgagee is unwilling to file the stipulation required by § 2, he can never have a decree of foreclosure or of sale, and can never realize anything from the security under foreclosure in court. In that case it was held that the right to redeem within one year rendered the statute unconstitutional and void, the court saying: "Common sense and observation teach us that the right to sell at once the entire fee simple in lands and to give the purchaser immediate possession is worth more and will be more likely to produce the mortgage debt than the restricted right of selling a con-

ditional interest in lands. Thus the law, if extended to previous mortgages, would curtail and materially embarrass the creditor's right to subject the entire interest of the debtor in the property to the payment of the debt intended to be secured." So this court held that because the act denied the right to sell the entire interest, and withheld from sale the equity of redemption for one year, the act was void as to existing mortgages, and correctly so. Here the act prohibits any decree for sale, except plaintiff stipulate to pay the full amount of the debt, etc., and prohibits any confirmations, even for the amount of the debt, interest and costs, until after the court has ascertained from evidence on a hearing that such amount was "the fair market value of the property." In other words, if the court should determine that the amount bid at the sale was not "the fair market value of the property," it would have the right and power to disapprove the sale, "even though no fraud or inequitable conduct is attributed to any person conducting said sale or any party interested therein," and even though the plaintiff filed the required stipulation and did bid the amount of the judgment, interest and costs. Sections 3 and 4 so provide. This comparison of the act under consideration with that discussed in *Robards* v. *Brown, supra,* is made for the purpose of showing, which it does, that the former presents a clearer case of violation of the obligation of existing contracts than did the latter, and we desire to say that we again approve what was said in *Robards* v. *Brown,* and that it is supported by many decisions of the Supreme Court of the United States, both prior and subsequent thereto. We therefore hold that said act 57, as applied to existing contracts, is void.

Now, as to its application to future contracts, or to mortgages and deeds of trust on real estate executed subsequent to the effective date of the act, we think a careful examination of the act itself discloses that it has no application to the foreclosure of such contracts or mortgages. It does not in express terms apply to foreclosures on mortgages and deeds of trust on real estate

to be hereafter executed, but apparently to foreclosures on contracts already in existence. In fact, the words "mortgage" or "deed of trust" are nowhere used in the act. Foreclosures on real estate are several times mentioned, and foreclosures on mechanics' liens and purchase money liens are covered as well as mortgages and deeds of trust. The evident purpose of the Legislature was to relieve a present condition by applying the poultice of the act to the sore spot of deficiency judgments in foreclosures of mortgages, caused by decline in realty values. They made it expressly applicable to cases of foreclosure now pending and sales already made but not confirmed, which could not possibly have reference to future contracts, (section 3); and also to "suits filed after the effective date of this act and real property is sold under foreclosure decree of courts foreclosing same, said sale shall not be confirmed," etc. The whole context, we think, shows the Legislature was dealing with what it deemed a temporary emergency. Another matter, not without force in determining this question, is that House Bill No. 270, by Gates, of Cleveland, was introduced and passed both Houses almost simultaneously with the Senate bill, which became act 57, which prohibited deficiency judgments in mortgage foreclosures, but by its express terms in § 2, applied only to future contracts. It was introduced in the House January 26 and finally passed both Houses on February 13. Whereas act 57 was introduced in the Senate January 18, and finally passed both Houses February 10. The former was vetoed by the Governor, and the latter became a law without his signature. Evidently the Legislature thought the provisions of the bill, which became act 57, were not broad enough to prevent deficiency judgments on future contracts, and introduced and passed House Bill 270 to cover the apparent defect.

Before concluding, we desire to call attention to the case of *Dennis* v. *Moses,* 18 Wash. 537, 52 Pac. 33, holding unconstitutional an act of that State, entitled, "An act relating to deficiency judgments." We cannot review this case, nor the many others in both this State

and the Supreme Court of the United States, sustaining, as we view them, the present holding. Suffice it to say that we have carefully considered the matter from every legal viewpoint, and have reached the conclusion that the act applies only to foreclosures on existing contracts, and is unconstitutional and void.

The judgment will therefore be reversed, and the cause remanded with directions to enter the decree of foreclosure and sale of the property without reference to act No. 57 of the Acts of 1933.

BUTLER, J., (concurring). The case before the court involves the question of procedure in the foreclosure and sale under a mortgage executed prior to the passage of act No. 57 of the General Assembly of 1933. Therefore, this act could have no other than a retroactive application to the case at bar. The majority hold that such an application violates the contract clause of the Federal Constitution. I agree that this question is concluded by the decisions of the Supreme Court of the United States and of this jurisdiction, although it would appear that the authority of these decisions has been somewhat shaken by later decisions of the Supreme Court of the United States in the cases of *Block* v. *Hirsch,* 256 U. S. 135, 41 S. Ct. 458, and *Marcus Brown Holding Company* v. *Feldman,* 256 U. S. 170, 41 S. Ct. 465. I therefore concur in the judgment of the majority in so far as it holds that the act, *supra,* can have no application in the instant case, for to so apply it would violate the contract clause of the Federal Constitution as construed by our own decisions and those of the United States Supreme Court. But to that part of the opinion which declares the act under consideration indivisible, and, if one section be found to be unconstitutional, the whole act must fall, I cannot agree. Neither can I agree to the conclusion that the act has no application to the foreclosure of deeds of trust and mortgages executed after it became effective.

In the first place, I observe that these questions were not before the court, and the declarations relating

to them were unnecessary in disposing of the real question involved. They are, therefore, *obiter dicta* and not binding upon this court in any subsequent case. In the second place, the construction, I submit, can be justified in no other way than by reading into the act something that is not there and which from its language is clear the lawmakers never intended, a proceeding which is plainly an invasion by the judiciary of legislative powers.

If any special provision of an act be unconstitutional and can be stricken out without affecting the validity of the residue of the act, it will be done and the remainder of the act will be allowed to stand. This is the general rule announced by many of our decisions, among the later of which is *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000. In the opinion of the majority act No. 57 is copied. It will be seen from an examination of it that all of its sections except § 3 are general in their terms, and might, except for the presumption that all acts are to be given a prospective effect except where a contrary intention clearly appears, be both retroactive and prospective. Section 1 relates to "any foreclosure"; section 2 to "any foreclosure suits"; section 4 refers to "any such suits filed after the effective date of this act"; section 5 provides: "When any suit seeking the foreclosure of real estate is filed." Section 3, the one sought to be applied in the instant case, is not general in its terms, but limited and special, and relates to only such suits as had been instituted and were pending before and at the time of the passage of the act, and provides that no sale of real estate shall be confirmed unless and until the chancellor had ascertained that its fair market value had been bid. Its effect is plainly limited to suits to foreclose mortgages which had been executed prior to the passage of the act and is therefore so unconnected with the remaining provisions of the act, with a different purpose to be accomplished, that it may be stricken out without injury to §§ 1, 2, 4 and 5. If there was any doubt on this subject, it is removed by the expressed will of the Legislature. Section 6 provides: "If any part, sentence, section or paragraph of

this act is held to be unconstitutional, the remaining valid parts shall not be affected." Courts have no right to ignore such provisions in legislative acts. This court, in the case of *Snetzner* v. *Gregg,* 129 Ark. 542-8-9, 196 S. W. 925, referring to a similar provision, stated the duty of the court in these words: "But for the provision just quoted, it would follow that the whole statute is void, because the Legislature had determined it was appropriate and just to tax all of the property, both real and personal, for the construction of the improvements, and we could not see that the Legislature would have passed the statute with the authority to tax personal property eliminated." (This had been eliminated by the court from the statute because in excess of the constitutional power of the Legislature.) Continuing, the court further said: "This declaration incorporated by the lawmakers into the statute presents an altogether different question, for it expresses the purpose of the lawmakers to effect that, even if the personal property cannot be taxed, it is not only practicable to construct the improvement out of the taxation or benefits accruing to real estate, but that it is just to do so. We have then in the statute two legislative determinations; one, that it is just and fair to include the benefits to personalty in the scheme of taxation; and also that, if that cannot be done under the law, it is equally just to pay for the construction of the improvements with funds derived from the taxation on benefits accruing to real property alone. This is not the delegation of legislative authority to the courts, nor is it an inconsistent alternative. It is a positive declaration of the purpose of the Legislature to put the law in force to the full extent of its constitutional power. * * * Under a statute like that, a part of the law which is not swept away by the courts as being in conflict with the Constitution is declared to be in force, and there is no mistaking the legislative will in that respect." Here it seems certain the Legislature intended the law to apply to the foreclosure of all mortgages, both those executed in the past and those which might be in the future. The language in all the sections,

except § 3, is all-embracing and provides for certain procedure in "any suits" without limitation as to the time when the instrument sought to be foreclosed was made. The necessary effect of § 3 could relate only to contracts then existing. Therefore, there appear two purposes sought to be accomplished, and by § 6 the Legislature makes plain its intent that, if one purpose be unattainable because of constitutional restrictions, the other should be carried into effect.

Among the fundamental rules governing the construction of statutes all must admit the following to obtain; the duty of the court to arrive at the legislative will to be determined primarily from the language of the statute itself and to sweep aside all obstacles in accomplishing it; that statutes are to be construed as having only a prospective operation unless the purpose of the Legislature to give them a retroactive operation is expressly declared or necessarily implied from the language used. Applying these rules to the act, with § 3 eliminated, how can any ingenuous view of it or just interpretation justify the statement in the majority opinion: "Now, as * * * to future contracts, or to mortgages * * * subsequent to the effective date of the act, we think a careful examination of the act itself discloses that it has no application to the foreclosure of such contracts or mortgages." To support this statement, reference is made to the action of the Governor in vetoing a certain other bill and the subsequent passage of act No. 57 as persuasive of the interpretation that the latter act was intended to be retroactive only. This argument seems to me to be far-fetched, for it can make no difference what the Governor thought or did, as an application of the rule stated to the language of the statute makes plain the legislative intent without reference to extraneous sources. Section 3 of the act can apply to nothing save suits on mortgages, etc., executed prior to its passage. Included in the comprehensive terms of the remainder of the act are all suits to foreclose any mortgage. So that it might be both retroactive and prospective. In its retrospective effect, like § 3, it is in conflict with

the provisions of the Federal Constitution prohibiting legislation by the States which impair the obligation of existing contracts. In its prospective application it is not open to that objection and is constitutional. *Ogden* v. *Saunders,* 12 Wheat., page 295. This result is reached also by the application of the rule that where any doubt about the constitutionality of a statute exists it must be resolved in favor of its validity and the language given a construction which makes it constitutional, if it is reasonably susceptible to such construction (*Dobbs* v. *Holland*, 140 Ark. 398, 215 S. W. 709), and it will be sustained if there is any reasonable doubt of its unconstitutionality (*Little River County Board of Education* v. *Ashdown Special School District,* 156 Ark. 549, 247 S. W. 70); and where two constructions may be placed on the language of the act the construction will be adopted which will render the statute valid. *Booe* v. *Simms,* 139 Ark. 595, 215 S. W. 659. This rule, with that by which a statute is construed to have a prospective effect rather than a retroactive one (*Elrod* v. *Board of Imp.,* 171 Ark. 848, 298 S. W. 965), makes the statute effective as it relates to suits on mortgages executed after the passage of the act.

Learned counsel appearing as friends of the court, and who contend for the unconstitutionality of the act in its entirety, to my mind recognize the weakness of their position when they evoke visions of economic disaster which may result by reason of its enactment, and when they contend that it has practically dried up the streams of credit, so that home owners are unable to find relief from Federal agencies which, but for the provisions of the act, would lend money in order that the distress of the home owner might be relieved. This is an argument with which we have no concern. It is common school-boy knowledge that questions of policy are for legislative and not for judicial determination. It is possible that it was unwise to enact the law; it may be that good results might flow therefrom. But whether wise or foolish, good or ill, if this court remains within the restrictions placed by the Constitution on its powers,

it can do nothing. The argument made should be addressed to those authorities having the power to redress the wrong, if there be one, and not to us. This court, and all others has always recognized its limitations in these regards and has always refused to encroach on the domain of the Legislature.

MEHAFFY, J., (dissenting). I cannot agree with the majority, either in holding that the act has no application to future contracts, or in holding that the act is unconstitutional as to existing contracts.

The one statement in the majority opinion, however, to which we may all agree is the following: "The evident purpose of the Legislature was to relieve a present condition by applying the poultice of the act to the sore spot of deficiency judgments in foreclosures of mortgages caused by decline in realty values."

While the decline in realty values was partly the cause of the sore spot, it was not the whole cause. It is a matter of common knowledge that many loans were made in this State on real estate in 1920, and the years immediately following 1920, where the amount of the loan was fifty per cent. or less of the value of the property. In many instances the mortgage was on the homestead.

Many persons paid on these mortgages until 1930. In 1930 prices were so low that the price the farmer received for his crops was, in many instances, not more than the cost of producing the crop. It was therefore impossible for them to pay during that year. Many mortgagees took advantage of the accelerating clause in the contract, declared the entire amount due, foreclosed, purchased the property at foreclosure sale for less than twenty-five per cent. of its value, and secured a deficiency judgment for the balance. The money lender, therefore, in these instances, collected approximately half the money that he had loaned, took the farmer's home, and had a judgment against him for the balance. This is evidently the sore spot mentioned in the majority opinion.

I think, when conditions as described above existed, and the mortgagee took advantage of the accelerating clause in the contract, and, being the only bidder, purchased the property at less than twenty-five per cent. of its normal value, that this constitutes inequitable conduct, and should justify the court in ordering another sale where the mortgagee is the only bidder at the first sale. This court, however, has held to the contrary.

The court is bound to know the conditions. A court cannot blind its eyes to the knowledge of a fact which is notorious throughout its jurisdiction. 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. See *Federal Land Bank of St. Louis* v. *Ballentine,* 186 Ark. 141, 52 S. W. (2d) 965.

I think it was to relieve the people who were oppressed, as above described, that this act was passed.

Mr. Justice BUTLER, in a concurring opinion, has in my judgment shown very clearly that act 57 applies to future contracts. I agree with what he has said on this subject, and shall not discuss that feature of it at length. I think the entire act is valid.

The majority opinion cites and relies on the case of *McCracken* v. *Haywood,* 2 Howard 608. That case was decided nearly 100 years ago, and is based largely on the case of *Bronson* v. *Kinzie,* 1 Howard 311. In the last case mentioned, the court said:

"If the laws of the State passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a State may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it

to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional."

It therefore appears to me that the very cases relied on by the majority hold acts affecting the remedy constitutional.

It was also said in the case of *Bronson* v. *Kinzie, supra*: "Mortgages made since the passage of these laws must undoubtedly be governed by them; for every State has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction."

But the majority says that act 57 does not apply to future contracts. It says that the act does not, in express terms, apply to foreclosures on mortgages and deeds of trust on real estate to be hereafter executed.

The act is copied in the majority opinion and discussed at length by Mr. Justice BUTLER, but what the majority opinion says about the act not in express terms applying to future contracts may be said of seventy-five per cent. of the laws enacted in the last fifty years.

I am unable to understand how the court could reach the conclusion that act 57 applies to existing contracts only. The same reasoning would lead to the conclusion that most of the acts passed by the Arkansas Legislature apply to existing conditions and not to the future.

While the authorities are not entirely uniform, I think the great weight of authority is to the effect that one can have no vested right in a remedy, and that changing the remedy or depriving one of a remedy does not impair the obligation of a contract if it leaves him an efficient remedy.

"To deprive a person of the only legal remedy he has by which to enforce his rights is either to impair the obligation of a contract or deprive him of property

without due process of law. One may have a vested right to a remedy on contracts. He has no vested right to a *particular* remedy. A statute which said that he shall have no remedy whatever for the enforcement of an existing right is essentially different in its operation from one which withholds some particular pre-existent remedy and leaves him to the choice of those which remain to him. The decisions are almost uniform that, though a law which deprives one of all remedy is a law impairing the obligation of a contract, or one taking private property without due process of law, it is equally true that any particular remedy may be abrogated at the pleasure of the lawmaker, provided it leaves a substantial means of enforcing the right." Wade on Retroactive Laws, 201.

In the case of *Conkey* v. *Hart,* decided by the Court of Appeals of New York, 14 N. Y. R. 22, the court said:

"Between the execution of the lease and the issuing of the warrant the Legislature had passed an act entitled, 'An act to abolish distress for rent, and for other purposes,' the first section of which is in these words: 'Distress for rent is hereby abolished.' The Supreme Court held that this act in its application to a lease like the present, existing at the time of its passage, was in violation of that clause in the Constitution of the United States which forbids any State to pass a law impairing the obligation of contracts. The correctness of this determination is therefore to be considered.

"It is not to be overlooked that the stipulations of parties, with which the statute is supposed to interfere, relate to the remedy for a breach of the principal provision of the contract which provides for the payment of the rent. That obligation the statutes does not interfere with, but it may be enforced by all the means which the State furnished for the enforcement of other contracts. In this particular the question presented in this case differs from that in any of the cases which have been considered in the Supreme Court of the United States. * * * All the cases recognize the obvious distinction between impairing the obligation of the contract and altering the remedy for a breach of it, and acknowledge

the power of the State over the latter, while maintaining its want of power to impair the obligation of the contract."

It was stated in the case of *People* v. *La Fetra,* 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152, that a State may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power, although the rights of private property are thereby curtailed and freedom of contract thereby abrogated.

The Legislature evidently knew the conditions existing in this State at the time of the passage of this act, and passed this act for the purpose of giving some relief.

The Supreme Court of Arizona said: "We understand the rule to be that parties have no vested right in particular remedies or modes of procedure, and that Legislature may change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts, provided an efficacious remedy remains for its enforcement." *Brotherhood of American Yoemen* v. *Manz,* 23 Ariz. 610, 306 Pac. 403.

The Court of Appeals of Kentucky, in discussing the statute changing the remedy as to liability of stockholders, said:

"The statutes bear upon the remedy only. The liability of the stockholders remains the same as it was prior to their passage. * * *

"Thus where, at the time of the insolvency, the only remedy against the shareholders was by proceedings in equity on the part of the bill holders, and subsequently, pending the liquidation of the affairs of the bank, a new statute was passed creating the machinery of the Bank Commissioner, and providing a simple and expeditious means whereby they could enforce collections from shareholders, it was held that the shareholders in the already insolvent bank could not object to the application of this new statute to their own case. It bore on the remedy only, not upon the liability." *Hughes* v. *Marvin,* 216 Ky. 190, 287 S. W. 561.

The Supreme Court of Arizona held a law valid which contained the following paragraph: "All mort-

gages of real property and all deeds of trust in the nature of mortgages shall, notwithstanding any provision contained in the mortgage, be foreclosed by action in a court of competent jurisdiction."

The court said: "This is a remedial statute, and it is well settled that laws changing the remedy or substituting another and different remedy are valid, so long as they do not impair the obligation of contracts." *Schwertner* v. *Provident Mut. Bldg.-Loan Ass'n,* 17 Ariz. 93, 148 Pac. 910.

"Modes of procedure in the courts of a State are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away." *Ry. Co.* v. *La.,* 157 U. S. 219, 15 S. Ct. 581.

"It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes or procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract." *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 23 S. Ct. 234; *Nat. Surety Co.* v. *Architectural Decorating Co.,* 226 U. S. 276, 33 S. Ct. 17; *Wright* v. *Wimberly,* 94 Ore. 1, 184 Pac. 740.

Act 57 was evidently passed by the Legislature with a view of relieving the people of Arkansas from an

intolerable condition. While I might cite many other cases, the above citations are sufficient to show how the courts generally hold on questions of this kind.

The obligation of the contract is not impaired by the act, and the mortgagee is not deprived of a remedy by which he can enforce the collection of his debt. He may bring a suit at law on the note or bond, obtain a judgment, sell the mortgaged property, and, if it does not sell for enough to pay the debt, he can sell any other property belonging to the debtor. If he does not want to go into court, he may advertise and sell under the power of sale in the mortgage, purchase the property himself, make a deed to himself, and then sue at law for the difference between the amount of the debt and the amount for which the property was purchased.

The enactment of this law did not deprive the mortgagee of the right to bring his suit at law, nor deprive him of the right to sell under the power of sale in the mortgage, and, by the great weight of authority, act 57 does not impair the obligation of a contract.

I think the act is valid and should be upheld. Mr. Justice HUMPHREYS agrees with me that the act should be upheld.

BLACKBURN *v.* TURNER.

4-3044

Opinion delivered June 19, 1933

Buzbee, Pugh & Harrison, for appellant.

Partain & Agee and *Vincent M. Miles,* for appellee.

MCHANEY, J. Only a question of fact is involved in this appeal. Appellee was a guest in appellant's car,

with others, when she was injured, as alleged by her, when "about four miles west of the town of Ozark, the defendant carelessly and negligently drove said automobile at a high, negligent, dangerous and unlawful rate of speed and in a careless and negligent manner and thus caused said automobile to skid and turn over several times." A trial resulted in a verdict and judgment against appellant in the sum of $3,000.

Appellee testified that she did not know what caused the accident; that the car skidded and went in the ditch and turned over a time or two; that she did not know how fast appellant was driving. Appellant testified that he was not a fast driver, was driving at the time about 20 miles per hour, around a curve on a wet road about 40 feet wide, and that the car skidded about 75 to 100 feet before going into the ditch. He was an experienced driver. The mechanic who went to get the car after the wreck testified there were no skid marks; that it seemed to him, from an examination of the situation shortly afterwards, that appellant simply failed to take the curve and drove off the highway and into the ditch. We think this evidence was sufficient to take the case to the jury as to whether appellant was driving in a careless and negligent manner, whether he was giving to the driving of the car the attention necessary at the time. The court instructed the jury that, if the accident was caused solely by the skidding of the automobile and appellant was not at fault in that respect, the verdict should be for appellant.

Since the evidence was sufficient to take the case to the jury, and no other error being assigned or relied upon, the judgment must be affirmed.

MARYLAND CASUALTY COMPANY *v.* DAVENPORT.

4-3110-11-12-13

Opinion delivered June 19, 1933

Brewer & Cracraft, for petitioner.

A. M. Coates, for respondent.

BUTLER, J. Four suits were instituted in the Phillips Circuit Court against the Maryland Casualty Company to recover the value of work done and material furnished by the plaintiffs to Lynch Bros., while they were engaged in the construction of a portion of the levee system along the right bank of the Mississippi River near Helena. The Casualty Company demurred to the jurisdiction of the court, and, the demurrer being overruled, filed its application for a writ of prohibition in each case, alleging the sole and exclusive jurisdiction of the United States District Court over the subject-matter, and making as a part of its several petitions a copy of the complaints filed in the cases, the original contract entered into between Lynch Bros. and the United States Government, the bond executed by the Casualty Company, and a supplemental agreement later entered into between the Government, Lynch Bros. and the Casualty Company.

It is the contention of the petitioner that the liability of the Casualty Company is predicated upon the bond first executed to guarantee the performance by Lynch Bros. under their contract to build the levees and to pay the laborers and materialmen. The respondent contends that the several causes of action are grounded on the supplemental agreement by the terms of which, it is insisted, the Casualty Company became primarily liable for all of the debts incurred by Lynch Bros. without regard to the terms of the bond executed by it.

It appears from the petition and the exhibits that Lynch Bros. entered into a contract with the United States Government on October 31, 1931, to build a cer-

tain portion of the levee system along the Mississippi River in Phillips County, Arkansas. At that time the Casualty Company executed a bond as provided by the Federal statute, now § 270, title 40, of the United States Code Annotated, generally designated as the "Hurd Act." This bond was executed in the penal sum of $15,000, conditioned that the contractors should perform the work as specified, and that they should promptly pay all persons supplying labor and material in the prosecution of the work provided for in the contract. The contractors began the performance of the contract and continued until July, 1932, when the Government, becoming dissatisfied with the manner in which the contractors were performing the work, exercised the right given it in the contract and notified the contractors that they had failed to exercise proper diligence, and that it would take over the contract, finish the work, charging to the contractors and the surety any excess costs that might be occasioned. The surety thereupon expressed the desire to take over the contract and complete the work. This was acceded to, and a writing was executed designated as a "supplemental agreement."

The petitioner insists that the obligation of the casualty company to pay the debts incurred by Lynch Bros. during the time they were engaged in the performance of the work and before the Casualty Company took it over arises out of the bond which it executed to the United States Government, and that, because of this, the jurisdiction to hear and determine the controversy is in the United States District Court under the terms of the Hurd Act, *supra*. This act provides that, if the general government does not bring suit within six months from the completion of the work, those supplying labor and material will be furnished a certified copy of the contract and bond by the department of the Government under whose direction the work is done, and "he or they shall have a right of action and shall be and are hereby authorized to bring suit in the name of the United States, in the district court of the United States in the district in which said contract was to be performed and

executed, irrespective of the amount in controversy in said suit and not elsewhere, for his or their use and benefit against said contractor and his sureties." The act further provides that there shall be only one suit in which all creditors must intervene and have their rights adjudicated upon proper notice.

The respondent does not question the propriety of the remedy invoked, and concedes that, under the provisions of the statute referred to, *supra,* as construed by the Supreme Court of the *United States in Texas, etc., Co.* v. *McCord,* 223 U. S. 157, 34 S. Ct. 550; *Miller* v. *American Bonding Co.,* 257 U. S. 247, 42 S. Ct. 98, and *United States* v. *Congress Construction Co.,* 222 U. S. 199, 32 S. Ct. 44, in suits to enforce liability arising out of the obligations of a bond given under the provisions of that act, jurisdiction is lodged in the United States District Courts and not elsewhere. Respondent contends, however, as previously noted, that the suits filed in the Phillips County Circuit Court are not based upon the bond executed by the casualty company, but upon the contract of July 23, 1932, in which it is claimed the Casualty Company agreed with Lynch Bros. to assume their place in the original contract and to complete the same, paying the debts incurred by them while they were engaged in constructing the levee; that this had the effect of substituting the Casualty Company as the principal contractor and subjected it to suits in any courts of superior general jurisdiction.

Article 9 of the original contract between Lynch Bros. and the United States Government provides: "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article I, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his

sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue work, in which event the actual damages for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof."

By the terms of the bond, the Casualty Company undertook to guarantee that the contractors would perform and fulfill all of the undertakings, covenants, etc., of the contract, and that they should promptly make payment to all persons furnishing labor and material in the prosecution of the work. The supplemental agreement refers to the contract first entered into between the Government and Lynch Bros., reciting the execution of the bond with the Casualty Company as surety, and makes said contract and said bond a part of the agreement as "if physically attached and copied herein." It further recites the inability of Lynch Bros. to complete the work within the time limited in the contract, and that "it is to the manifest interest of the United States of America, to the contractor and to the surety on the contractor's bond, that arrangements be made immediately to put on sufficient forces to complete the work called for by said contract within the time therein limited." It further recites the willingness of the contractor and the United States Government to permit the surety to take over and complete the said contract, and, continuing, provides:

"Now therefore it is mutually understood and agreed by and between James and Leo Lynch, partners doing business as Lynch Brothers, hereinafter designated 'Con-

tractor,' and the United States of America, hereinafter designated 'Government,' and Maryland Casualty Company of Baltimore, Maryland, hereinafter designated 'Surety' as supplemental to said original contract between said government and contractor as follows, to-wit:

"1. That effective at six o'clock P. M., July 23, 1932, by and with the consent of the Government, said aforesaid contract for construction of earthwork in the White River Levee District is turned over by said contractor to the said Maryland Casualty Company, its surety, and by these presents the said surety company hereby agrees to perform all the work called for by said contract according to the terms thereof and the plans and specifications made a part thereof.

"2. It is further agreed that the surety shall receive payment for all work performed and materials furnished pursuant to the terms of said original contract of October 31, 1931, between the contractor and Government, and that the surety shall be paid all retained percentages of labor and/or materials thereto before furnished by and due to said contractor under the terms of said original contract, and all sums due said contractor, payment of which is withheld by the Government pursuant to the terms of said original contract, it always being understood and agreed that the government shall have the right to retain any payments due to it as deductions under the original contract in accordance with the terms and provisions thereof until due thereunder.

"3. The surety agrees and undertakes that it will take over said original contract as of six o'clock P. M. Saturday, July 23, 1932, and to perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract as therein stipulated.

"4. The surety further agrees, on final approval of the work by the contracting officer designated in said original contract and receipt by it of final payment of sums due thereunder, to pay or cause to be paid, under direction of said contracting officer, any balance due said

original contractor, after payment of costs of completion and all outstanding bills for labor and/or materials, and/or services performed or rendered and/or amounts chargeable against the carrying out of the contract of the original contractor and the performance of the work undertaken by it under said original contract."

When the original contract, the bond and the supplemental agreement are considered together, as they must be, it is clear that the contention that the casualty company took the place of the original contractors can be sustained only as to its operation after the execution of the supplemental agreement, and its liability extended only as to such indebtedness as might be incurred in the prosecution of the work after that date, its relation to the principals in the original contract remaining unaltered as the liability under the first contract and bond to secure its performance is expressly recognized and incorporated in the agreement. Its liability for the payment of all material which had been furnished or work done in the prosecution of the construction before the date of the supplemental agreement was already fixed and the payment guaranteed up to an amount specified in the bond. The argument advanced as a reason for the extension of the liability of the casualty company to the effect that it received a valuable consideration for entering into the supplemental agreement in that it received some six or eight thousand dollars already earned by Lynch Bros. is without merit, as it is apparent under the terms of the agreement that whatever sums it received, earned by the original contractor, were paid to it only for the purpose of being disbursed in payment for material or labor, and any sums earned above the actual cost of the construction were, by the express terms of the agreement, to be paid to the original contractor.

We are of the opinion therefore that the claims sued on are liabilities of the casualty company only because of its undertaking in the bond, for it is stated and not denied that they are for material and labor furnished to Lynch Bros. before the Casualty Company took over the contract under the supplemental agreement. The pro-

visions of the Hurd Act are therefore applicable, and the claimants must have their rights adjudicated in the United States District Court, the Phillips Circuit Court is without jurisdiction over the subject-matter, and the petitioner is entitled to the relief prayed. Let the writ be granted.

MEHAFFY, J., (dissenting). I cannot agree with the majority in granting a writ of prohibition against the judge, thereby preventing him from trying the case brought by the plaintiffs against the Maryland Casualty Company.

Section 270 of title 40, U. S. Code, Annotated, provides for persons who enter into contracts with the United States for certain purposes, giving a bond with good and sufficient securities. The section also provides that persons furnishing labor or materials shall have a right to intervene and be made parties to any action instituted by the United States on the bond of the contractor. The section also provides that, if suit is not brought by the United States within six months, persons supplying the contractor with labor or materials shall have a right of action and are authorized to bring suit in the district court of the United States, and not elsewhere.

It will be observed that this provides for a suit on the bond of the contract. The suits in this case were not on the bond. The facts are stated in the majority opinion, and will not be restated here.

One of the sections of the supplemental contract is as follows: "The surety agrees and undertakes that it will take over said original contract as of six o'clock P. M., Saturday, July 23, 1932, and to perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract as therein stipulated."

In section 4 the surety company agrees to pay or cause to be paid any balance due the original contractors after payment of costs of completion and all outstanding bills for labor or materials. It is therefore expressly agreed that it will take the place of the contractor, and

not only complete the work, but pay all outstanding bills, bills that were outstanding at the time it took over the contract. It was upon this agreement, and upon the taking over the contract by the surety company, that these suits were based. They were not based on the bond, and the Federal Court would have no jurisdiction, and there is no authority under the Hurd Act for bringing a suit of this kind in the Federal Court. The Hurd Act authorizes suits brought in the Federal Court where the suit is on the bond.

A suit was brought in the State court in New York on an agreement of the contractor to give bond. He had entered into the contract and promised to give the bond required by the Hurd Act, but had failed to do so. The city court held that there was no remedy whatever. The case was then appealed, and the appellate term took the view that the contractors' obligation was independent of the bond, which was important only as fixing the obligation and defining the procedure in an action against the surety. The judgment of the city court was reversed, and the cause was then tried in the appellate division, which reversed the judgment of the appellate term holding that the proper remedy was an action in the Federal Courts, the procedure to be the same as if the bond were in existence.

The Court of Appeals in New York held that the judgment of the appellate term must be affirmed, that is, that the contractors' obligation was independent of the bond, and that the suit was properly brought in the State court.

As I have already said, this suit was not brought on the bond, but was brought on the supplemental contract. Whether the plaintiffs were entitled to recover on that contract is not involved. Certainly the bond was not in any way involved, and, that being true, the circuit court had jurisdiction. It is wholly immaterial whether the plaintiffs could have recovered, but, under the pleadings, the suit, I think, was unquestionably within the jurisdiction of the circuit court.

When the contractor failed and the surety took the place of the contractor, it became liable as a contractor, without any regard to whether it had signed a bond or not. Besides that, it expressly agreed to pay all claims. It was not liable for all claims under bond, but was only liable for $15,000. The surety took over the contract for its protection. It received a considerable sum of money that was due the contractors, and received the retained percentages, and whatever profit it made by completing the work.

I think the effect of the majority opinion is practically the same as the holding of the city court in New York in the case above cited. This is, that the material furnishers and laborers were without remedy.

A contract was made for the construction of a courthouse in Lenawee County, Michigan, and bond was given with sureties for the due performance of the contract. The contractors proceeded, for a time, just as Lynch Bros. did in this case, and then failed, and the sureties for their own protection took an assignment of the contract and went on with the work. The claims sought to be collected were claims against the original contractors, and not contracted after the sureties took charge. The court said:

"In our opinion that is an immaterial fact. The relators step into the shoes of the contractors." *Knapp* v. *Swaney,* 23 N. W. 162; *United States to use of Zambetti* v. *American Fence Const. Co.,* 15 Fed. (2d) 449.

"The claims and demands of the casualty company, the plaintiff in this action, are based in large part upon the provisions of the contracts made by the Board of Water Commissioners with the Loyd Company, for which the bonding company was surety. All the facts lead to the conclusion that what happened in this case was that the surety company elected to complete the contracts of its principal. When it did so, it took the place of the contractor." *Maryland Cas. Co.* v. *Bd. of Water Com'rs,* 43 Fed. (2d) 418.

"The surety was already engaged in carrying out the original contract, and it continued therein to the end.

* * * When the surety elected to complete the contract, it took the place of the contractor. The law is not that it thereby only took the possible benefits of that position. Its position was no different to that of an assignee of the contract. Such assignee would take subject to all prior mechanics' liens; and so did the surety." *Harley* v. *Mapes-Reeve Const. Co.,* 68 N. Y. S. 191.

"When contractor stopped, surety simply took its place and went on to finish the work. What its rights may have been if it too had declined to finish, and commissioners had completed, are matters and questions not before us. What did happen was that the surety stepped into the contractor's shoes and finished the work, and neither surety nor commissioners were in any different position than if contractor had itself finished the work and called on the commissioners to settle." *Fidelity & Deposit Co. of Md.* v. *Hay,* 9 Fed. (2d) 749.

I think it would be unjust and unreasonable to hold that the surety company could take over the work when the contractors failed, in the manner that the surety company did in this case, and then be relieved from liability or require the parties to go into Federal court, where they would only get their proportionate share of the $15,000, if they could, in fact, recover anything.

I think the writ should have been denied.

STATE USE SCHOOL DISTRICT NO. 14 *v.* AMERICAN SURETY COMPANY.

4-3114

Opinion delivered June 26, 1933.

W. E. Beloate and *Horace Chamberlin,* for appellant.

Cunningham & Cunningham, W. P. Smith and *J. H. Townsend,* for appellees.

JOHNSON, C. J., (after stating the facts). It will be seen from the statement of facts that this is a suit, primarily, upon the bond of the county treasurer of Lawrence County. In the outset we are confronted with the question of jurisdiction of the trial court.

Section 1165 of Crawford & Moses' Digest, in part, reads as follows: "Actions for the following causes must be brought in the county where the cause or some part thereof arose. * * * Third: On actions upon the official bond of a public officer, except as provided in § 1175."

Section 1175 of Crawford & Moses' Digest reads as follows:

"All actions for debts due the State of Arkansas, and all actions in favor of any State officer, State board or commissioner, in their official capacity, and all actions which are authorized by law to be brought in the name of the State and all actions against such boards or commissioners or State officer, for or on account of any official act done or omitted to be done, shall be brought and prosecuted in the county where the defendant resides."

In the case of *Edwards* v. *Jackson,* 176 Ark. 107, 2 S. W. (2d) 44, which was an action against the sheriff of Montgomery County and the sureties on his bond as such, and was brought in the Polk County Circuit Court, it was alleged by the plaintiff in that suit that her husband had been wrongfully killed by the sheriff's posse, certain members thereof being residents of Polk County, who were served with process in that county. It was there insisted that, as the Polk County residents had been properly sued and served with process in that county, the right existed to sue the sheriff as a joint tort-feasor, in that county. We held, however, that an action upon the official bond of a county officer had been localized by § 1165, Crawford & Moses' Digest, and could be brought only in the county in which the cause of action arose, and the suit against the sheriff and his sureties was dismissed upon demurrer, for the reason that the Polk Circuit Court was without jurisdiction of the cause of action, notwithstanding the allegation that all of the defendants were joint tort-feasors, two of whom had been properly sued in Polk County.

In the more recent case of *Leonard* v. *Henry, ante* p. 75, this court again approved the doctrine announced in *Edwards* v. *Jackson,* and used the following

language in reference thereto: "The language and meaning of the statute on the questions involved herein is so plain as to admit of no construction. It was within the competency of the Legislature to enact it; it is not in conflict with the Constitution of the State, and does not deprive appellants of any rights guaranteed by the Constitution of the United States.

"The venue of the action, as shown by the allegations of the complaint, was in Montgomery County, where the cause arose, no part of it having arisen in Polk County, where the suit was brought, and the demurrer was properly sustained. *Bledsoe* v. *Pierce Williams Co.*, 147 Ark. 51, 226 S. W. 532; *Reed* v. *Williams*, 163 Ark. 520, 260 S. W. 438."

From what we have said, it is perfectly evident that the venue of this action, as shown by the allegations of the complaint, was in Lawrence County, where the cause of action arose and where the official bond of the treasurer was executed, and not in Pulaski County, where the suit was filed.

It is not necessary to discuss other interesting questions presented in briefs.

For the error indicated, the judgment of the Pulaski County Circuit Court is reversed, and the cause of action dismissed.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE *v.* BAREFIELD.

4-3042

Opinion delivered June 26, 1933.

Moreau P. Estes, for appellant.

John G. Rye and *J. B. Ward,* for appellee.

SMITH, J. This is a suit on an accident policy, and from a judgment in favor of the insured is this appeal.

The complaint alleged that the plaintiff was traveling north in a Ford coupe, in company with his son, when they met a large sedan traveling in the opposite direction at a high rate of speed, and just as the cars were passing the sedan ran over a stick and "flipped the said stick in the direction of the car in which the plaintiff was riding, striking the said car at the front of the left-hand door. The stick was hurled into the car and struck the plaintiff in the right eye, causing said plaintiff to lose the total and irrecoverable sight of said right eye. That the accident above referred to is covered by the terms of said policy; that said accident occurred while said policy was in full force and effect."

The cause was heard on a stipulation, which recited that "the facts are as stated in the complaint at law filed by the plaintiff, and, if the facts so stated make out a case of liability against the defendant in favor of the plaintiff, the court is authorized to render a judgment

against the defendant in favor of the plaintiff for the sum of $1,625, and penalty of 12 per cent. if the court finds plaintiff is entitled to said penalty from the facts stipulated herein, subject to defendant's right to except and appeal to the Supreme Court of Arkansas for a reversal of such judgment."

The stipulation incorporated the relevant portion of the policy sued on, which reads as follows: The appellant insures the plaintiff against the result of certain bodily injuries, including the loss of an eye, "if the insured shall [suffer such injuries] by the collision of or by any accident to any railroad passenger car, passenger steamship, public omnibus, street railway car, taxicab or automobile, stage or bus, which is being driven or operated at the time by a person regularly employed for that purpose, and in which such insured is traveling as a fare-paying passenger or on which he is lawfully riding on a pass; or by the collision of or by any accident to any private horse-drawn vehicle or private motor-driven car in which insured is riding or driving; or shall [suffer them] by any accident to any passenger elevator in which insured is riding as a passenger; provided that in all cases referred to in this paragraph there shall be some external or visible evidence on said vehicle of the collision or accident."

For the reversal of the judgment of the court below, it is insisted that, under the stipulation as to the facts, there is no evidence that there was any "external or visible evidence on said vehicle of a collision or accident," as required by the policy, and also that no causal connection was shown between the loss of the eye and the accident to the car.

It appears, however, that there was an accident to the car. It was an accident, within the meaning of the policy, for the flying stick to strike the car, and in striking the car the stick was deflected so as to strike the plaintiff and cause the loss of his eye, and, if it be said that there was left no external or visible evidence on the car of the accident, this provision was in the nature of an exception to the event insured against, to-wit, that

the insured, while riding in one car, should be accidentally injured through the operation of another. Plaintiff having made proof that he was so injured, the burden was upon the insurer to show that the case fell within an exception to the contract by which the insurer had indemnified the insured against such an injury.

The rule appears to be that, when proof is made of damage apparently within a policy of insurance, the burden is on the insurer to show that the injury or damage was caused by an event from the occurrence of which the insured had exempted itself from liability. The rule is stated at § 599 of the chapter on Insurance in 14 R. C. L., page 1437, as follows: "Where proof is made of a loss apparently within a policy, the burden is on the insurer to prove that the loss arose from a cause for which it is not liable. Accordingly, while the plaintiff in an action on an accident policy must prove that the death was caused by accidental means, yet where *prima facie* evidence of that fact has been adduced, the defendant must show that the death of the insured resulted from an excepted cause."

The following, among other decisions of this court, are to the same effect: *Grand Lodge, A. O. U. W.,* v. *Banister,* 80 Ark. 190, 96 S. W. 742; *Continental Casualty Co.* v. *Todd,* 82 Ark. 214, 101 S. W. 268; *Ætna Life Ins. Co.* v. *Taylor,* 128 Ark. 155, 193 S. W. 540; *Harrison* v. *Interstate Business Men's Acc. Ass'n,* 133 Ark. 163, 202 S. W. 34; *Mutual Life Ins. Co. of New York* v. *Raymond,* 176 Ark. 879, 4 S. W. (2d) 536.

We are of the opinion also that there was such causal connection, under the provisions of the policy, between the accident and the injury as to sustain the judgment of the court. The flipping of the stick was clearly an accident. The stick was thrown against the car, and, after striking the car, was so deflected that it struck the plaintiff and injured him. That the stick did strike the car, and was deflected in so doing, is a fact which the parties have stipulated to be true, and this stipulation, in our opinion, distinguishes the instant case from that of *Life & Casualty Ins. Co. of Tennessee* v. *Whitehurst,*

148 So. 162, decided by the Court of Appeals of Alabama, which was cited by appellant and relied upon as announcing the legal principle which should control our decision.

It is finally insisted that the trial court erred in assessing a penalty and attorney's fee in this case, for the reason that the insurer had defended in good faith under the belief that it was not liable. We have held, however, to the contrary. The plaintiff recovered the full amount sued for; indeed, there was a stipulation declaring the extent of the liability if the insurer was liable at all, and the fact that the assertion of nonliability was made in good faith is no valid defense to the assessment of a penalty and the allowance of an attorney's fee, as provided in § 6155, Crawford & Moses' Digest. There was a review of what we regarded as the controlling authorities upon this subject in the recent case of *Missouri State Life Ins. Co.* v. *Fodrea,* 185 Ark. 155, 46 S. W. (2d) 638, and we do not again review them.

As we construe the contract sued on, the judgment is correct, and it is therefore affirmed.

WASSON *v.* STATE USE LONOKE COUNTY.

4-3154

Opinion delivered June 26, 1933.

Trieber & Lasley, for appellant.

George F. Hartje and *Chas. A. Walls,* for appellee.

HUMPHREYS, J. This is an appeal from a decree of the chancery court of Pulaski County requiring appellants to pay appellees $17,734.24 on special deposit in the

People's Bank under a depository agreement between Lonoke County as party of the first part, the People's Trust Company, party of the second part, and Bankers' Trust Company, party of the third part. The duties of the party of the third part were to hold the bonds deposited by the People's Trust Company to secure the deposits of the public fund to be made from time to time, dependent upon the amount deposited. The People's Trust Company continued to act as the depository of Lonoke County until the Bank Commissioner took charge of its assets on May 2, 1933, pursuant to act 88 of the Acts of the General Assembly of 1933. The designation of the People's Trust Company as the depository of Lonoke County grew out of the failure of the Lonoke County Bank, which was the regularly designated depository for said county under the provisions of act 163 of the Acts of the General Assembly of 1927. The People's Trust Company was designated as the depository of said county under the provisions of the same act. Appellant attacked the validity of the order constituting the People's Trust Company the depository of Lonoke County as well as the agreement or contract entered into between them on the ground that in both it was provided that the People's Trust Company should pay no interest for the use of the money, although the act provided for the payment of 4 per cent. interest, and for that reason asked that the collaterals of $49,000 securing the public funds be released for the benefit of the general creditors of the People's Trust Company, and that the money set aside as a special deposit be declared a general deposit. The case went off on demurrer. One paragraph of the complaint states the gist of the contention of appellant, which is as follows:

"Plaintiff further states that Marion Wasson, as Bank Commissioner in charge for management of People's Trust Company, has refused to pay over to Lonoke County the balance of $17,734.24 of its deposits on the ground that the pledge of securities under the contract between Lonoke County and People's Trust Company, whereby the latter was designated as depository and

under which said funds were deposited, was unauthorized and void, inasmuch as no interest was to be paid on said deposit, and for that reason People's Trust Company had no legal right to pledge any of its assets as security for the public funds so deposited."

The People's Trust Company acted as the depository of Lonoke County for about a year and had the free use of the public money during that period. The average deposit during that period was about $50,000. When the commissioner took charge, the status of all creditors was fixed as the contract was an executed one and performed as far as possible.

The facts bring the instant case within the rule adopted and announced in the case of *State ex rel. Independence County* v. *Citizens' Bank & Trust Company,* 119 Ark. 617, 178 S. W. 929, as follows:

"The principal of law controlling here may be stated in the language of Mr. Justice SWAYNE, speaking for the Supreme Court of the United States in *Union National Bank* v. *Matthews,* 25 U. S. (L. C. P. edition) 188-190. 'A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains.' While this is not strictly a contract *inter partes,* it is the same in legal effect, and the same principal applies hereto."

We regard this case as parallel in its salient points and controlling; so we deem it unnecessary to refer to the other cases cited in the briefs.

No error appearing, the decree is affirmed.

STOKES *v.* FARMERS' BANK OF HARDY.

4-3040

Opinion delivered June 26, 1933.

Coleman & Reeder, for appellant.

Sidney Kelley and *Gus Causbie,* for appellee.

KIRBY, J., (after stating the facts). Appellants insist that the court erred in not holding the note invalid as executed for accommodation of the bank, with the understanding it was not to be paid and without consideration.

The testimony showed that the president of the bank, Metcalf, who had just taken charge of the bank's affairs to save it if it could be done, was not responsible for its condition any more than appellants, that he stated the bank's condition to them and the necessity for the contribution or assessment in order to prevent and avoid the necessity for assessments against the stockholders that it might continue business without such assessment and with capital unimpaired. That they gave their note for the purpose of taking up the bad paper upon the agreement of the bank president to match the amount thereof in cash, which was done. This furnished, of course, sufficient consideration for the note. *Jones* v. *Green,* 173 Ark. 846, 293 S. W. 749; *Ellis* v. *Jonesboro Trust Co.,* 179 Ark. 615, 17 S. W. (2d) 324.

It makes no difference, so far as such consideration was concerned, that Metcalf later bought and took up $1,428 worth of the notes in the bank, whether they were bad paper or not, since he paid in cash the value thereof.

The note sued on was not conditional, and Metcalf, with whom the agreement was made for its execution, paid the amount as he agreed to do and used same in taking out the bad paper of the bank and prevented an assessment of stockholders or impairment of the capital.

The note was a valid obligation made for a valuable consideration, of which the court correctly found there was no failure, upon testimony amply sufficient to sustain the finding, and returned judgment thereon accordingly. *Ellis* v. *Jonesboro Trust Co., supra.*

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

CURLIN *v.* WATSON.

4-3137

Opinion delivered June 26, 1933.

R. V. Wheeler, for appellant.

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

MEHAFFY, J. The appellant began this suit in the Pulaski Chancery Court alleging that he is the duly qualified and acting sheriff of Crittenden County, Arkansas, for the term ending December 31, 1934, and that the appellee is the duly qualified and acting Commissioner of Revenue of the State of Arkansas; that under the provisions and authority of §§ 29, 30, 31, 32 and 33 of act No. 65 of the General Assembly of 1929 the appellant, as sheriff, is charged with the duty of collecting, under the State Highway Commission, the motor vehicle tax as provided in said act; that such act was amendatory of the laws previously in force; that under preceding sections of the same act the State Highway Commission is charged with the supervision of the collection of said motor vehicle tax, preparation of supplies for use in collecting said tax, including the metal tags for use on the motor vehicle as evidence of the fact of payment, and the auditing of the accounts of the various sheriffs in connection with such collection; that, under the provisions of § 30 of said act, the appellant is entitled to 35 cents from each collection made, as a fee for his services; that, during the session of the General Assembly for the year 1933, acts No. 9 and No. 94 were passed, which, while not stating that they were amendments to said act No. 65, are to a certain extent amendments thereto.

It was further alleged that the only effect of the acts of 1933 was to transfer the duties of the State Highway Commission to the Revenue Department, but leaving act 65 in full force as to all duties enjoined upon the sheriff under said act; that the appellee has notified appellant and other sheriffs that he will undertake on July first all duties under said act 65, and will not allow the sheriffs to exercise any functions under said act, and will not furnish them with any supplies for use in connection with such collection.

Appellant prayed an order restraining the Commissioner of Revenue from acting under act No. 94 of the Acts of 1933.

Appellee filed answer admitting that he would, on July 1, 1933, proceed to collect the motor vehicle tax, and would not recognize the sheriffs as having any duties in connection with said collections; and he admitted that one of the effects of the construction placed upon said act would deprive the sheriffs of the fee for services performed, and that in all acts in connection with such tax, appellee would be acting as Revenue Commissioner of the State of Arkansas.

This cause was submitted to the court upon complaint and answer, and the court entered a decree dismissing the complaint for want of equity. The case is here on appeal.

Act No. 9 referred to by appellant, transferred the duties enjoined upon the highway commission and highway department in relation to the registration and license fees on automobiles, trucks, tractors, motorcycles and all other motor vehicles to the Revenue Department.

Act No. 94 reads as follows: "Section 1. Beginning July 1, 1933, the Commissioner of Revenues shall collect the motor vehicle license fees prescribed by law, and he is empowered to make and enforce the necessary rules and regulations to insure such collections."

The only question for our consideration is whether act No. 94 makes it the duty of the Commissioner of Revenues to collect the motor vehicle license fees, and repeals that part of the law with reference to the collection of this tax by sheriffs.

Act No. 94 is plain and unambiguous, and in express terms requires the Commissioner of Revenues to collect the taxes. It is in direct conflict with the provisions of act No. 65 of 1929.

While the law does not favor repeal of a statute by implication, yet subsequent legislation repeals previous legislation with which it is in conflict, whether it expressly declares such repeal or not. An implied repeal results when the later act cannot be harmonized with the terms and necessary effect of an earlier act. In such case the later law prevails as the last expression of the legislative will. When the repugnancy is ascertained, the later act,

in date, has full force, and displaces by repeal whatever in the earlier act is inconsistent with it, and this is true whether it expressly declares such repeal or not. Lewis' Sutherland Statutory Construction, vol. 1, 461 *et seq; Massey* v. *State use Prairie County,* 168 Ark. 174, 269 S. W. 567; *Mays* v. *Phillips County,* 168 Ark. 829, 274 S. W. 5, 279 S. W. 366; *Standley* v. *County Board of Education,* 170 Ark. 1, 277 S. W. 559; *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649; *State* v. *White,* 170 Ark. 880, 281 S. W. 678; *Ouachita County* v. *Stone,* 173 Ark. 1004, 293 S. W. 1021.

As repeal by implication is not favored, in order that a later statute repeal a former statute by implication, there must be such a positive repugnancy between the two laws that they cannot stand together, and there must be irreconcilable conflict. When, however, two acts relating to the same subject are necessarily repugnant to or in conflict with each other, the later act must control, and, to the extent of such repugnancy or conflict, operates as a repeal of the prior act, whether so expressly declared or not. *State* v. *Bain,* 172 Ark. 480, 289 S. W. 324.

Act No. 94 of the Acts of 1933 is in irreconcilable conflict with the prior law with reference to the collection of motor vehicle licenses, and the later act must control.

The decree of the chancery court is affirmed.

ROETZEL *v.* ADAMS.

4-3057

Opinion delivered June 26, 1933.

Golden Blount and *Brundidge & Neelly,* for appellant.

John E. Miller and *C. E. Yingling, Marvin T. Reed, W. H. Gregory,* for appellee.

BUTLER, J. In the latter part of November, 1930, the Citizens' Bank of Bald Knob, having closed its doors and seeking to reopen, was required by the State Bank Commissioner to strengthen its capital structure in the sum of $5,000. This money was procured, and the bank reopened and continued in business for a time, but again closed its doors and was taken over by the Banking Department as an insolvent corporation, for purposes of liquidation.

In the proceedings relating to this matter, J. A. Roetzel intervened, alleging that the money above referred to had been secured from him on the 24th day

of November, 1930, and paid by him into the Citizens' Bank of Bald Knob, payment of which was guaranteed by a contract signed by certain persons who were directors and stockholders in said bank for themselves and the remaining stockholders, and that subsequently at a regular meeting of the stockholders the contract had been ratified by all the stockholders present in person or by proxy. It was alleged that payment had not been made, and judgment was prayed for the allowance of appellant's claim against the bank as a preferred claim and for judgment against all of the stockholders by reason of their guaranty.

The stockholders were made parties defendant, and various pleadings were filed by the bank and these defendants. The cause was submitted to the court upon the intervention of appellant, the exhibits thereto, the demurrers and other pleas filed by the respective parties. The court decreed that the defendants, Bing Moody, W. C. Crenshaw, J. W. Coombe, John Q. Adams, J. R. Kilman and L. B. Wallace were personally liable for an amount equal to one-third of the par value of the capital stock owned by each of them in the bank when it became insolvent; that only those stockholders who signed the contract of guaranty were personally liable, but that the capital stock owned by each of them was liable for one-third of its par value for which a lien was fixed and the stock ordered sold in satisfaction thereof. Judgment was entered in accordance with these findings and the intervention dismissed as to the Bank Commissioner and the defendants, W. A. Hodges, R. L. Brawner and Mrs. Sarah Pearce, acting for themselves and others in like position.

On appeal various contentions are made by the appellant and appellees, all of which depend on the construction of the contract of guaranty and its ratification by the stockholders. All of the stockholders were not present in person or by proxy at the stockholders' meeting, and as to these absent stockholders it is conceded by the appellant no liability attaches. This, in our opinion, is correct. We therefore consider only the questions which

relate to the liability of the Citizens' Bank of Bald Knob and the other stockholders.

The record discloses that all of the defendants, and J. A. Roetzel and his wife, Mrs. Adeline Roetzel, were stockholders of the Citizens' Bank of Bald Knob. The contract of guaranty is as follows: "This contract made and entered into by and between Bing Moody, J. R. Kilman, W. C. Crenshaw, L. B. Wallace, J. W. Coombe and John Q. Adams unto and with J. A. Roetzel, all as officers and directors of the Citizens' Bank of Bald Knob, Arkansas, acting for themselves and the stockholders of the said bank but not for the bank as an individual corporate. Whereas, in order to facilitate the reopening of said bank and to strengthen its capital structure, the said W. C. Crenshaw, L. B. Wallace, Bing Moody, J. R. Kilman, J. W. Coombe and John Q. Adams agree with the said J. A. Roetzel that, if he will pay into the undivided profits account of said bank the sum of five thousand dollars, said officers and directors for themselves and the stockholders of said bank agree that they will guarantee to said J. A. Roetzel that, in case he should, by reason of paying into said undivided profits account said sum of money, fail to be reimbursed for such sum together with interest thereon from date until paid at the rate of eight per cent. per annum by June 1, 1932, which date is the end of the liquidation period entered into this day by said bank unto and with its depositors, that all stockholders of record of said bank of this date shall be held equally and ratably liable unto said J. A. Roetzel, his heirs and assigns, according to the amount of stock which they may now own of record in their respective names, and, upon demand by said J. A. Roetzel, his heirs, executors or assigns, will pay promptly over to said J. A. Roetzel, his heirs, executors or assigns, above said sum with stipulated interest, further agreeing that no outstanding stock of said bank shall be transferred upon the books of the bank until said liquidation period of time has passed and this obligation discharged, and the said J. A. Roetzel for and in the above consideration and stipulations hereby agrees and does pay over to the cash-

ier of said bank said sum of money to be credited to its undivided profits account."

The annual meeting of the stockholders was held on January 13, 1931, a record of which meeting was before the court, giving the names of the stockholders present in person or by proxy, the total amount of the outstanding shares of stock present and voting in person or by proxy. At that meeting the following resolution was adopted:

"Whereas, on November 20, 1930, during the financial crisis, it became necessary for the directors of this bank to close it for a period of five days in order to stabilize conditions, and,

"Whereas, in order to perfect a reopening and meet the requirements of the State Bank Commissioner, the officials and directors were required to strengthen its capital structure to the extent of five thousand dollars immediately in order that certain notes under criticism of said Bank Commissioner might be charged out, and

"Whereas, such officers and directors acting for the stockholders as a whole negotiated a loan from Mr. J. A. Roetzel in the amount of five thousand dollars to be repaid on June 1, 1932.

"Therefore be it resolved: That all stockholders of record this date are hereby assessed an assessment against his or her stock in this bank to the amount of 33 1/3 per cent. of the par value thereof, which assessment is payable on or before June 1, 1932, the proceeds of which shall be used to liquidate said note of $5,000 to J. A. Roetzel, and all such stockholders are hereby directed and ordered to pay said amount to the cashier of this bank on or before said June 1, 1932. This assessment is hereby declared a lien upon said stock for the payment of said $5,000, and all dividends which may accrue and be payable prior to June 1, 1932, shall be held to apply to same."

We will dispose first of the question of the liability of the Citizens' Bank. An examination of the contract and of the resolution adopted at the stockholders' meeting discloses the reason and purpose for which the loan

was procured from the intervener. Unless the capital structure of the bank could be strengthened in the sum of $5,000, the bank would be unable to open, and the stockholders were threatened with loss of their investment and an additional assessment on their stock. It was therefore very much to their interest that the requirement of the Bank Commissioner be met. Mr. and Mrs. Roetzel together owned 96 shares out of a total of 600 shares of the capital stock. It was therefore as much to their interest as to the other stockholders to keep the bank a going concern. The condition was that the bank's capital structure should be strengthened to the extent of $5,000, and that certain worthless notes in that aggregate be withdrawn from the assets of the bank. To meet this condition, the $5,000 was procured from the intervener. If the bank was to owe Roetzel for this money, its capital structure would not have been strengthened. Hence it was necessary that the bank be not a party to the contract guaranteeing to Roetzel the payment of the money borrowed from him, and this was provided for in express language. Those who signed the contract covenanted that they were acting for themselves and the stockholders of said bank, "but not for the bank as an individual corporate." As pointed out by counsel for the Bank Commissioner, it will be noted in the resolution ratifying the contract it is recited that the officials and directors were required to strengthen the bank's capital structure, and that such officers and directors, acting for the stockholders, negotiated the loan. It was the interpretation placed on the contract by the stockholders themselves that it was not the obligation of the bank, but of the stockholders, and that it was their intention that they were acting in their individual capacities and not for the corporation. This is clear from the unambiguous language of the contract itself, and where there is no ambiguity it is our duty to enforce the contract to the letter.

"A contract is not binding on the corporation but on the officers or agents individually, where it is not signed by such corporation, or it does not otherwise appear

that there was an intention to bind it, but is made with the officers, or with stockholders, in their individual capacities, even though the corporation gets the benefit of the contract." 14 C. J., p. 481. The court, therefore, correctly dismissed the intervention as to the Bank Commissioner.

Since it is conceded that only those stockholders who ratified the contract of November 24, 1930, are liable in this action, the remaining subject of inquiry is which of the stockholders are liable and the extent of that liability. The court found that only such of the stockholders as signed the contract were personally liable to the intervener and those the court held were not liable here insist that the contract in so far as it related to the bank was *ultra vires* and void, and that because of this it could not be ratified by the stockholders. We are of the opinion that our conclusion as to the liability of the bank and what we have said regarding it disposes of this contention. The officers and directors were not acting for the bank, nor did they profess to do so, but for themselves and the other stockholders personally. The contract, in express terms, guarantees the payment to the intervener the $5,000 and professes to act for the parties signing the contract and for the stockholders. These stockholders at their next annual meeting considered a resolution which recited the reasons for the advancement of the money by the intervener, the negotiations of the officers with the intervener for the loan, and that in conducting the same they were acting for the stockholders. With this in mind the resolution was adopted by which, in express terms, they recognized their liability and not that of the bank under the contract theretofore entered into between the directors and Roetzel. By this resolution the par value of the shares of stock each stockholder owned was used as a yard stick by which the liability of each would be measured, and such stock was pledged to the extent of such liability. Because of this resolution, we are of the opinion that there was no other or different liability on those acting for the stockholders who signed the contract and those who ratified it. By the plain terms of the language used they intended to

and did, bind themselves personally to pay their just proportion of the $5,000 advanced by Roetzel, which was deemed to be an amount equal to one-third of the par value of the capital stock owned by each. It was equally to the interest of J. A. Roetzel and Adeline Roetzel as to the other stockholders that the capital structure of the bank be strengthened. They joined with the other stockholders in the resolution, and therefore they, too, are liable for their proportionate part, and, with this deducted, the remaining stockholders are obligated for the balance.

It follows that the decree of the trial court must be reversed as to that part dealing with the liability of the stockholders, and the cause is remanded with directions to enter a judgment against each of them who signed the contract or were present in person or by proxy and ratified the same at the stockholders' meeting, in such proportion as one-third of the par value of the capital stock owned by each bears to the sum borrowed, after the proportionate amount due by J. A. Roetzel and Adeline Roetzel as stockholders is deducted; and that a lien be fixed on the stock and the stock sold to satisfy the judgment, the intervener being entitled to have execution for any residue of the debt after the stock has been applied to the payment thereof.

LEONARD *v.* SMITH.

4-3143

Opinion delivered June 26, 1933.

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

Trieber & Lasley, for appellee.

BUTLER, J. This suit was brought for the purpose of restraining the appellant, Roy V. Leonard, as State Treasurer, from paying in cash warrants drawn on the State Highway Fund, each of which was for less than $100, to holders of the same whose aggregate holdings exceeded $100 without first requiring said holders to present the warrants to the State Refunding Board for action thereon. The complaint alleged that there were outstanding, on February 1, 1933, warrants and vouchers issued by the highway department payable out of the State Highway Fund, each for a sum of less than $100

but in the aggregate amounting to a sum in excess of $500,000; that the appellant, as State Treasurer, had accepted such warrants and had redeemed the same by paying out of the Bond Refunding Fund $60,000 and that, unless restrained, he would continue to pay the same in cash without requiring the holders to present said warrants to the Refunding Board for examination and allowance.

A demurrer was interposed to the complaint which was overruled by the court, and, appellant refusing to plead further, the temporary injunction which had been granted was made permanent and in accordance with the prayer of the complaint. From the action of the court in overruling the demurrer and from the judgment, an appeal to this court was prayed and granted.

The correctness of the court's ruling on the demurrer is to be determined by the construction of legislation passed by the Legislature of 1933. To arrive at a proper construction of this legislation the intent of the Legislature, of course, must be discovered, and this we find to be not without doubt and difficulty. The intent is obscured by the general terms in which it has manifested its purpose, and it is necessary to notice the situation existing which induced its action.

At the convening of the General Assembly of 1933, the State had just completed an ambitious program for the construction and maintenance of highways, the cost of which was to be paid from revenues derived from the license fees on automotive vehicles and the oil and fuel used in their propulsion. From a survey of the revenues derived from these sources, it was expected that those derived from the same sources in the future would be ample to pay the current expenses of maintenance of the administration of the Highway Department and for the interest on bonds and for their retirement as the same matured. Owing largely to extraordinary circumstances which were not foreseen, such as the failure of many banks in Arkansas in the fall of 1929 and the spring of 1930, unusual climatic conditions and the general and wide-spread financial depression, a great falling off in the use of motor-driven vehicles on the highways resulted

and a consequent decline in the fuel and oil consumed, which occasioned a corresponding decrease in the amount of revenues, far below the sum expected, and at the beginning of the year 1933 the State found itself unable to pay the interest on bonds not matured and for the bonds that had matured, and also unable to pay for the ordinary maintenance of the highways constructed on which work had been done and warrants issued to those who had performed the work and furnished the material. To meet this situation, the Legislature of 1933 addressed itself.

Under the legislation existing prior to the meeting of the General Assembly of 1933, the highway revenues were deposited in the State Treasury, designated as "The State Highway Fund," and all warrants drawn for payment of construction, maintenance work and other highway expenses were made payable out of this fund, warrants for the payment of highway notes and interest, toll bridge bonds and interest, revenue bonds and interest being given preference over the payment of the salaries of the State Highway Audit Commission and the maintenance of the Highway Department and highways. By §§ 7 and 8 of act No. 82 of the General Assembly of 1933, it was provided: "Section 7. There is hereby created in the State Treasury a fund to be known as the Highway Maintenance Fund, and all appropriations for the expenses of the Highway Department and for the maintenance of the State Highway System shall be payable from this fund, to which the State Treasurer shall transfer each month from the highway revenues in the Unapportioned Fund the sum of $166,666. The remainder of the State Highway revenues shall be transferred to a fund to be known as the Bond Refunding Fund."

"Section 8. The State Treasurer shall transfer from the State Highway Fund to the Highway Maintenance Fund immediately upon the effective date of this act the sum of $166,666, and he shall also transfer to the Unapportioned Fund the remainder of the Highway Fund. After these transfers have been made all further transfers required by law to be made to or from the

State Highway Fund shall be made to and from the Bond Refunding Fund."

The effect of these sections was to abrogate the State Highway Fund and substitute for it the funds named in the sections *supra,* evincing the purpose of the Legislature to change the method for the payment of warrants drawn against the State Highway Fund.

Following the passage of act No. 82, *supra,* the General Assembly passed act No. 167, the parts of which, pertinent to the question involved, are as follows: "Section 1. The issuance of Arkansas State Bonds, hereinafter called State bonds, is hereby authorized in a total sum equal to the aggregate of the entire outstanding indebtedness of the State on account of the construction and maintenance of the State Highway System, including all State highway notes or bonds, toll bridge bonds, revenue bonds, valid outstanding road district bonds on which the State has been paying interest under act No. 11 of the Acts of 1927 and act No. 65 of the Acts of 1929, hereinafter called road district bonds, certificates of indebtedness issued or authorized under act No. 8, approved October 3, 1928, and act No. 85 of 1931, short term notes issued under act No. 15, approved April 14, 1932, all valid claims against the State Highway Commission, and all warrants and vouchers issued by the State Highway Commission prior to February 1, 1933, together with the interest on the respective obligations and claims. Such bonds shall be the direct obligation of the State, for the payment of which, principal and interest, the full faith and credit of the State and all its resources are hereby pledged. They shall be dated May 1, 1933, shall be payable in twenty-five years, and shall bear interest at the rate of three per cent. per annum, the interest to be payable semi-annually, and to be evidenced by attached interest coupons."

"Section 5. The holder of any State Highway Note or Bond, Toll Bridge Bond, Revenue Bond, valid Road District Bond or Short Term Note issued under act No. 15 may deposit the same with the State Treasurer for exchange for a State Bond of equal face value. All other obligations and claims mentioned in § 1 shall be presented

to and examined by the State Refunding Board, and, if allowed, may be presented to the State Treasurer, with the certificate of allowance, and exchanged for a State Bond of the face value of the amount allowed by the Board."

"Section 7. Whenever the amount for which the State Treasurer is to issue a State Bond is not one hundred dollars or a multiple thereof, the treasurer shall issue such bonds in denominations of one hundred dollars or multiples thereof and pay the excess in cash."

The General Assembly of 1933 also passed act No. 206, approved on the same day as act No. 167, §§ 2 and 3 of which provided as follows: "There is hereby appropriated payable from the Bond Refunding Fund, the sum of one hundred thousand dollars ($100,000) for the purpose of paying to the holders of obligations to be exchanged for Arkansas State Bonds the difference between bonds delivered to such holders and the obligations exchanged.

"The Auditor of State is hereby directed to issue his warrants against the above appropriations on vouchers drawn by the designated agent of the Refunding Board."

It is apparent that the State was unable to meet its matured obligations in cash, and it is also apparent from the language of the legislation just quoted, viewed in the light of the circumstances then existing, that it was the dominant purpose of the Legislature to provide for a just and equitable method for the satisfaction of those holding the obligations of the State. Not being able to provide for the payment of these obligations in cash, the Legislature provided by § 1 of act No. 167 that, in lieu of the outstanding obligations evidenced by State Highway Notes or Bonds, Toll Bridge Bonds, Revenue Bonds, Road District Bonds, Certificates of Indebtedness issued under existing authority of law, Short Term Notes issued under act No. 15 of the Acts of 1932, all valid claims against the State Highway Commission and all warrants and vouchers issued by the State Highway Commission prior to February 1, 1933, together with the in-

terest on the respective obligations and claims, interest-bearing bonds of the State should be issued, for the payment of which the full faith and credit of the State would be pledged. There was no distinction made between any of these obligations or the amounts thereof, but it was the obvious purpose to issue bonds in lieu of all of them, regardless of the amount of the obligation or the manner in which it was evidenced. The Legislature deemed it proper that no bond should be issued in any sum less than $100 and provided that the method for the exchange of the outstanding obligations for State Highway Bonds was that these obligations should be presented to and examined by the State Refunding Board, and, if allowed, a certificate of allowance should be issued by the State Board, which, when presented to the State Treasurer, might be exchanged for a State bond of the face value of the amount allowed by the board. It was provided that the bonds should be issued in denominations of $100 or multiples thereof. The Legislature recognized that some of the valid obligations would not come under this classification, that is, that some one might have claims which in the aggregate exceeded $100, but did not equal a multiple thereof—for instance, for $125; also that others might present claims which did not amount to $100, and by § 7 provided that in such cases the warrants when allowed might be redeemed in cash. If this section is considered apart from the remaining sections of the act and the sections of acts 82 and 206 noted, it might appear that the Legislature seemed to have had in mind those having claims in excess of $100 or some multiple thereof. But the language of the section should be construed, if it may be done so reasonably, to include any claim allowed in a less sum than $100, for it is not to be presumed that the Legislature intended to avoid the payment to those holding a single small obligation and to provide for the payment of only those obligations as would in the aggregate amount to $100 or more. Therefore, we are of the opinion that where one is a holder of a number of warrants, each of which is in a sum of less than $100, but

the aggregate of which exceeds $100, the holders are entitled only to receive bonds for each $100 or multiple thereof, the remainder if any to be paid in cash.

It is the contention of the appellant that, unless it was the intention to pay obligations for less than $100 in cash out of previous appropriations made, then no provision has been made, that act No. 167 impaired the obligation of contracts, and for that reason, in so far as it has done so, is void. It is further contended that the Legislature either intended that all of the small warrants (those for less than $100) should be paid in cash or not at all. The Attorney General has pressed these contentions and supported them by apt argument and reasons which merit, and have had, our closest attention. We are unable, however, to accede to the position taken by him.

We do not see how any substantial right of the holder of small warrants is impaired by the legislation referred to. There was no money with which to pay these warrants, and, under § 3 of act No. 15 of the Acts of 1931, the payment of small warrants was deferred until all the matured bonds and accrued interest thereon should be paid. There is little doubt that, under the law existing prior to the passage of acts Nos. 82, 167 and 206 of the Acts of 1933, *supra,* all the highway warrants unpaid at that time would remain so for an indefinite period. This included not only the small warrants, but those in excess of $100, and the legislation, therefore, could not reasonably be said to impair the rights of holders in any substantial manner.

As noted, when the purpose of the legislation, *supra,* is considered and the circumstances which impelled it, it seems to us that the controlling thought was not how any particular claim should be paid, but how all might be taken care of on a just and equitable basis without discrimination. It is current history, of which we take knowledge, that the fund in the State Treasury pledged to the payment of the outstanding obligations was virtually exhausted, and that the revenue then to be expected was totally inadequate to provide

for the payment in cash of but a very small portion of these outstanding obligations. Therefore, as this condition existed, the State was attempting to do the best it could to meet it, which was to issue its interest-bearing bonds payable in the future in sums of $100, or multiples thereof, and it was only in the event that bonds of this character could not represent the obligation that payment in cash was provided. So, it would be immaterial whether one had only a single warrant of less than $100 or a number of such which, in the aggregate, exceeded $100, or some multiple thereof; for, in the first instance, no bond could be issued and the claimant was therefore entitled, under § 7 to have his warrant paid in cash; and, in the second instance, no bond could be issued for the excess where the aggregate amount exceeded $100, or a multiple thereof, and in that event the excess was to be paid in a like manner. It is alleged and admitted by the demurrer that the aggregate of small warrants outstanding is in excess of $500,000. It is to be presumed that the Legislature in dealing with the subject knew of the amount of the small outstanding warrants, and, indulging this presumption, we are of the opinion that the view just expressed is strengthened by the language of § 2 of act No. 206, *supra,* for, if the Legislature intended that all of the small warrants should be paid in cash, it would have appropriated a sum approximately sufficient to effectuate this purpose.

If, then, the holder of a number of warrants, each in a sum of less than $100 but in the aggregate amounting to a greater sum, can receive in cash only the amount the aggregate sum was in excess of $100, or some multiple thereof, it follows that the evidences of the outstanding obligations, whether bonds, notes, certificates of indebtedness, warrants or vouchers issued by the State Highway Commission before February 1, 1933, must be presented to the State Refunding Board for allowance. From the provision of § 5 of act No. 167, *supra,* the only way in which one holding these instruments can exchange same for State bonds and receive the excess in cash, where they amount to over $100 or

some multiple thereof, is by presenting them to such board for allowance and for its certificate of such to be presented to the State Treasurer. Hence, if one having a number of small warrants which, in the aggregate, exceed the sum of $1,000 and less than $1,100, we will say, the only method provided by the statute is that these be presented to the Refunding Board, and if allowed, such board will issue its certificate for the issuance of State bonds up to the sum of $1,000 and for the payment in cash of the excess.

Section 5 of act No. 167, when considered in connection with § 1 thereof, can have no other meaning than that all obligations except notes and bonds mentioned therein must be presented to the State Refunding Board before any bonds can be issued or cash paid. The language is: "All obligations and claims mentioned in § 1 shall be presented to and examined by the State Refunding Board and, if allowed, may be presented to the State Treasurer with the certificate of allowance and exchanged for a State Bond of the face value of the amount allowed by the Board."

It is argued that the Refunding Board has no authority, under the legislation we have reviewed, to inquire into the validity of small warrants and that to require them to be presented to a Refunding Board which has no authority to pass upon them would be absurd, and that where a warrant is for less than $100 and is presented, the board has no discretion in the matter and must allow the same. This contention is untenable for the reason that, when the act gave the board authority to allow or disallow a claim or warrant, there was necessarily implied the power to investigate the validity of a warrant and, if found to be valid, to allow the same; otherwise, to disallow it. As suggested by counsel for the appellee, the investigation of the Audit Commission disclosed the fact that there had been irregularities in the allowance of claims by the Highway Commission and the issuance of warrants, and that many illegal claims and warrants had been discovered. The Legislature deemed it wise to vest in the Refunding Board the authority to investigate

the claims and warrants presented in order to ascertain whether or not they represented valid obligations of the highway department. It is argued that to require the holder of a small warrant to present his claim to the Refunding Board before it could be paid would occasion much trouble to the holder and probably result in great delay and expense to him. This may be true, but reliance must be placed upon the board to provide for a procedure which will be as little burdensome as possible to the warrant holder and yet protect the interest of the State.

We have considered acts Nos. 82, 167 and 206, since they deal with the same subject-matter and are in *pari materia,* drawing from all of them, together with the circumstances of the occasion, the reasons for the enactment of act No. 167 and the consequences flowing therefrom. When this is done, we are constrained to find that the conclusion reached by the court below is correct. The decree will therefore be affirmed.

KIRBY, J., dissents.

JERNIGAN *v.* HARRIS.

4-3179

Opinion delivered July 3, 1933.

C. W. Norton and *John Sherrill,* for appellant.

Roy D. Campbell, for appellee.

SMITH, J. This appeal questions the constitutionality of acts 131 and 132 passed at the 1933 session of the General Assembly.

Act 131 provides the means whereby the cities and towns of the State may purchase, construct, and improve waterworks systems, and operate them. The act provides that these municipalities may, by ordinance, provide for the issuance of revenue bonds, which ordinance shall set forth descriptions of the contemplated improvement, the estimate of costs, the rate of interest, and time and place of payment, and other details in connection with the issuance of the bonds, from the proceeds of the sale of which the waterworks are to be purchased, constructed or improved. The act declares a statutory mortgage lien upon all property to be acquired or constructed,

and directs the city or town council to fix the minimum rate for water to be collected from the users of the water, and pledges the revenues derived from the waterworks system for the purpose of paying such bonds and the interest thereon, which pledge shall definitely fix and determine the amount of revenues which shall be necessary to be set apart and pledged to the payment of the principal; that the rates to be charged for the service of the waterworks shall be sufficient to provide for the payment of interest upon all bonds and to create a sinking fund to pay the principal thereof as and when they become due, and to provide for the operation and maintenance of the system, and also an adequate depreciation fund.

The act further provides that the bonds shall be payable solely from the revenues derived from the waterworks system, and shall not, in any event, constitute an indebtedness of the municipality within the meaning of any constitutional inhibition. The act provides that the statutory mortgage lien securing the payment of the bonds and the interest thereon may be, if necessary, foreclosed by a suit in equity.

Section 9 of the act reads as follows: "For the purpose of acquiring any waterworks system under the provisions of this act, or for the purpose of acquiring any property necessary therefor, the municipality shall have the right of eminent domain as is provided in § 4009 of Crawford & Moses' Digest of the Statutes of Arkansas (and any acts amendatory or supplemental thereto)."

By § 18 of the act it is provided that: "Said revenue bonds shall be exempt from all taxation, State, county and municipal; this exemption including income taxation, inheritance taxation as well as all forms of property taxation."

It was alleged that the provisions of the act referred to are violative of various sections of the Constitution of the State.

Act 132 contains many provisions similar to act 131, and the same constitutional objections are offered to it.

By the provisions of act 132 the cities and towns of the State are authorized to construct, own, equip, operate, maintain and improve sewage plants, and to authorize charges against the owners of real estate within such cities and towns for the use of same, and for the collection of such charges, and to authorize cities and towns to issue revenue bonds, payable solely from the revenues from such systems. Section 13 of act 132 directs the city and town councils to pass ordinances "to establish and maintain just and equitable rates or charges for the use of and the service rendered by such works, to be paid by each landowner whose premises are connected with, and use, such works by or through any part of the sewerage system of the city or town, or whose premises in any way use, or are served by, such works." The councils are charged with the duty of changing and adjusting such rates or charges from time to time to such extent as will not render insecure the rights of the holders of the revenue bonds, the proceeds of the sale of which are to be used in the construction, etc., of the sewage system.

This § 13 of the act provides that: "It is the intention of this act that a landowner shall be liable for such service charge, even though the use of the sewer system is by his tenant or lessee; but vacant, unoccupied property not actually using such works shall not be subject to a service charge." It is provided that these rates or charges shall be sufficient for the payment of operation, repairs and maintenance, and "for the payment of the sums herein required to be paid into the sinking fund."

It is further provided that all rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works, "said charges to constitute a lien upon the fee title to the land and permanent improvements, even though the occupant receiving the benefit of the service for which the rate or charge is due has merely a leasehold interest (or other lesser estate) in the premises," and that the service charge or rate may be recovered by the sewer committee of the council by a suit in the chancery court, where a lien shall be declared and foreclosed to enforce the payment.

Act 132 contains provisions similar to those of act 131 exempting the bonds from taxation and authorizing condemnation proceedings in accordance with § 4009, Crawford & Moses' Digest, and acts amendatory thereof.

The appellant filed a complaint in the Woodruff Chancery Court, in which he alleged that he was the owner of a lot in the town of McCrory, which he was occupying as a homestead, and that the council of the town of McCrory had passed ordinances pursuant to both acts, under which a waterworks system and a sewage system would be installed unless that action were restrained, and he prays that relief as against both systems. The causes were consolidated and heard on a demurrer thereto, which the court sustained. The plaintiff declined to plead further, and both complaints were dismissed, and from that decree is this appeal.

We proceed to consider the objections made to the constitutionality of the legislation.

It may be first said that the power of cities and towns to install sewage systems and waterworks is universally recognized. The health, as well as the comfort and convenience of persons living together in close relation and in large numbers require the existence of such powers, and a sewage system would be valueless unless the power inhered to require all property owners to make physical connections with the sewers.

The existence of this power was clearly recognized in the case of *Dinning* v. *Moore,* 90 Ark. 5, 117 S. W. 777. That was a suit under § 5525, Kirby's Digest (now appearing as § 7593, Crawford & Moses' Digest) which provides that the board of health of any city may direct property owners to make connections with adjacent sewers, with a provision that, upon their failure to make such connection, it shall be the duty of the board of health to have it made and to charge the property therewith, and to enforce payment of the cost thereof against the property by a suit in the chancery court. The power of the city to pass such an ordinance and to enforce its provisions was not questioned, but the relief there prayed was denied solely upon the ground that the board of

health had not properly entered the necessary orders of record to bind the owner whose property was sought to be charged.

It is insisted that the attempt to make the provisions of § 4009, Crawford & Moses' Digest, and acts amendatory thereof, available to the district are violative of § 23, of article 5, of the Constitution, and are not sufficient to incorporate that legislation into acts 131 and 132, and that there is therefore a lack of power to exercise the right of eminent domain which will probably be required to make either or both systems effective.

We quoted § 9 of act 131 above, and the same provisions appears in act 132, the effect thereof being that the municipalities "shall have the right of eminent domain as is provided in § 4009, Crawford & Moses' Digest, of the Statutes of Arkansas, and any act amendatory or supplemental thereto."

Such legislation, known as a reference statute, is quite common, and is uniformly upheld. It refers to another statute to regulate the procedure to make its provisions effective, and legislation would be very cumbersome and difficult if such acts were not held valid. For instance, it was contended in the case of *Wilson* v. *Magnolia Petroleum Co.*, 181 Ark. 391, that § 5745, Crawford & Moses' Digest, providing that chancery courts shall have concurrent jurisdiction with the circuit courts to remove the disability of minority in the same way and manner as is provided for the removal thereof by circuit courts in § 5744, Crawford & Moses' Digest, was unconstitutional because it violated article 5, § 23, of the Constitution, which provides, in effect, that no act may be amended by reference to its title, but that so much thereof as is revived, amended, extended, or conferred, shall be reenacted and published at length. In overruling this contention we there said: "The two sections of the statute exist as separate and distinct legislative enactments. The later act in no manner attempts to amend or change the existing requirements as to the removal of the disabilities of minors. It simply confers the power upon the chancery courts to remove their disabilities, and pro-

vides that it shall be done under an existing statute as to the procedure. In other words, it confers upon the chancery court the power to remove the disabilities of minors, and provides the same procedure in executing the power as already existed in the case of circuit courts. (Citing cases.)" See also *Winton* v. *Bartlett,* 181 Ark. 669, 27 S. W. (2d) 100; *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; *House* v. *Road Imp. Dist.,* 154 Ark. 218, 242 S. W. 68; *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41; *Arkansas State Highway Commission* v. *Otis & Co.,* 182 Ark. 242, 31 S. W. (2d) 427; *Shepherd* v. *Little Rock,* 183 Ark. 244, 35 S. W. (2d) 361; *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. (2d) 779.

We conclude therefore that neither act violates § 23 of article 5 of the Constitution.

It is attempted in both acts to exempt from all forms of taxation any of the bonds authorized by each of the acts.

Section 5 of article 16 of the Constitution provides that all property subject to taxation shall be taxed according to its value, in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State, and provides also the property which shall be exempt from taxation. Section 6 of the same article of the Constitution provides that "All laws exempting property from taxation other than as provided in this Constitution shall be void."

It would appear therefore that this provision of the act exempting the bonds from taxation is void, at least when such bonds are held by any person or agency whose property is not otherwise exempt from taxation. *Clallam County, Washington,* v. *United States Spruce Products Corporation,* 263 U. S. 341, 44 S. Ct. 121; *United States* v. *Coghlan,* 261 Fed. 424; *United States Shipping Board Emergency Fleet Corporation* v. *Delaware County, Pa.,* 17 Fed. (2d) 40; *United States Housing Corporation* v. *City of Watertown,* 186 N. Y. Supp. 309; *United States* v. *City of New Brunswick,* 11 Fed. (2d) 476; *United States* v. *Mayor and Council of City of Hoboken, N. J.,*

29 Fed. (2d) 932; *State of Alabama* v. *United States,* 38 Fed. (2d) 897.

This exemption does not however render either act void, for the reason that each act contains identical sections reading as follows: "The sections and provisions of this act are separable and are not matters of mutual essential inducement, and it is the intention to confer the whole or any part of the powers herein provided for, and if any of the sections or provisions or parts thereof is for any reason illegal, it is the intention that the remaining sections and provisions or parts thereof shall remain in full force and effect."

We have uniformly held that, where a statute is unconstitutional in part, the valid portion will be sustained if complete in itself and capable of being executed in accordance with the apparent legislative intent. These acts are both complete and capable of being executed in accordance with the legislative intent expressly declared in the section quoted, and the acts must therefore be upheld, notwithstanding this exemption and its consequent unconstitutionality as applied to persons or agencies whose property would otherwise be subject to taxation. *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; *Marshall* v. *Holland,* 168 Ark. 449, 270 S. W. 609; *Alsup* v. *State,* 178 Ark. 170, 10 S. W. (2d) 9; *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. (2d) 1000; *State* v. *Hurlock,* 185 Ark. 807, 49 S. W. (2d) 611.

The provisions of § 13 of act 132, hereinabove referred to, providing for the sale of the fee for a service charge due by an occupant in possession under a lesser estate is not subject to the objection that one owner is required to discharge a burden which the law has imposed upon another. It is the theory of the acts that, before either improvement is begun, the cost thereof shall be ascertained and shall be paid with the proceeds of the sale of bonds, which are to be discharged, together with operating expenses, etc., by charges against the real estate, ratably fixed in such manner that these charges will accumulate the money with which to pay the bonds.

A sewer is a permanent improvement, and, if properly maintained, lasts indefinitely. It adds to the value of the fee as well as to the value of the mere right of occupancy, and the property thus served pays the installments of cost as they mature.

A case declaring the legal principle here involved was that of *Crowell* v. *Seelbinder,* 185 Ark. 769, 49 S. W. (2d) 389. There a question arose between the owner of the remainder and the owner of a lesser estate as to liability for the annual assessments due upon the property thus owned in an improvement district. We there held that the equitable distribution of the burden of paying the annual assessments requires the life tenant to discharge these assessments during each year of his occupancy. Yet, the entire fee would have been sold had this burden not been discharged, for the reason that the assessments were a lien upon the fee. But, as between the owners of the two estates, it was the duty of the occupant to pay installments maturing during his occupancy. So here the remainderman may require the owner of the lesser estate, as between themselves, to discharge rates maturing during the continuance of his estate, but, if neither pays these charges, the entire estate may be sold, for the reason that the entire estate has the benefit conferred upon the land by the sewer system.

The plaintiff has alleged that he occupies his property in the town of McCrory as a homestead, and he insists that act 132, which authorizes the sale thereof under a decree of the chancery court, if he does not pay the rates and charges of his sewer connection, is violative of § 3 of article 9, of the Constitution. This section 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, except such as may be rendered for the purchase money, to enforce certain specific liens, or for taxes, or against certain persons sued in their fiduciary capacity.

It was contended in the case of *Shibley* v. *Fort Smith & Van Buren District*, 96 Ark. 410, 132 S. W. 444, that an act of the General Assembly creating an improve-

ment district to construct a bridge across the Arkansas River was void, because assessments imposed under the authority of the act were made liens on the homesteads of residents of the district, which might be enforced by decrees of courts, in violation of § 3 of article 9, of the Constitution. It was held, however, that these assessments were in the nature of taxes against which there was no right of homestead exemption.

The liens which may arise under act 132, and which may be enforced pursuant to its authority, are not taxes within a strict definition of that word, but they are of that nature. More properly, they are burdens imposed pursuant to the exercise of the police power, to and for the validity of which the consent of the property owner is not essential. It is a burden imposed *pro bono publico.*

At § 1463 of Dillon on Municipal Corporations, vol. 4 (5th ed.), page 2621, it is said: "It has been decided, in Massachusetts, that authority to make needful and salutary by-laws, or perhaps authority to make regulations for the public health, will, in the absence of more specific power, authorize a city to construct a *common sewer,* and to subject the owners of the lots or land abutting, and who use the sewer, to contribute for the expenditure." See also *First State Bank of Sutherlin* v. *Kendell Lumber Corporation,* 107 Or. 1, 213 Pac. 142.

It is urged that the acts are violative of § 4, of article 12, of the Constitution, which prohibits any municipality from levying a tax to a greater extent in one year than five mills on the dollar of the assessed value of the property in the city or town; and also that the acts violate § 1, of article 16, of the Constitution, which provides that no city or town shall ever loan its credit for any purpose whatever, nor ever issue any interest-bearing evidences of indebtedness.

A single answer will dispose of both objections. The municipality, as such, does not incur any obligation on account of the bond issues, nor does it assume any responsibility for their payment, nor can payment be enforced out of taxes or other municipal revenues. It is provided in each act that the bonds to be issued shall be

payable solely from the revenues of the proposed systems, the waterworks, in one case, the sewer system, in the other, and that such bonds shall not, in any event, constitute an indebtedness of such municipality within the meaning of the constitutional provisions or limitations, and that it shall be plainly stated on the face of each bond that the same has been issued under the provisions of the respective acts and do not constitute an indebtedness of such municipality within any constitutional or statutory limitation.

In the case of *Mississippi Valley Power Co.* v. *Board of Improvement Water Works District No. 1,* 185 Ark. 76, 46 S. W. (2d) 32, a waterworks improvement district found it necessary to expend large sums of money, which it did not have on hand, for engines and replacement expenses. A property owner in the district sought to prevent this action, upon the ground that the district could only incur such an obligation after having been authorized so to do upon the petition of property owners. Under the terms of the contract for the purchases required by the district, it was provided that the purchase price was payable only out of the savings in the cost of pumping the water "and shall never be held to create any liability or general obligation upon the said district, and no taxes, general or special, shall ever be levied upon the real estate or other property in said district or hereafter within the district, to pay all or any part of said sum of $23,560 or any interest thereon." In holding against the contention of the protesting property owner that the district was without power to incur the obligation, we there said: " 'It is, in effect, a cash transaction, where the payments are to be made *pari passu* with the accumulation of the fund, and the only fund, out of which they are to come.' *Smith* v. *Town of Bedham,* 144 Mass. 177, 10 N. E. 782. Appellant insists, however, that, notwithstanding the notes or instruments are payable out of the 'savings fund,' they are none the less a debt, bearing interest, and are purchase-money notes for machinery, of which title is retained until their payment. The courts have held, however, that contracts of this

character did not create debts within the purview of constitutional or statutory prohibitions against incurring debts as the only recourse in the contract which the selling company has in the case of the failure to pay the purchase price is to retake the machinery. It is a contingent liability only, for which a general tax cannot be levied, and does not constitute a lien upon the power plant, nor its revenues. It can be paid only on the contingency that the district derives enough net revenues from the consumers of water and lights furnished by the plant to pay such notes after payment of all expenses of operation, and, as said in *Bell* v. *Fayette,* 325 Mo. 75, 28 S. W. (2d) 356: 'There is no aspect to that situation which could make the agreement to pay in the manner provided a debt of the city. It is a contingent purchase, the property to be paid for only out of the net earnings which it produces; the seller takes a chance on that contingency.' (Citing numerous cases)."

In the case of *McCutchen* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. (2d) 1037, it was held, (to quote a headnote) that "A contract with a city to construct a power house and install necessary equipment therein and providing for payment solely from the light plant's earnings *held* not to violate amendment No. 10 forbidding a contract in excess of revenue for the current year."

As to amendment No. 13, it may be said that it has no application here, as there is no attempt to exercise any of the powers conferred by it.

We conclude therefore that neither act violates any of the constitutional provisions which appellant insists render it unconstitutional. The decree of the chancery court must therefore be affirmed, and it is so ordered.

MEHAFFY, J., dissents.

DODD *v.* GOWER.

4-3150

Opinion delivered July 3, 1933.

George W. Parks, J. Paul Ward and *Ben B. Williamson,* for appellant.

W. O. Edmondson and *Coleman & Reeder,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment of the circuit court of Stone County dismissing the election contest of appellant for the office of assessor of Stone County.

The contest was heard by the county court of said county upon the pleadings and testimony adduced before him, from which he found that, after the returns had been delivered to the election commissioners, and before they had certified appellee the duly elected assessor at the regular November election, the talley sheets in the townships of Turkey Creek, Richards, Franklin and Washington were erased, changed and altered so as to add 55 more votes to appellee than actually received by him in said four townships and to take from appellant 35 votes less than received by him in said townships; and that the judges and clerks in Sylamore township failed to count certain votes cast for appellant.

Based upon these findings, the court found and declared that appellant had carried the county by a ma-

jority of 25 votes and entered a judgment that appellant was the duly elected tax assessor of Stone County, from which judgment appellee prosecuted an appeal to the circuit court of Stone County, where the cause was heard *de novo* on the pleadings filed and depositions introduced in the county court.

After the depositions had been read, the circuit court ordered the ballots brought into court. During the interval between the two trials, it was discovered that the ballots had been kept in the vault of the circuit and county clerk, where any one who desired might enter in the daytime, and that the ballots had been broken into. The court thereupon declared that the ballots had lost their integrity and could not be used in evidence, and that he must rely on the certificate of the election commissioners, holding that it was *prima facie* correct, and that such presumption had not been overcome by sufficient evidence.

The undisputed evidence in the record reveals that the certificate of the election commissioners was made up from the talley sheets of the various townships in Stone County, and that the talley sheets in four of the townships had been tampered with between the time they had been delivered to the election commissioners and before the time the count and certification was made.

The *prima facie* effect of the certificate was overcome by the undisputed testimony that it was based upon talley sheets, the integrity of which had been destroyed.

After finding that the integrity of the ballots in the four townships had been destroyed, the court should have proceeded to ascertain from secondary evidence the number of votes each received in the four townships in question. We refer to such evidence as the talley sheets, poll books and certificates in the hands of the judges and clerks which had not been tampered with and any other evidence tending to show what number of votes the contestant and contestee had received in said townships.

The court sat as a jury in this case, and was trying the case *de novo,* and it was his duty to try the case and

declare the result with the best admissible testimony available. This court is not trying the case *de novo,* as it is not an equitable proceeding.

The judgment is therefore reversed, and the cause is remanded with directions to the trial court to proceed with the hearing in accordance with this opinion.

HOUGH *v.* LEECH.

4-3053

Opinion delivered July 3, 1933.

John D. Shackleford, for appellants.

Oscar H. Winn, for appellee.

MEHAFFY, J. Salina Leech, widow of Will Leech, deceased, filed a complaint in Pulaski Circuit Court against J. D. Hough and Hughie Hough, alleging that about the 14th day of January, 1931, H. M. Hough carelessly and negligently, and without ordinary care for the safety of Will Leech, husband of Salina Leech, fired a gun and shot Will Leech in the hip; that he was thereafter taken to the hospital; that he suffered severe physical pain and mental anguish from the date of his injury until the date of his death on January 24, 1931; that said H. M. Hough was negligent and careless in firing his

pistol at the deceased to make him dance, and was negligent in using a pistol or gun loaded with powder and ball to secure amusement, shooting at deceased and other negroes present; that said H. M. Hough was at the time drinking.

Leech was about 60 years of age. It is alleged that his earning capacity was $50 a month, and that his widow, who brought the suit, had been damaged in the sum of $6,000, and prayed for judgment for the further sum of $6,000 for pain and suffering. The gunshot wound caused pneumonia, from which he died 10 days after the injury. There was a prayer for $12,000 damages against H. M. Hough.

There is no allegation in the complaint with reference to J. D. Hough, and no judgment is asked in the complaint against him.

The facts are that J. D. Hough owned a store in North Little Rock, and his son, H. M. Hough, who is about 40 years of age, worked around the store and lived near there, and, on the day of the injury, J. D. Hough, the father, had gone to lunch and Will Leech, the deceased, and another negro named McIntosh, were at work there. H. M. Hough and Will Leech had both taken a drink of whiskey. There was an old pistol in the store which had not been fired in a long while. H. M. Hough secured this pistol, fired it several times, and finally, while carelessly handling the pistol, shot Will Leech, as described in the complaint. Leech lived about ten days thereafter, and died.

This suit is to recover damages for his death and pain and suffering.

There is no evidence that J. D. Hough was guilty of any negligence or wrongful conduct in any way. The evidence is ample to sustain the verdict against H. M. Hough.

It is contended that H. M. Hough was about the master's business. In the case of *American Ry. Express Co.* v. *Mackley,* 148 Ark. 227, 230 S. W. 598, a great many cases were cited by the court, and, after citing these cases, the court said: "The doctrine of all these cases

is that the test of the master's liability is, not whether a given act is done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business." In the instant case the act was committed during the existence of the employment, but it was certainly not committed in the prosecution of the master's business. It had no connection with the master's business.

Again we said, in the same case: "Where a servant acts without reference to the service for which he is employed, and not for the purpose of performing the work of the employer, but to effect some independent purpose of his own, the master is not responsible for either the acts or omissions of the servant." Numerous cases of this court might be cited in support of this rule. Applying the test mentioned in the case cited, there is no liability in this case.

As we have already said, there is no evidence tending to show that J. D. Hough was guilty of any negligence or wrongful conduct in connection with the shooting of Leech. Verdicts of juries must be based on evidence, must be supported by some substantial evidence, and not on mere speculation. *Hunter* v. *State Bank of Morrilton,* 181 Ark. 907, 28 S. W. (2d) 712.

Again we said:

"The rule is firmly established that the master is civilly liable for the tortious acts of his servant, whether of omission or commission, and whether negligent, fraudulent or deceitful, when done in the line of his employment, even though the master did not authorize, or know of such acts, or may have disapproved of or forbidden them. But the act must be done not only while the servant is engaged in his master's service, but it must pertain to the particular duties of that employment. * * *

"An act is within the scope of the servant's employment, where necessary to accomplish the purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act, rather than its method of performance, is the test of the scope of employment. * * * The mere fact that he was in the

service generally of the master or that the servant was in possession of facilities afforded by the master in the use of which the injury was done would not make the act attributable to the master. The act must have been done in the execution of the service for which he was engaged." *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229.

The appellant, H. M. Hough, admits that he shot Leech, and, although he says it was an accident, he admits that he shot the pistol 5 or 6 times, and that at the time he shot Leech he had the gun, rolling it around by the cylinders.

Evidence of other witnesses tended to show that H. M. Hough was negligent, and the question of his negligence was submitted to the jury under proper instructions, and the jury's verdict, where there is any substantial evidence to support it, is conclusive here.

It follows from what we have said that the judgment against H. M. Hough must be affirmed, and the judgment against J. D. Hough reversed and dismissed. It is so ordered.

BEAVERS *v.* STATE.

Crim. 3844

Opinion delivered July 3, 1933.

[redacted]

Rains & Rains, for appellant.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

MEHAFFY, J. The appellant was convicted of transporting liquor, and fined $100. At the trial, after the appellant had exhausted his challenges, three citizens were called as jurors, T. J. James, Lee Basham and D. P. Selby.

Each of these three citizens had served on the petit and grand juries of their county within two years next before the trial. Appellant challenged each of these jurors for cause before he was accepted on the jury.

His ground of objection was that T. J. James had served on the regular panel of the petit jury within the last two years, and this was admitted by the juror.

Lee Basham was challenged for cause because he had served on the regular panel of the grand jury within the last two years, and D. P. Selby was challenged for cause on the ground that he had served on the regular panel of the petit jury and grand jury within the last two years.

The challenges and objections to each of the jurors were overruled, and they were selected and served on the jury that tried appellant.

The learned trial court held that they were competent jurors, as they were only called in as special jurors at this term of court.

Act 135 of the Acts of 1931 entitled, "An Act to Regulate Jury Service," reads as follows:

"Section 1. After ninety days from the passage and approval of this act no citizen in this State shall be eligible to serve on either grand or petit jury oftener than one regular term of the circuit court, every two years.

"Section 2. All laws and parts of laws in conflict herewith are hereby repealed and this act shall take effect and be in force from and after its passage."

This appeal is prosecuted to reverse the judgment of the circuit court.

The Attorney General confessed error on the ground that the three jurors mentioned were not eligible to serve on the jury, and that it was error to accept them as jurors because each of them had served on the regular panel of the circuit court within two years before the trial.

After a careful examination of the record we have concluded that the confession of error is well taken.

It was thought by the trial court that the act above copied made jurors ineligible to serve on the regular panel if they had served on a regular panel in the circuit court within less than two years, but that it did not render them ineligible to service as special jurors.

Statutes must receive a reasonable construction, and courts should take into consideration the purpose of the Legislature in passing the act, and ascertain the intention of the Legislature in passing the act.

The title of the act, "An Act to Regulate Jury Service," means, we think, what it says. No one is eligible for jury service if he has served on the regular panel of either grand or petit jury within two years of the time he is called to serve.

The service of a special juror or a juror selected to serve on one case is as important as the service on the regular panel, and there would seem to be no reason why a juror would be eligible to serve on a case when summoned specially, and not be eligible to serve on the regular panel.

There seems to be some conflict in authority, but when the disqualification in terms applies to jurors generally, it applies to a special juror as well as members of the regular panel. 35 C. J. 253; *City of Goshen* v. *England,* 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253.

The Supreme Court of Nebraska, in construing a statute regulating jury service said:

"The statute has made no exception in favor of talesmen, and we do not feel justified in making exceptions. The purpose of the statute seems to be to exclude professional jurymen, but, whether so or not, the language is plain and unambiguous. It is therefore a

good cause of challenge to one called as a juror that he had been summoned and attended the district court as a juror at any term of court held within two years prior to the time of challenge, and this rule applies to those summoned as talesmen." *Figg* v. *Donahoo,* 4 Neb. Unoff. 661, 95 N. W. 1020; *Coil* v. *State,* 62 Neb. 15, 86 N. W. 924.

It was the intention of the Legislature to exclude from jury service professional jurymen, and to exclude this class of jurors, whether called on the regular panel or to serve on a special case.

We therefore think the trial court erred in not excusing the jurors mentioned, and the judgment of the circuit court is therefore reversed, and the cause remanded for new trial.

HOWE *v.* LONG PRAIRIE LEVEE DISTRICT.

4-3144

Opinion delivered July 3, 1933.

Rose, Hemingway, Cantrell & Loughborough, for appellant.

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

MCHANEY, J. This litigation involves a contest between appellants and appellee Tolman as to the priority of bonds held by them which are the obligations of the Long Prairie Levee District of Lafayette County. This

district was created by special act of the Legislature, act 106 of 1905, p. 267, for the purpose of constructing a levee along the east bank of Red River in the territory described in the act. The act further provided for the levy annually of a tax upon the real property included in the district, based upon the valuation according to the real estate assessment books of the county, not to exceed annually 4 per cent. of the assessed valuation. Section 20 provides that "the said board of directors shall have the power to borrow money, and to that end may issue bonds of said board to the amount of not exceeding $125,000," which were to be made payable in not less than 20 nor more than 40 years, and should be designated as 20-40 bonds, "that is, at the discretion of said board all or any number of said bonds shall, on notice, * * * be redeemable or payable at the end of twenty years, but it shall be the duty of said board, should it not elect to pay all of said bonds at the end of twenty years, to create a sinking fund for the payment of the principal of said bonds by annually appropriating from the revenue, as provided for by this act, a sum not less than $5,000, which shall, as soon as paid in, be applied annually to the payment of said bonds, commencing with number one and paying them consecutively."

Section 28 provides: "That (to) the payment of both the principal and interest of the bonds to be issued under the provisions of this act, the entire revenues of the district arising from any and all sources, and all real estate, railroads, and tramroads subject to taxation in the district, is by this act pledged, and the board of directors are hereby required to set aside annually from the first revenues collected from any source whatever a sufficient amount to secure and pay the interest on said bonds." There are many other provisions of the act, but we deem it unnecessary to set them out.

This act was amended in 1907, act 34, p. 71. It recognizes the fact that the first bond issue was insufficient to complete the levee by providing in § 4 the following: "That for the purpose of building, erecting and *completing the levee begun* by the board of directors of the Long

Prairie Levee District, and for enlarging, repairing, constructing and maintaining the same, and to enable the said board of directors to fully carry out the ends and purposes of this act and of said act of March 23, 1905," the said board was empowered to borrow $225,000 and issue bonds therefor, including the $125,000 already outstanding, or, in other words, to issue $100,000 additional bonds. The rate of the maximum tax to be levied was raised from 4 per cent. to 8 per cent. A similar pledge of revenues was authorized.

Certain other amendments to the original act were passed in 1909 and 1915. In 1917 the Legislature enacted act 339, vol. 2, p. 1683, Acts 1917, entitled, "An Act Conferring Additional Powers Upon the Long Prairie Levee District." The preamble to the act states the necessity therefor by reciting that the district has lost a considerable portion of its levees by overflows of the Red River, and that, "owing to the erection of levees upon the opposite bank of Red River, it has become necessary to raise and strengthen the levees" of the district. Section 2 of said act provides for the appointment of assessors to assess the benefits accruing to the lands in the district "by reason of the levees heretofore built and of those which will be built under this act." Another section provides for the collection of a tax on the benefits so assessed of 5 per cent. per annum. Section 8 reads as follows: "In order to fund the outstanding indebtedness of the district, and to raise money with which to make the improvements contemplated by this act, the board of directors of said district is authorized to issue bonds payable serially through a period of not exceeding twenty-five years, and in an amount not exceeding $500,000, bearing a rate of interest not exceeding six per cent., the first bonds to be payable not earlier than three years after date. The lowest numbers of said bonds in an amount equal to the outstanding certificates of indebtedness of the district shall be set aside and used only in taking up the outstanding certificates of indebtedness, bonds and coupons thereof, either by exchanging the new bonds for the old certificates of indebtedness and bonds ma-

tured coupons at par, or by sale and the application of the proceeds to the retirement thereof, as the board deems most desirable, if the board concludes to fund the outstanding indebtedness. The bonds shall not be valid until authenticated by some trust company located either in the city of Chicago or in the city of St. Louis, to be chosen by the directors and the funding of the old bonds shall be effected through such trust company." Section 9 pledges all the revenue of the district to the payment of the principal and interest of the bonds to be issued under the act, and that, if any bond or interest coupon so issued shall be in default for 30 days, it shall be the duty of the chancery court to appoint a receiver on the application of the holder thereof to collect the taxes, and an assessor to reassess the benefits, if necessary, "and the proceeds of such taxes and collections shall be applied, after the payment of costs, first, to the overdue interest, and then to the payment *pro rata* of all bonds issued by the said board which are then due and payable."

The district did not refund the outstanding bonds issued under authority of the Acts of 1905 and 1907 by the $500,000 authorized to be issued by the act of 1917, nor did it sell enough of the 1917 authorization to pay them off in cash. It sold only $275,000 of bonds under the 1917 act, which made a total of $500,000 outstanding. Some of the bonds and interest coupons held by appellants being in default more than 30 days, they brought suit in the Lafayette Chancery Court for the appointment of a receiver, alleging that all the bonds outstanding were on a parity, and that all were entitled to share alike in the proceeds of the collections. A receiver was appointed. Appellee Tolman intervened, claiming priority on account of his ownership of bonds issued under authority of the Acts of 1905 and 1907. The trial court sustained his claim, and this appeal is from that order.

In *Hoehler* v. *W. B. Worthen Co.*, 154 Ark. 444, 243 S. W. 822, it was held, quoting syllabus: "Though bonds issued under authority of a special statute creating a certain road improvement district (Acts 1909, p. 1151) were issued and sold in two successive allotments, all

the bonds issued were within the authority conferred, and amounted to a single issue, and no priority was created in favor of the holders of the allotment just issued, and the funds in the hands of a receiver appointed on default in judgment under the statute should be distributed *pro rata* on all matured bonds." There the bonds were issued at different times but under the same authority. In *McKinney Bayou Drainage District* v. *Garland Levee District,* 181 Ark. 898, 28 S. W. (2d) 721, we held that there was no priority of liens of bonds issued in overlapping districts, created by different acts of the Legislature and at different times, except as to accrued taxes in the district prior in point of time. We there said: "There are holdings by some courts in other States that the improvement district first created has the prior lien, while in others it is held that the last created has the prior lien. But, as we see it, great confusion will result from either holding. No doubt the Legislature has the power to provide that the one or the other is prior, but, until it has done so in plain and unmistakable language, we do not feel that we should so hold. Furthermore, the view we now take is just and equitable. It is conceded that the levee district without the drainage district failed to accomplish the purpose of its creation. It is likewise true that the drainage district without the levee district would be practically useless. Each therefore is complementary to the other. It would therefore appear to be unfair and inequitable for either lien for taxes to be held prior to the other, except as indicated herein, unless the Legislature has made it so in plain and unmistakable language, and we do not think it has done so. The acts under which both districts were created provide that each lien shall be superior to all other liens, but, as we have already shown, such liens are not superior to the State's lien for taxes and are only superior to contract liens."

An examination of the acts relating to this district, which we have set forth above rather fully, is convincing that no priority of rights was intended to be given to any bond issue. The only object or purpose of a levee

of this kind is to reclaim land from overflow. If it fails to accomplish this purpose, it is worthless. If the lands it is designed to protect are not protected, they receive no benefit, and benefits to the land is the only excuse for burdening them with the cost thereof. The act of 1907, § 4, constitutes a legislative finding that the $125,000 of bonds sold under the act of 1905 did not complete the levee, and that $100,000 more was required "for the purpose of building, erecting and completing the levee begun." Therefore, if in fact the levee was not completed and the first bond issue was exhausted, the lands had not been reclaimed or benefited. It was necessary therefore to sell the bonds authorized by the act of 1907 to complete the levee. If these latter bonds constitute a second lien or mortgage only, who, except, perhaps, the holders of the first bonds, will buy them? It is not usually considered to be a safe investment to buy a second mortgage. The district ran along then for 10 years, in the meantime incurring additional indebtedness for which certificates were issued under authority of acts 339 of 1909 and 320 of 1915, for which payment was provided by raising the percentage of taxation on the assessed valuation of the land, until the act of 1917 was passed. This act is a legislative finding that a considerable portion of the levee had been lost by overflows and that the levee was too low and too weak because of a levee constructed on the opposite bank of the river, and that the absolute necessity existed to raise an additional sum of $275,000 to rebuild, raise and strengthen the levee, else the land in the district would be without protection, would become worthless and the security for the payment of previous bonds destroyed. We think this act provides in substance that all bonds shall be on a parity. It provides that the prior bonds might be refunded. If they had been, it could hardly be contended that they constituted a prior lien. They were not refunded, but could have been, had the district so desired, and are not entitled now to priority. Appellee purchased his bonds of the former issues with the full knowledge that the levees, even after completion, might wash away and of the power of the

Legislature to provide for their restoration. This does not impair the obligations of his contract, because he contracted with reference to the inherent nature of the subject-matter and the power of the lawmakers in the premises. Any other holding would render it impossible to sell bonds in a levee district.

We do not overlook the holding of the Circuit Court of Appeals in *St. Louis Union Trust Co.* v. *Franklin-American Trust Co.*, 52 Fed. (2d) 431, to the contrary view. The Supreme Court of the United States dismissed the writ of certiorari as having been improvidently granted, without writing any opinion on the merits of the case. Whether the dismissal of the writ meant an approval of the holding of the Circuit Court of Appeals is not certain, as it is stated by eminent counsel that where the decision is approved the writ is not dismissed, but the judgment is affirmed. Whatever the court may have meant by its action in that case we are of the opinion that we have already decided the question in principle in the Hoehler and McKinney Bayou cases, above cited, and we adhere thereto.

Other questions are discussed in the excellent briefs filed by learned counsel on both sides, but we deem it unnecessary to discuss them. The decree will be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion, with costs to appellants.

SMITH, J., dissents.

BUFFALO STAVE & LUMBER COMPANY *v.* RICE.

4-3062

Opinion delivered July 3, 1933.

M. A. Hathcoat, W. P. Spears and *Cotton & Murray,* for appellant.

Griffin & Griffin and *A. B. Arbaugh,* for appellee.

BUTLER, J. The appellants had each sold to the appellees lumber and other material for the construction of a tourist camp situated on a forty-eight acre tract of land. The aggregate of the several amounts was approximately $1,300. Suit was brought in the Newton Chancery Court for judgment and for foreclosure of the materialmen's liens on the property. The cases were consolidated for trial and a judgment rendered in favor of the plaintiffs (appellants here) for the respective amounts of their debts and their several liens declared against the entire tract of land, which was ordered sold by a commissioner appointed by the court for that purpose unless the judgments were paid within a certain time. After this the appellees conveyed the property to a trustee by warranty deed, in which deed it was first recited the amounts of the several judgments given in favor of the appellants, and that a lien had been declared upon the lands, and that it was the desire of the parties (grantors) to pay said judgments in full. The deed then

provided that, in consideration of the premises and $1 paid, and the full satisfaction of the judgments mentioned, the land was bargained, sold and conveyed to the trustee. Then followed a description of the land and a covenant of general warranty with relinquishment of dower by the appellee, Mrs. Clemmie Rice, wife of appellee, G. H. Rice. This deed was properly acknowledged and delivered to the trustee.

Contemporaneously with this, the appellees executed two promissory notes, one for $750, due and payable on November 15, 1932, and one in the sum of $550, due on March 15, 1933, both of said notes bearing interest at the rate of 8 per cent. per annum from date, the interest to be paid annually. A contract was there and then entered into between the trustee and the appellees, which recited the conveyance by the appellees to the trustee, the execution of the two promissory notes mentioned, and that the agreement that a quitclaim deed to the property then executed by the trustee to the appellees, the notes, and a copy of the contract should be placed in the Newton County Bank at Jasper, Arkansas, in escrow to be delivered to the appellees upon the payment by them of the notes with accrued interest and such further sums as the trustee acting for the appellants might have paid to keep the property insured and taxes paid thereon, the appellees in the contract having obligated themselves to keep the premises in good repair, free from liens and incumbrances, insured against loss or damage by fire, hail or tornado in a sum not less than $1,300, loss payable to the appellants as their interest might appear, and further obligated themselves to keep all taxes on the property fully paid. The contract further provided that, in the event of default in payment of either of the notes at maturity or any interest payment when due, or on failure to reimburse the appellants for any amounts expended for taxes, insurance, etc., within thirty days after such payments had been made, the Newton County Bank, the escrow agent, should surrender the quitclaim deed to the appellants, with the further provision that any payments made by the appellees should be considered as

rental of the premises, and that, in the event of default aforesaid, the appellees should surrender immediate possession of the lands and premises to the appellants or their legal representatives. The quitclaim deed was executed and delivered to the escrow agent as provided for in the contract.

On the ..... day of November, 1932, the appellees filed a motion in the chancery court praying that the order of sale be quashed and the judgment modified, alleging as a ground therefor that the judgment had erroneously included the entire tract of land on which the improvements were located in violation of § 6906 of Crawford & Moses' Digest, which provides for a lien on the improvement and one acre of ground upon which the improvement is located and that the deed executed to the trustee had been procured under threats and coercion. To this motion a response was filed denying the allegations we have adverted to and interposing the plea of *res judicata* as to all the allegations regarding the judgment. The respondents (appellants) alleged that they were the owners of the land in fee as tenants in common by reason of the deed executed to the trustee, that appellees were in unlawful possession of the property, and prayed that possession be delivered to them, or, in the event the court should find that immediate possession should not then be delivered, that a receiver be appointed to take charge of the same and preserve the rents and profits for their use.

At the hearing, oral testimony was taken which was afterwards reduced to writing, and, upon the motion and exhibits thereto, the response and exhibits thereto, and the testimony adduced, the court found that the warranty deed to the trustee and the contract entered into between the appellants and the appellees, the notes and quitclaim deed contemporaneous therewith, constituted a single contract which was in legal effect a mortgage to secure the payment of the notes mentioned in the said contract, and that the plaintiffs in the original suit (appellants here) might amend their response to the motion and pray for a foreclosure of said mortgage; and, in the event the

plaintiffs (appellants) should not elect to amend their response, that the motion should be dismissed. The appellants elected not to amend their response so as to pray for a foreclosure, and the court thereupon decreed that the judgment in favor of the appellants theretofore entered be set aside, having been satisfied by the execution of the deed and contract, and that the order of sale be quashed and the warranty deed and contract made by the appellees on March 21, 1932, be deemed a mortgage on the lands involved in the suit in favor of the appellants according to their respective interests, and the response of the appellants to the petition of the appellees to quash the order of sale was dismissed. From that judgment is this appeal.

It is the contention of the appellants that the deed executed to the trustee constitutes a deed absolute since by it the judgment debt theretofore existing was fully discharged, and that the quitclaim deed and contract were an additional sale and not, nor intended to be, a form of security for a debt, since no debt existed for which they could be security. It is well settled, as contended by the appellants, that a contemporaneous agreement for resale and purchase does not, of itself, make a deed a mortgage, but that question must be determined according to the real intent of the parties; and where there is a conveyance which extinguishes the debt and the parties intend that result, a contract for resale at the same price does not destroy the character of the deed as an absolute conveyance. The cases cited by counsel for the appellants support this declaration. *Hayes* v. *Emerson,* 75 Ark. 554, 87 S. W. 1027; *Wimberly* v. *Scoggin,* 128 Ark. 67, 193 S. W. 264; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023.

It is likewise the rule that, where a deed purports on its face to convey the absolute title, and where the contention is made that it was in fact intended as a mortgage, the evidence to support that contention must be clear, unequivocal and decisive. *Henry* v. *Henry,* 143 Ark. 607, 221 S. W. 481. In the cases cited, and in all other authorities dealing with the subject, in determin-

ing whether a deed absolute on its face is such, indeed or only to be considered as a mortgage, the real question for the court's determination is what was the intention of the parties at the time; and where such deed is accompanied by an agreement to reconvey upon certain conditions, it is proper to construe the agreement and the deed together to determine whether that agreement was conditional sale or whether it should be deemed to be a mortgage when the transaction is considered as a whole. But the court, in determining the question, is not limited to the determination from the instruments alone, but from these and whatever extrinsic facts or circumstances are disclosed by the evidence. In reviewing the decisions of courts of chancery on questions of this character, great weight should be given to the opinion of the court as the presiding judge may be fully apprized of the existence of circumstances which but dimly appear to us from an examination of the record. The learned chancellor had an intimate knowledge of the instant case from its inception and of the character and situation of the parties and the course of the lawsuit. He interpreted the instruments, viewed in the light of the attendant circumstances and the evidence adduced, as a security for a debt, that security having been changed from the lien given by the court by instruments which were in effect nothing more than a mortgage. He concluded that this was the intention of the parties, and we are unable to say, after a careful consideration of the record before us, that he has wrongly decided.

Both Mr. and Mrs. Rice testified in the case, and the chancellor doubtless interpreted their testimony as clearly indicating their understanding to be that their judgment creditors did not wish to deprive them of their property, but merely to secure their debt. Their testimony was not disputed by any one, and from it it may be inferred also that the property was worth many times the amount of the judgment. This should always be a persuasive circumstance in determining whether an absolute conveyance is indicated or merely a mortgage. If the judgment debt, the satisfaction of which was the con-

sideration in the deed to the trustee, was ever in fact canceled on the record of the judgment, the record before us does not disclose that fact; and, if so, it is not conclusive of the question before us, for it might have been the intention to cancel that debt and by another transaction between the parties to create another means of continuing the former in force. The evidence on behalf of the appellees regarding the intention between the parties is strengthened by that paragraph of the contract which obligates them to keep the property insured at their own expense for a sum equal to the aggregate amount of the two promissory notes and to pay the taxes on the property. For these are usually burdens upon, and incident to, ownership and tend to sustain the contention of the appellees and the conclusion reached by the learned chancellor. It is true the appellants had a decree which was as effectual a means to collect their debt as the one the chancellor offered to give them, which they refused, and it might be argued that because they did renounce their rights under this decree is an evidence that they did not intend to take merely a mortgage. It is to be gathered from the record before us, however, that the execution of this decree had been enjoined before the transaction which we are now considering, and this might have influenced them in changing the form of the debt and the method of its security. It is true that the decision reached will have the effect of postponing the collection of appellants' debt, but in the meantime it is drawing a legal rate of interest, and it appears that the security is ample, whereas, if appellants' contention should be sustained, they would receive for their debt property which appears to be several times its value and take from the appellees all they have. The decision of the trial court, as we have seen, works no substantial injury to the appellants, but gives to the appellees a last clear chance to pay the debt and preserve the property. We are of the opinion that the court has worked out the equities in the case, and its decree is not against the preponderance of the evidence under the rule announced in *Henry* v. *Henry, supra.*

Affirmed.

BENTON *v.* NOWLIN.

4-3153

Opinion delivered July 3, 1933.

Murray O. Reed, for appellant.

Wallace Townsend, for appellee.

BUTLER, J. The commissioners of Street Improvement District No. 419 of Little Rock, Arkansas, were proceeding under the authority of act No. 112 of the

Acts of the General Assembly of 1933 to refund the outstanding bonds of the district in the sum of $60,000. This suit was instituted by the appellant as a taxpayer to restrain the board from proceeding further in its contemplated action. A stipulation of facts was filed by the parties and a demurrer interposed to the complaint which the court sustained, and, the appellant electing to stand upon his complaint, the same was dismissed for want of equity. This appeal followed.

Section 1 of act No. 112 of the Acts of 1933 provides that any municipal improvement district shall have power to fund and refund its outstanding indebtedness, including its bonded indebtedness, and the accrued interest thereon, and to extend the maturity of such indebtedness on such terms as the commissioners of the district shall deem for the best interests of the same, and to that end may issue negotiable bonds of the district. It was provided that the refunding bonds might be exchanged for bonds outstanding of the original issue including the matured interest thereon, or they might be sold and the proceeds thereof applied to the outstanding indebtedness of the district; also, that refunding bonds should not be issued in a greater amount than necessary to pay the existing indebtedness with interest to the date of the delivery of the new bonds plus expenses incurred in connection with the new issue, and the new bonds could not be delivered except upon the surrender and cancellation of a proportionate part of the indebtedness being refunded; nor should the new bonds bear a greater rate of interest than six per cent. per annum or be disposed of at less than par upon the basis of such interest.

The complaint challenges the constitutionality of § 2 of the act, said section being as follows:

"Section 2. In order to provide for the additional interest requirement of such refunding bonds and the expense incurred in connection with the issuance of such refunding bonds, the improvement district issuing refunding bonds may follow any one of the alternative procedures hereinafter outlined and designated as (a) and (b), to-wit:

"(a) Such improvement district issuing refunding bonds may provide by resolution of the board of commissioners, duly adopted, that the entire balance unpaid on the date of the refunding bonds of the assessment of benefits against each lot, block and parcel of land and railroad track and right-of-way shall draw interest at any rate deemed advisable or necessary, not in excess of six per cent. per annum, from the date of the refunding bonds until paid, but the interest need not be collected until it is necessary to do so to avoid exceeding the total amount of benefits, and, if collected, shall be collected on each installment or annual levy separately; and after the date of said refunding bonds, the annual levies of assessment of benefits shall be collected on the balance unpaid on the date of said refunding bonds against each lot, block and parcel of land and railroad track and right-of-way in the improvement district, and a certified copy of such resolution shall be filed with the secretary of the district with the collector of the district; or

"(b) Such improvement district issuing refunding bonds may provide by resolution of the board of commissioners duly adopted that the entire balance unpaid on the date of the refunding bonds, of the assessment of benefits against each lot, block and parcel of land and railroad track and right-of-way shall be the assessment of benefits against each respective lot, block and parcel of land and railroad track and right-of-way for the refunding issue of bonds and shall draw interest at any rate fixed by the resolution, not in excess of six per cent. per annum, from the date of the refunding bond until paid, but the interest need not be collected until it is necessary to do so to avoid exceeding the total amount of benefits, and, if collected, shall be collected on each installment or annual levy separately; and after the date of such refunding bonds, the annual levies of the assessment of benefits shall be collected on the respective assessments of benefits as thus fixed against each lot, block and parcel of land and railroad track and right-of-way, with or without an interest charge thereon, as the commissioners may deem necessary, provided, how-

ever, that when such a resolution is adopted by the board of commissioners it shall be certified by the secretary to the said improvement district, and it shall be filed with the city clerk or town recorder who shall publish in some newspaper published in said city or town, if there be one, and, if not, then in some newspaper published in the county and having a *bona fide* circulation in such city or town, a notice which shall be in the following form:

" 'Notice to owners of property: (Here follows form of notice).' "Within ten days after the publication of said notice, the district or any property owner may apply to the city or town council to revise the assessment so made, and the district or the property owner may within thirty days apply to the chancery court of the county to have the assessment revised and corrected. If no application is made to such council within ten days, or to such court within thirty days, said assessment shall become final and incontestable, subject only to annual revision as provided by law. On appeal to the city or town council a hearing can be had as prescribed in § 5661 of Crawford & Moses' Digest. When said assessment is filed, the city clerk or town recorder shall make the corrections upon the original assessment roll on file in red ink, and shall certify said assessment to the collector of the district."

By the stipulation of facts it was agreed, among other things, that at the time of the construction of the improvement in 1926, business conditions were good, and the city of Little Rock enjoyed the general prosperity; that the improvement was built with the expectation that connection would be made with one of the main highways of the State and continued as a boulevard to the State Fair Park making the project a valuable one greatly increasing the value of property fronting the proposed improvement, and therefore the commissioners, with the consent of the property owners, built a wider and more substantial street than necessary to serve the ordinary traffic needs. The State Highway Department, however, refused to include it in the State Highway System, and to make the connection with the State high-

way and changes in business conditions have prevented the carrying forward of the plan of making the improvement a boulevard to the park. Because of this and the general decline in property values, the property owners have found the burden of assessments more severe than anticipated, and because of decline in rental values they have become unable to pay the annual assessment of benefits necessary to retire the present issue of bonds as contemplated, and a large part of the annual assessments have become delinquent and remain unpaid, to a total of approximately $14,000, the annual delinquencies becoming progressively greater each year. Consequently the property owners are in grave danger of losing their homes unless the bond issue can be refunded and the annual collections be greatly decreased.

The present plan of the commissioners contemplates the retirement of the bond issue over a period of fifteen years, beginning with the year 1934, on which the annual requirements will be approximately one-half of what is required under the present schedule of maturity. The district is in default $9,500 in bonds due September 1, 1932, and $1,362 interest due March 1, 1933. The plan of the commissioners brings all delinquent assessments up to date, cuts the annual burden about fifty per cent., and to that extent is a direct and positive benefit to the property owners in the district.

The complaint attacks the constitutionality of the act on three separate grounds. First, that, in order to pay the interest on deferred assessments provided for in the act and contemplated by the commissioners, the assessments of benefits must be increased, and, as the assessments cannot be levied or collected for any purpose except for the construction of the improvement including the necessary incidental expenses, the act violates the Constitution, as held in *Bourland* v. *Southard,* 185 Ark. 627, 48 S. W. (2d) 555. In this connection the appellant calls attention to the case of *Street Improvement Dist., etc.* v. *Goslee,* 183 Ark. 539, 36 S. W. (2d) 960, where it is held that the assessment of benefits in municipal improvement districts is fixed as of the time of the

original assessment, which therefore can neither be increased nor diminished except for some physical change in the condition of the property since the original assessment, resulting in an increase or diminishing of property values.

Attention is also called to the case of *Kelly Trust Co.* v. *Paving Improvement Dist., etc.,* 185 Ark. 397, 47 S. W. (2d) 569, and the rule there announced to the effect that local assessments can be imposed only to pay for improvements which result in special benefits to the property assessed.

On the doctrine of these cases, counsel for the appellant contends that the interest provided for in § 2, *supra,* and the expenses incurred by appellees in connection with the refunding of the outstanding bonds of the district, are additional burdens to the property of the district, and the practical result will be that the assessments of benefits must be materially increased to pay for the same, and that this is equivalent to increasing the cost of improvement. Moreover, they contend that the property will receive no corresponding physical, material, or substantial benefit, and therefore the act comes within the constitutional inhibition as decided by the cases which counsel have cited, *supra.*

Counsel also cite the case of *Turner* v. *Edrington,* 170 Ark. 1155, 282 S. W. 1000, in support of the contention that local improvement districts in cities and towns have no authority to collect interest on installments of assessments of benefits.

We do not assent to these contentions or agree that the case last cited holds as the appellant seems to think. It is true that the assessments of benefits must be based upon the special benefits to the property to be taxed which forms the basis of the right to impose the cost of local improvement upon the property, and that there can be no imposition of a tax in excess of the value of the benefits. It is also true that the consent of the property owners must first be obtained in the manner provided by law for the assessment of benefits to pay for the cost of construction of improvements in municipal improve-

ment districts, and that the authority conferred by the original petition under which the district was formed could not be subsequently enlarged by legislative enactment to an additional burden to which the taxpayers had not consented. *Paving District No. 5* v. *Fernandez,* 142 Ark. 21, 217 S. W. 795; *Bourland* v. *Southard, supra.*

The interest on deferred payment of assessments however is no part of the original cost of improvement, but is a legitimate charge for the use of the money of which the appellants have received the benefit. They might have paid the assessment of benefits against their property in cash and so avoided the payment of any interest which might be imposed. On this theory, the general rule has been formulated that the Legislature may authorize the collections of interest on postponed installments of assessments. In the case of *Oliver* v. *Whittaker,* 122 Ark. 291, 183 S. W. 201, it is stated, in effect, that the value of benefits must be fixed at the time they accrue to the property from the construction of the improvement, but interest on the deferred installments becomes also a part, as it accrues, of the benefits, and payment thereof may be exacted. In that connection, the court said: "All the authorities which are brought to our attention seem to agree that the Legislature may authorize the collection of interest on postponed payments of assessments." A number of our decisions restate and approve the rule announced in *Oliver* v. *Whittaker, supra.* Among these are *Phillips* v. *Tyronza, etc., District,* 145 Ark. 487, 224 S. W. 981; *Skillern* v. *White, etc., District,* 139 Ark. 4, 212 S. W. 90; *Pfeiffer* v. *Bertig,* 141 Ark. 531, 217 S. W. 791; *Summers* v. *Cole,* 144 Ark. 494, 223 S. W. 721.

The case of *Turner* v. *Edrington, supra,* relied on by the appellant as authority for the contention that municipal improvement districts have no authority to collect interest on installments of benefits, holds merely that, in the absence of statutory authority, such districts may not charge or collect such interest, but, as we have seen, when authorized by the statute, they do have this right, and it is not to be taken as a part of the cost of

construction, nor effect an increase in the assessment of benefits within the meaning of the law. The interest charge on deferred payments of assessments may be imposed by the Legislature after the assessment has been made and the construction finished. *Pfeiffer* v. *Bertig, supra.*

Secondly, it is insisted that the act is unconstitutional for the reason that it attempts to take away from the assessors of the district who, under the terms of the general statute, serve for its life, the duty of making the assessment of benefits and give that power to the commissioners. The answer to this contention is that no provision for a new assessment of benefits is to be found in the act. The method provided by which the amount of the refunding bonds is to be ascertained is one in which no discretion is given, but involves an arithmetical calculation. In procedure (b) provided for in § 2, *supra,* the one adopted by the commissioners in the instant case, it is provided that the entire balance unpaid on the date of issue of the refunding bonds or the assessment of benefits (unpaid) against each lot, block, parcel of land, and railroad track and right-of-way shall be the assessment of benefits against the same. From the stipulation it appears that the amount of the original issue was $107,000, payable serially on the first day of September of the years 1927 to 1937, both inclusive, bearing interest at the rate of five per cent. per annum from date until paid, interest payable semi-annually on said dates. Of this issue there remained outstanding $60,000 of which $9,500 was past due and unpaid with unpaid interest to the amount of $1,362.50. It was the balance of the unpaid bonds which was determined by subtracting the bonds which had been paid from the original issue, which had become the amount for which the refunding bonds are proposed to be issued; and the balance of the original assessment of benefits becomes the new assessment of benefits on the property of the district from which the bonds as refunded are to be paid.

In the third place, the appellant contends that the expenses provided for in the act in connection with the

issue of the refunding bonds is an expense not in the minds of the property owners at the time the petition was signed and the assessment of benefits made. A sufficient answer to this contention is that in the instant case this expense (which likely is, and ought to be, insignificant) does not increase the assessment of benefits, for these remain proportionately the same as when the district was first organized, for the proposed issue of new bonds amounts exactly to the balance unpaid of the old issue. From the facts as stipulated, it is manifest that the application of the act in the instant case effects the consummation of a salutary purpose and brings to the property owners a method of relief by which their obligations may be liquidated with relative ease and prevent the loss of their property.

It is our conclusion that the statute is a valid enactment. The decree of the trial court is correct, and it is therefore affirmed.

BROWNE *v.* MERCHANTS' NATIONAL BANK OF FORT SMITH.

4-3080

Opinion delivered July 10, 1933.

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Cravens & Cravens, C. R. Barry and *Hardin & Barton,* for appellant.

Daily & Woods and *Geo. W. Dodd,* for appellees.

JOHNSON, C. J., (after stating the facts). It is first contended on behalf of appellant that the note executed by her on November 14, 1926, was materially altered before its delivery to the bank. Whatever alteration was effected in this note was done by Fred Browne, the husband of Sadie Browne, and innocently done. This note had been delivered by Sadie Browne to her husband, Fred Browne, for the use and benefit of the wholesale grocery company, of which he was president and general manager, to secure the debt of her husband to the grocery company in a sum in excess of $85,000. The title and beneficial interest in this note, of course, passed to the grocery company; it had the right to transfer and assign the security to whomsoever it chose. Any alteration made in the note by Fred Browne was innocently done.

In the case of *McConnon* v. *Browne,* 169 Ark. 954, 277 S. W. 539, this court said:

"The distinction between the effect of an innocent and fraudulent alteration is not recognized in all of the authorities, but we think that, according to the weight of authority, there is such a distinction, and that the true rule is that, unless the alteration was fraudulently

made, the obligee is not barred from his right of action on the original debt."

The alterations made in this note by Fred Browne effectually carried out the intent of the maker at the time of its execution. At any rate, it cannot be said that Fred Browne had any intention of defrauding his wife, the wholesale grocery company or the bank in effectuating this alteration. There can be no question under the uncontradicted facts in this case but that this alteration was effected by Fred Browne to carry out the intention of the parties at the time this mortgage and note were executed.

It is next contended on behalf of appellant that the indebtedness of Fred Browne to the wholesale grocery company was paid and satisfied by Fred Browne on February 20, 1931. On this question it suffices to say that the trustee in bankruptcy made Fred Browne a party to this suit alleging an indebtedness of Fred Browne in a very large sum. No defense was interposed by Fred Browne to this cross-complaint. The chancellor found that Fred Browne was indebted to the wholesale grocery company in a sum in excess of $16,000. No appeal has been prosecuted by Fred Browne from this judgment of the court. This judgment was a part of the original indebtedness of Fred Browne to the wholesale grocery company. In addition to this, it is admitted by all that on the date this note and mortgage was transferred to the bank that Fred Browne was owing to the grocery company more than $85,000. If Fred Browne effected the payment of his indebtedness to the wholesale grocery company after that time, it could not and should not impair the rights of the bank to the security held. The bank took a vested interest in this note and mortgage on January 27, 1931, and no subsequent contract between Fred Browne and the wholesale grocery company could impair it.

It is next contended on behalf of appellant that no assignment of the mortgage from the wholesale grocery company to the bank was effected. A complete answer to this argument is found in the letter from Fred Browne, president and manager of the wholesale grocery com-

pany, to the bank wherein the note was delivered to the bank. The note which was inclosed in this letter bore the blank indorsement of Fred Browne and also the indorsement of the grocery company by its president and manager, Fred Browne. "Equity regards that as done which ought to have been done."

This court held in the early case of *Richardson & May* v. *Hamlett and Wife,* 33 Ark. 237, quoting from the syllabus:

"An agreement between the vendor and vendee, that the latter shall execute to the former a mortgage upon the land to secure payment of the purchase money will give the vendor or his assignee the same rights in equity as if the mortgage had been executed."

This rule has been consistently followed by this court in all subsequent cases. We conclude therefore that the chancellor was correct in treating the mortgage in the instant case as duly transferred to the bank.

It is next contended on behalf of appellant that the pledge had been made by appellant to the grocery company for the specific purpose of securing the debt of her husband and was effected without consideration to her. Neither can we agree to this contention. The chancellor was warranted in finding that the debt to the grocery company was the joint obligation of Sadie Browne and her husband, Fred Browne. First, Sadie Browne acknowledged in the mortgage deed that she was indebted to the grocery company in the sum of $25,000. Secondly, the testimony shows that she bought much merchandise in person from the grocery company, and that it was charged to her and her husband's account on the books of the company. At any rate, she executed and delivered the note and mortgage to the wholesale grocery company for a valuable consideration. On January 27, 1931, when the note and mortgage were transferred to the bank, the wholesale grocery company had a perfect and lawful right to transfer and deliver same to any third person. Appellant knew or should have known that this transfer might be accomplished. In other words, appellant knew or should have known that she was putting it in the power of the wholesale grocery company to trans-

fer and deliver this mortgage and note to some third party, and after this is accomplished it does not lie in her mouth to say that this event could not be foreseen by her. In any view of the situation, appellant is estopped in a court of equity to assert a superior right to appellee.

No errors appearing, the decree is in all things affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* CREW.

4-3069

Opinion delivered July 10, 1933.

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

E. P. Toney, A. Z. Golden and *J. M. Golden,* for appellee.

JOHNSON, C. J., (after stating the facts). Appellant earnestly contends that the trial court committed reversible error in refusing to direct the jury to return a verdict in its favor. This argument is based upon the theory that there is no evidence to show that Raymond Crew was struck or injured by a moving train on appellant's line of road.

It is true, of course, that there is no positive testimony that Raymond Crew was struck or killed by a moving train, but the circumstances are such as to warrant

this inference. The testimony introduced shows that the body of deceased was found upon the right-of-way and within a few feet of appellant's track. The skull was crushed, the neck broken, and several ribs on the right side were injured, and the jury was fully warranted in finding that the death of Raymond Crew resulted from a terrific blow from a moving train.

This court held in *St. Louis-San Francisco Railway Company* v. *Crick*, 182 Ark. 312, 32 S. W. (2d) 815, quoting from the second headnote:

"Where the body of deceased was found upon defendant's right-of-way within a few feet of the track with his skull crushed and his shoulder crushed, with black oil smeared upon his hair and clothing, the jury were warranted in finding that he was killed by the defendant's train."

On the facts, the Crick case is full authority for the submission of this case to the jury. The fact is, the instant case is much stronger than the Crick case, because Thomas Crick, the injured party there, was determined to be a trespasser on the railroad company's tracks, whereas in the instant case Raymond Crew was an invitee and had a perfect right to be at the flag station at the time he was killed. The facts and circumstances were such as to warrant the jury in believing that Raymond Crew was awaiting the arrival of a train to transport him to McGehee; that he had his railroad pass in his hand in preparation of boarding the train; that, because of the defective condition of the headlight on the engine and the excessive amount of steam flowing from the engine, the employees on the train did not and could not discover his presence, and, as a result thereof, operated said train against him, which resulted in his death.

It is next insisted that the court erred in giving and refusing to give to the jury certain instructions.

Instructions 1, 6, 8, 9 and 12, given on behalf of appellee, are conceded to be correct declarations of law, but it is said that there is no evidence to support them. As we have heretofore pointed out, the evidence was amply sufficient to submit to the jury the questions as to whether

or not a lookout was kept by the engineer and fireman, and whether or not it was possible for the engineer and fireman to keep such lookout with a defective headlight and a badly smoking engine. It is said that the evidence of the fireman and engineer to the effect that a constant lookout was maintained is undisputed, and therefore plaintiff's instructions should not have been given. This contention is fully and completely answered by the engineer's work sheet report made on the night of the injury. This report shows that the headlight on the engine was dim and in bad condition, and, in addition, that the engine was smoking badly. Appellant's requested instructions which were refused by the trial court were fully covered by instructions given.

The facts of this case bring it well within the rule announced by this court in *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Gibson,* 113 Ark. 417, 168 S. W. 1129, wherein we held: "The effect of our holding in the former opinion is that, where proof has been introduced by the plaintiff of an injury to a person by the operation of a train under such circumstances as to raise a reasonable inference that the danger might have been discovered and the injury avoided if a lookout had been kept, then the burden is shifted to the railway company to show that such lookout was kept."

No error appearing, the judgment is affirmed.

HOWARD *v.* WASSON.

4-3070

Opinion delivered July 10, 1933.

Shinn & Henley, for appellant.

M. A. Hathcoat, for appellee.

SMITH, J. Appellants seek by this suit to have a claim for $1,500 allowed and classed, (under the provisions of act 107 of the Acts of 1927) as a preferred claim against the Citizens' Bank & Trust Company, of Harrison, Arkansas, which institution is being liquidated as being insolvent by the State Bank Commissioner.

The case was heard in the court below upon an agreed statement of facts, from which we copy the following recitals:

"On the .....day of....., 1931, the plaintiffs, Fred W. Howard, A. G. McBride and E. B. Folse, who are all residents of the State of Louisiana, entered into an agreement for the purchase of certain lands in Boone County, Arkansas, from Ralph Jefferson. It was orally agreed between these parties that Jefferson would deposit a deed to the lands in the Citizens' Bank & Trust Company, of Harrison, Arkansas, and the plaintiffs should remit the purchase price of the lands to the bank for payment to Jefferson upon the performance of certain conditions agreed upon by the parties.

"On August 11, 1931, A. T. Hudspeth, who was at the time an active vice-president of the bank, sent to E. B. Folse a telegram reading as follows: 'Wilson has put up his part of the money, five hundred dollars. And if you send me fifteen hundred, note and deed will be mailed at once.'

"On August 12, 1931, Folse wired the following reply: 'Remitting fifteen hundred dollars today.'

On August 15, Howard, McBride and Folse each remitted a check for $500, drawn on a bank in Louisiana, to Hudspeth, all of which were payable to his order, it being their intention that the proceeds of these checks

should be applied to the payment of the purchase price of the land, and "these checks were by A. T. Hudspeth deposited, without the knowledge or consent of these plaintiffs, in the said Citizens' Bank & Trust Company, of Harrison, Arkansas, on August 15, 1931, to his personal account, and caused to be issued to himself a certificate of deposit therefor."

In addition to the stipulation as to the facts, a deposition was read in evidence to the effect that on August 12, 1931, Hudspeth sent to Folse, at Bastrop, Louisiana, a telegram which, in substance, directed Folse to remit $1,500 either to the Bankers' Trust Company or to the Union Trust Company, of Little Rock, Arkansas, for the account of the Citizens' Bank & Trust Company, of Harrison, Arkansas; but, as appears from the facts already stated, the remittance was not made in this manner. On the contrary, it was made directly to Hudspeth in the form of checks payable to his individual order.

On September 1, 1931, the Citizens' Bank & Trust Company was taken over by the State Bank Commissioner for liquidation, at which time the personal account of Hudspeth was overdrawn.

Plaintiffs presented their claim to the State Bank Commissioner for allowance within the time and manner provided by law, and the same was disallowed either as a common or a preferred claim, and that action was later approved by the chancery court, and this appeal is from that action.

Section 1 of act 107 of the Acts of 1927 defines the persons who are designated as secured or prior creditors of insolvent banks which have been taken over for liquidation by the Bank Commissioner, and subdivision 4 of this section reads as follows: "A prior creditor shall be * * * (4) the owner of a special deposit expressly made as such in said bank, evidenced by a writing signed by said bank at the time thereof, and which the bank was not permitted to use in the course of its regular business."

Appellants insist that they are secured or prior creditors within the terms of this subdivision 4, and that

the writings herein set out evidence a special deposit expressly made, which the bank was not permitted to use in the course of its regular business.

We do not concur, however, in the view that a deposit, either general or special, is shown by the testimony in the case. No doubt the plaintiffs intended to make a special deposit, but a deposit of that character was not made. Indeed, they made no deposit of any character. The deposit made was by Hudspeth individually, and there is no record in the bank showing that plaintiffs became creditors of the bank, either general or special.

There appears in the record a letter, written on the stationery of the bank, dated August 18, 1931, from Hudspeth to Folse reading as follows:

"The deed we have is made to H. M. Walker, and I can get a deed from him or one from Mr. Jefferson, and save the recording fees on the deed made to Walker. Please advise me to whom you want the deed made and what consideration?

"Yours very truly,
"A. T. Hudspeth,
"Vice-President."

It is insisted that Hudspeth, as vice-president of the bank, was aware of the purpose of the plaintiffs, and that this knowledge on his part should be imputed to the bank, and attention is called to the letter from Hudspeth to Folse, written on August 18, 1931, set out above. In answer to this contention, it may be first said that this letter was not written until three days after Hudspeth had received checks, payable to his own order, and not to that of the bank, and had deposited them to the credit of his personal account. Moreover, this letter indicates that even then the deed had not been placed in the bank.

The court found the fact to be that, in the transaction stated, "A. T. Hudspeth was acting for himself, and not for said Citizens' Bank & Trust Company," and we think the testimony supports this finding of fact. Hudspeth advised Folse that, "if you send *me* fifteen hundred," the note and deed would be mailed, and that direction was followed.

The transaction was of no interest to the bank, and no showing is made that there was any prospect of profit to it, even though Hudspeth had not defrauded Folse and the associates of the latter by misappropriation of the checks to his own credit and account.

It was said, in the case of *Little Red River Levee District No. 2* v. *Garrett,* 154 Ark. 82, 242 S. W. 555, that: "A corporation must necessarily act through agents, and the universal rule is that knowledge of an agent is ordinarily to be imputed to the principal; but there is an exception to that rule that such knowledge of the agent will not be imputed to the principal where the agent acts for himself or has a personal interest in the transaction, thus rendering it improbable that he will report his knowledge to his principal. *Bank of Hartford* v. *McDonald,* 107 Ark. 232, 154 S. W. 512. This exception to the general rule has been, in many instances, extended to cases where an officer of a corporation acts for another corporation. Under these circumstances, the officer is treated as having a personal interest in the transaction, and his knowledge is not to be imputed to the corporation which he serves. This exception, however, to the rule does not extend to instances where an officer of a corporation acts as its sole representative or agent in the transaction under review. The reason for the exception fails where the officer of the corporation is its sole representative, and especially where, as in the present case, the officer is the corporation itself, without accountability to any superior. It would be entirely beyond reason or justice to hold that a person acting as the agent of both parties could wrongfully transfer property of one of his principals to the other."

At § 190 of the chapter on Banks in 3 R. C. L., page 564, appears this statement of the law: "The cases hold that the act of the cashier, by which he appropriates exclusively to himself a gratuitous special deposit in the bank, is not an act done in the bank's business, and within the scope of his employment. The custody of the deposit implies no act to be done, but only a mere continuance of possession until a return of the property is demanded. The cashier has nothing to do with refer-

ence to it except suffer it to remain in a safe place of deposit. Consequently, in taking it to himself, he is said to 'step aside' from his employment to do an act for his personal gain, regardless of the business for which he was engaged. Such an act is lacking both in the rendition of, and in the intent to render, any service to the employer. The cashier does not, as a matter of fact, act with the bank's authority, and, furthermore, does not essay, or even profess, to act in its behalf. He represents nobody but himself. He throws off all allegiance to his master and takes the part of a common enemy to all concerned. He becomes the same as a stranger from without, who by robbery, burglary, or stealth deprives the bank of a special deposit; and the authorities hold that the bank is not chargeable with such a loss, in the absence of gross negligence, though it is liable if grossly negligent. Such a fraud, by a well-selected servant, duly supervised, is not to be imputed to the bank as its own fraud. The bank cannot be said to have stolen when there is on its own part no participation in the theft, no appropriation, and no intent to appropriate the property. Of course, if the bank derives profit or benefit from its servant's speculation, it is liable."

A well-considered case which supports the statement of law just quoted is that of *Merchants' Nat. Bank of Savannah* v. *Guilmartin,* 88 Ga. 797, 15 S. E. 831, 17 L. R. A. 322. See also *Greer* v. *Levee Dist. No. 3, Conway County,* 140 Ark. 67, 215 S. W. 171.

Viewed in the light most favorable to appellants, it is disclosed by the testimony only that they contemplated that the bank would act as a gratuitous bailee in the discharge of their agreement with Jefferson, but the opportunity to perform even this service was not offered, because the individual whom the plaintiffs selected as their agent misappropriated the checks before they reached the bank, and the deposit thereof was made in the individual name of the payee in each of the checks. Had the checks been payable to the order of the bank, a different question would be presented which we are not required to discuss.

The decree is correct, and it is therefore affirmed.

WILLIAMSON *v.* NIXON.

4-3158

Opinion delivered July 10, 1933.

Talley, Coulter & Talley and *Will G. Akers,* for appellants.

Wayne W. Owen, for appellee.

SMITH, J. The question presented on this appeal is whether The Daily Legal News, printed and published in the city of Little Rock, has become and is now a "newspaper" within the meaning of § 6807, Crawford & Moses' Digest.

In an opinion delivered on May 2, 1932, reported in 185 Ark., at page 748, 49 S. W. (2d) 371, under the style of *Continental Life Insurance Co.* v. *Mahoney,* it was held that this publication was not a newspaper within the meaning of § 6807, Crawford & Moses' Digest, which section of the statute authorizes and directs the publication of certain legal notices in newspapers. After a review of the cases dealing with the subject, we declared the requirements which a publication must meet to be classed as a newspaper within the meaning of the statute. The headnote in that case reads as follows: "A daily publication specializing in news relating to the courts and to business transactions, and having a $20 yearly subscription rate, but carrying no news of a general character, *held* not a 'newspaper' in which notice of foreclosure proceedings could be published, under Crawford & Moses' Digest, § 6807." We there said: "We think the test in determining the question is whether or not the publi-

cation regularly carries the record of events occurring of general interest to the public as a whole, and those publications which do carry such items might be properly designated as newspapers, although some special purpose or class of happenings be the chief object to which the publication is devoted. The reason for the test we have suggested becomes apparent when the object for which notices are printed is considered, *i. e.*, that they be given wide and general publicity, and publications cannot reasonably be expected to be generally read when they have no news of general interest, but are restricted to events of interest only to a few classes. There are numerous cases which support this view, among which are the cases cited, *supra,* and *Beecher* v. *Stevens,* 25 Minn. 146; *Reagan* v. *Duddy,* 25 Ky. Law Rep. 1664, 78 S. W. 430; *Times Printing Co.* v. *Star Publishing Co.,* 51 Wash. 667, 99 Pac. 1040, 16 Ann. Cas. 414."

At the time of the former appeal the annual subscription price of the publication was $20. We were then and are yet of the opinion that a subscription price so large would necessarily limit the number and character of the subscribers to the class of persons interested in the news items of a legal nature in which the publication specialized, and was an important circumstance to be considered in determining whether its circulation was general. The subscription price has since been reduced to $12, and it is now shown that the circulation has been materially increased since the time of the former appeal.

In addition, it is now made to appear that "the publication regularly carries the record of events occurring of general interest to the public as a whole." A number of different issues of the publication are exhibited, and all appear to be of about the same character. For instance, in the issue of May 23, 1933, the following news appears: An item relating to the Civilian Conservation Corps for Arkansas under a recent act of Congress and a call for physicians for that service; a half-column of social and society news, including meetings of various clubs and church societies; a list of motion picture shows in both Little Rock and North Little Rock; certain tabloid news from Washington respecting congressional legislation;

brief items of general news of Little Rock; news from Chicago concerning the 1933 World's Fair; river and flood news; an obituary column; report of a meeting of the North Little Rock city council; meetings of noon-day luncheon clubs; a social function held by the Little Rock Y. M. C. A.; sporting news; additional amateur sporting news; certain market reports; and a few other items of news. Other copies of the publication which are exhibited contain about the same character of news of a general nature.

We feel constrained to hold, in view of the enlarged news service which the publication now renders, that it has become and is a newspaper within the meaning of § 6807, Crawford & Moses' Digest, as that section was construed on the former appeal.

We therefore hold that the publication is eligible to print in its columns the legal advertisements which may be legally printed in other daily papers, and the decree of the court below, holding to the contrary, is reversed.

TEXARKANA *v.* JAMES & MAYO REALTY COMPANY.
4-3067

Opinion delivered July 10, 1933.

Willis B. Smith, for appellant.

Frank S. Quinn, for appellees.

KIRBY, J., (after stating the facts). The statutes of the State authorize cities of the first class to levy an occupation tax requiring any person, firm, individual or corporation, who shall engage in, carry on or follow any trade, business, profession, vocation or calling within the corporate limits of such city, to take out and procure a license therefor and pay into the city treasury such a sum or amount of money as may be specified for such license and privilege. Section 5 of article 16 of the Constitution of 1874; § 7618, Crawford & Moses' Digest. See also 37 C. J. 181.

The State can levy an occupation tax on all persons engaged in the real estate business herein, but appellees insist that they are not subject to any such tax for engaging in the real estate business in the city of Texarkana because they don't maintain offices or places of business in the city of Texarkana, Arkansas, although they do all other things necessary to be done in carrying on such business there, but maintain their places of business on the Texas side of the town.

The ordinance was not intended to license a place for carrying on a real estate business but the persons actually carrying on such business itself, and it is undisputed that the appellees were doing everything necessary to carrying on the business of real estate brokers (§ 2, act 142 of 1931) in the city of Texarkana, Arkansas, except that they had their places of business situated across the State line in Texas, where most of the negotiations for carrying on the business were consummated. It is the right to engage in the real estate business, the privilege itself, that is taxed, regardless of whether the operatives live or maintain their offices or places of business in the city where the business is carried on.

It is true that the statute provides that no person, firm or corporation shall pay license fees or taxes men-

tioned in this act (§ 7618, Crawford & Moses' Digest) in more than one city in this State, unless such persons maintain such place of business in more than one city. But a fair construction of this provision does not indicate that the license is not required to be paid by only those who have or maintain regular offices inside the city. It is the privilege of engaging in such business, the occupation, that is taxed, rather than the place or office for carrying it on.

Appellees deny that they are engaged in the real estate business in the city of Texarkana, Arkansas, within the meaning and intent of the occupation tax ordinance and the statute, (§ 7618, Crawford & Moses' Digest), but each and all of them, except Mrs. Swindell, had taken out and procured a license from the Arkansas Real Estate Commission under act 148 of 1929 as amended by act 142 of 1931 for engaging in the real estate business in the State of Arkansas. These statutes provide that no recovery may be had by any broker or salesman in any court in this State in a suit to collect a commission due him unless he is licensed under the provisions of the act and such facts are stated in the complaint.

The conduct of business in the city of Texarkana, Arkansas, by appellees brings them easily within the terms of the definition of a real estate broker as provided in § 2 of act 142 of 1931. There a person who does any of the things specified in said definition in the carrying on of his business comes within the terms of the statute and ordinance, and the undisputed testimony shows the appellees were engaged in the real estate business in the city of Texarkana, Arkansas, in violation of the ordinance requiring the payment of an occupation tax for carrying on such business. The person carrying on the business of a real estate broker or dealer need not do all the things mentioned as constituting or defining such broker within the limits of the city in order to become liable to the payment of an occupation tax therein.

In *Blytheville* v. *Webb,* 172 Ark. 874, 290 S. W. 589, under the terms of a city ordinance imposing a license tax on dealers engaged in selling oil and gasoline within

the city limits, a wholesale dealer in oil and gasoline who maintained his place of business without the city limits but caused his trucks to be driven into the city for sale and delivery of oil and gasoline therefrom was held liable for the tax, regardless of the fact that his storage tanks for loading gasoline and oil to be carried into the city were entirely outside the city limits.

The appellees could be real estate brokers within the meaning of the ordinance and statute and violate its terms and become liable to its penalty, although they did not live in the city of Texarkana, Arkansas, nor have a place of business there. See also *Town of Winston* v. *Taylor,* 99 N. C. 210, 6 S. E. 114; *City of Memphis* v. *Battaile,* 6 Heisk. 524, 24 Am. Rep. 285; *Arkadelphia Lumber Co.* v. *Arkadelphia,* 56 Ark. 370, 19 S. W. 1053.

It was held in *Texarkana* v. *Taylor,* 185 Ark. 1145, 51 S. W. (2d) 856, that a nonresident attorney, having no office in the city of Texarkana, Arkansas, was not subject to the license tax imposed in the ordinance upon practicing attorneys, since he was only practicing law incidentally therein and subject only to payment of the fee for enrollment of nonresident attorneys as provided by the statute, § 605, Crawford & Moses' Digest. Said statute has no application in the instant case, real estate dealers not being included within its terms.

It follows from what has been said that the court erred in rendering its decree, which is reversed, and the cause remanded with directions for further proceedings in accordance with this opinion and not inconsistent with the principles of equity.

JOHNSON, C. J., disqualified and not participating.

HOME LIFE INSURANCE COMPANY *v.* WASSON.

4-3073

Opinion delivered July 10, 1933.

[redacted]

Buzbee, Pugh & Harrison, for appellant.

Bridges, McGaughy & Bridges, for appellee.

KIRBY, J. This is the second appeal of this case, a sufficient statement of which appears in the opinion on the former appeal, *Home Life Ins. Co.* v. *Taylor,* 186 Ark. 768, 55 S. W. (2d) 929. The court reversed the judgment and remanded the cause with directions to enter judgment in favor of the Home Life Insurance Company for the full amount of the collection which had been made by the Bank Commissioner on certain paper which was a prior claim, for costs, etc.

The chancellor entered a decree pursuant to the mandate, and the appellants for the first time during the entire proceedings asked orally that it be allowed interest on the amount collected prior to the filing of the intervention ($35,194.29) from the day of the filing of the intervention and that the entire decree bear interest from date until paid. The court refused to allow interest on the claim and on the judgment, and the sole question raised in the appeal is whether interest can be paid on a preferred claim against an insolvent bank.

Appellee insists that the question was not presented to the lower court on the first hearing nor to this court on the first appeal, and also that interest cannot be recovered on a preferred claim against an insolvent bank in the hands of the Bank Commissioner.

It is true that the transcript does not show that the appellants ever requested or demanded that interest be allowed on their claim until the decree of the chancery court was entered pursuant to the mandate of the Supreme Court issued after the first appeal of this case, at which time an oral request was made. None was made in fact in the appellants' claim filed with the Bank Commissioner, and no such request was made in the intervention filed by the appellants in the first instance, nor in their amended intervention, and no such request was made in the general prayer for relief.

It may be that this court could well refuse to grant any relief on that account. *Hall* v. *Potter,* 81 Ark. 476, 99 S. W. 687; *Mutual Relief Ass'n* v. *Weatherly,* 172 Ark. 991, 291 S. W. 74; *Laflin* v. *Brooks,* 180 Ark. 1167, 22 S. W. (2d) 169; *Wolf* v. *Alexander Film Co.,* 186 Ark. 848. It is not necessary, however, to do this, since the matter can be decided on its merits and is controlled by the opinion of this court in *Taylor* v. *Corning Bank & Trust Co.,* 186 Ark. 691, 48 S. W. (2d) 1102. On the first appeal of that case reported in 183 Ark. 757, 38 S. W. (2d) 557, the court held the claim should be allowed as a preferred claim, but awarded no interest. Afterwards the chancellor in a decree on the remand of the cause allowed interest as demanded by the Corning Bank & Trust Company and the Bank Commissioner appealed. The court held that interest could not be recovered, saying: "While this claim is a prior or preferred claim, every other depositor has the same right as a depositor holding a preferred claim, except the right to be paid first, but, unless the banking institution or commissioner has sufficient funds to pay all the depositors, no interest can be paid on any claim."

It was further said there: "The general rule is that, unless there are sufficient funds to pay all the depositors, no depositor is entitled to interest on his claim. * * * A depositor in a bank, which has become insolvent, is not entitled to interest on his claim unless the assets are sufficient to pay all the depositors."

The court held there also that the statute, § 7360, Crawford & Moses' Digest, allowing interest on judgments, was not applicable to the question of whether interest was payable on a preferred claim against an insolvent bank in the hands of the Bank Commissioner.

There are no allegations in the complaint or facts shown which would take this case out of the rule, no showing being made that the funds of the insolvent bank were sufficient to pay all depositors.

It follows that no error was committed in the refusal to allow judgment for interest on the preferred claim, and the decree is affirmed.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* HARRIS.

4-3039

Opinion delivered June 12, 1933.

[redacted]

Dillon & Robinson, Owens & Ehrman, J. M. McFarlane and *John M. Lofton, Jr.,* for appellant.

J. H. Lookadoo, for appellee.

HUMPHREYS, J. Appellee brought separate suits against appellants in the circuit court of Clark County to recover the amount of the indemnity provided in each policy for the death of her husband, through external, violent and accidental means.

Each appellant defended upon two grounds: first, that the policies had lapsed for the nonpayment of premiums; and, second, that the insured's death was not accidental. The causes were consolidated for the purposes of trial, and, at the conclusion of the testimony, the trial court instructed the jury to return a verdict in each case for the amount sued for, penalty, attorneys fee, and costs, over the objection and exception of appellant, and from the verdicts and consequent judgments an appeal has been prosecuted to this court.

At the time the policies were issued, the insured, a negro, was working for the Missouri Pacific Railroad Company in section gang No. 52, and when he received the policy, he gave each of the appellants an order on the Missouri Pacific Railroad Company to deduct the

premiums from his wages and pay same to the appellants. The Missouri Pacific Railroad Company deducted premiums down to and through the month of June, 1927, but failed to make the deduction in July, August and September, because, according to appellants' admission in the course of the trial, the Missouri Pacific Railroad Company had not been asked to pay the premiums for those months. The insured was shot in the back while getting in a box car containing merchandise in the yard at Gurdon on October 23, 1927, in which yard he was then employed. He was working in section gang 52 then under the name of H. A. Harry through an error of the paymaster in making up the payroll, but there is no question about him being the same person who was insured. In the meantime he had been transferred for a while to section gang 11, then to section gang 4, then back to section gang 52. After he was shot by the special agent of the Missouri Pacific Railroad Company, the special agent had the car moved down to the station, where it was entered by the town marshal of Gurdon. The special agent stated that he had shot him. The insured had been shot five times, one shot at least entering his back and passing entirely through his body. His body was lying in the extreme end of the car. A knife supposed to belong to him was a short distance from his body, and it appeared that he had used it to open a box of cakes, out of which he had been eating. A pistol supposed to belong to him was found in the doorway with an empty cartridge in it. A disinterested witness stated he had heard and seen every shot that was fired by the sound and flash it made, and that every one of them was fired from the same place and in the same direction. An inquest was held, and the special agent was exonerated. None of the evidence introduced at the inquest appears in this record. The special agent did not testify in the case.

Based upon this undisputed testimony, the trial court instructed verdicts against appellants on the theory that it was their duty to collect the premiums on the orders which they had procured from the insured, and that their

failure to do so did not lapse the policies, and that no justification was shown for the homicide.

The first finding was correct because the insured had worked continuously for the railroad company after he gave the order and earned sufficient money to pay the orders had they been presented. It was admitted in the course of the trial that, if the railroad company had had the orders, it would have paid the premiums. The case of *Missouri Life Insurance Company* v. *Walker,* 67 Ark. 147, 53 S. W. 675, cited by appellants, is not in point. It was stated by the court in that case that it was not clear that the railroad company had money in its hands out of which to pay the last premium, and therefore that the insurance company was not required to notify Walker of the failure to pay the order because he knew he left no money with the company to pay it and must have known, without notice, that the order had not been paid. Not so in the instant case, but, on the contrary, it is admitted in the record that if the insurance companies had presented the orders, they would have been paid. It is a case of negligence on the part of appellants to protect themselves when they had an opportunity to do so through the method devised by them to collect their premiums, and they cannot take advantage of their own neglect to cancel the policies.

The second finding was correct also. The killing was admitted, and the burden was thereby cast upon appellants to show that the killing was justified. This court said in the case of *Metropolitan Casualty Insurance Company* v. *Chambers,* 136 Ark. 84, 206 S. W. 64: "It is the settled law in this State that proof of death of an insured from injuries received by him raises a presumption of accidental death within the meaning of an insurance clause insuring against injury by external, violent and accidental means, and this presumption will continue until overcome by affirmative proof to the contrary on the part of the insurer."

In the case of *Ætna Life Insurance Company* v. *Little,* 146 Ark. 75, 225 S. W. 298, this court defined an accidental killing within the meaning of the terms of these and like policies, as follows: "If a result is such

as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

According to this record, the special agent attacked and killed the insured because he thought he was robbing a car. The insured was working in the yard and may have had authority to enter the car and was killed while in the act of entering it. If the pistol at the door belonged to the insured, it was not shown that he used it or attempted to use it or the knife on the special agent. The empty cartridge may have been in the pistol all the time. The only use made of the knife was to open a cake box. He was eating cakes at the time, and none of these things justify homicide.

No error appearing, the judgment is affirmed.

SMITH, J., (dissenting). Inasmuch as the judgment here appealed from was rendered upon a verdict returned under the direction of the court, we must test that action by giving appellants' testimony its highest probative value, with all inferences reasonably deducible therefrom. Therefore, the question presented for our decision is not whether the testimony is legally sufficient to support a verdict in appellee's favor, but is rather whether, viewed in the light most favorable to appellants, it would have supported a verdict in their favor. If, under the testimony so viewed, a verdict could have been returned for appellants by the jury under proper instructions, then the judgment appealed from should be reversed for the error in directing a contrary verdict.

It may be first said that it is an undisputed fact that the premiums necessary to keep the policies in force up to and until October 22d or 23d, 1927, the date of the insured's death, were not paid, yet the insurance companies are required under the judgment here appealed from to pay policies upon which they had not received the premiums necessary to keep them in force.

The theory of the majority, as I understand the opinion, is that the insurance companies must pay the policies, although they did not receive the premiums, because they should not be heard to say that the premiums were not paid.

It is an undisputed fact that all of the insured's wages, except those earned during the last fifteen days of his life, were paid to the insured himself, and he, of course, knew that the premiums were not being paid out of his wages. The last wages earned by the insured were paid after his death to his widow.

The premiums were paid by the railroad paymaster down to and through the month of June, 1927, as the majority say, but, as the majority also say, there were no payments of premiums during the months of July, August and September. Now, although the insured himself drew his wages for these three months and appropriated them to his own use, the trial court declared, as a matter of law, that the policies continued in force because the railroad company should have paid the premiums to the insurance companies and should not have allowed the insured to draw the entire amount of his wages.

Now, the fact is that the pay orders which the railroad company received were executed by Aaron Harris, and the premiums were paid to the insurance companies so long as the name of Harris remained on the railroad payroll. There were two pay days each month, the first and the fifteenth. The pay orders executed by Aaron Harris were paid until and including the second pay day in June.

At the time the policies were issued and the pay orders were signed Harris, the insured, was working on section gang No. 52 of the Arkansas Division, which is located at Gurdon. He took a voluntary lay-off in the latter part of June, and then went to work on extra gang No. 4, which was working between Hope and Nashville. After working on the extra gang for about ninety days Harris returned to gang 52, but he went to work, not as Aaron Harris, but as H. A. Harry, and he failed to notify either the insurance companies or the pay-

master of the railroad that H. A. Harry was Aaron Harris back on the job.

The undisputed testimony shows that there are 101 section gangs on the Arkansas division of the Missouri Pacific Railroad, and many times that number on the entire system. Separate payrolls are kept for each gang, and if a man transfers from one gang to another the paymaster has no way of knowing that a man with a similar, or even identical, name, appearing on one section gang, has previously been employed on another gang, unless he is advised of that fact. In the absence of advice on the subject the paymaster could not be expected to know that H. A. Harry was Aaron Harris.

The trial court in directing a verdict for the plaintiff gave the following reason for that action: "It developed that during his life and after the policies were taken out he was transferred to another section, and it appears from the record in this case that about the time of that transfer the companies ceased receiving payments on the premiums, notwithstanding the fact that the railroad company had full authority, and had been authorized by the employee, who was the insured, to pay to these respective defendants the sum agreed on as premiums for the respective policies. Now, in addition to that, the evidence shows that the insured earned each month sufficient money to make these payments out of his pay to the companies. The court holds that it was the duty of the companies to collect the premiums on the order which they had procured from the insured to the railroad company, and that their failure to do it did not cause a lapse of the policies. The policies were still in force and effect just as if they had done it."

I think this action was erroneous, because the evidence showed that it was customary for employees who had signed pay orders to notify the paymaster of changes in employment, in order that the deductions might be continued. Harris, not only did not notify the railroad company that he and Harry were one and the same person, but, on the contrary, he drew down all the pay due Harry. He could not have been under the apprehen-

sion that his premiums were being paid by the railroad company when all his wages were being paid to him.

Each of the policies sued on provided that the insurance should forfeit without notice to the insured in the event of the nonpayment of the premiums, and each policy provided that the action of the employed in deducting the installments of premiums from the wages was entirely at the risk of the insured.

There is no question in this case about the pay orders having been delivered to the railroad company. They were at all times in the possession of the railroad company, and were regularly and properly honored by the railroad company so long as the records of the railroad company showed that the insured Harris was their employee. The railroad official having the pay records in charge testified that deductions were made pursuant to the pay orders so long as their records showed Harris to be in their employ, but payments were not made after June for the reason that the pay records did not show Harris to be an employee.

Why the insured returned to gang 52 and had his name placed on the payroll as Harry, instead of Harris, is not explained. It appears to me that it would not have been unreasonable for the jury to have found, had the case been submitted to the jury, that Harris employed this method to defeat and annul his pay order, in view of the fact that he drew down his full pay during the months of July, August and September. In any event, I think that this was not a proper case for a directed verdict.

It is to be remembered that the policies sued on are accident policies, and that a recovery was prayed upon the ground that the insured's death was effected by accidental means. The insured was a negro section hand, and there is no intimation that he had any duty to perform which required or authorized him to enter freight cars in the nighttime. Several boxes in this freight car had been broken open. One of these boxes contained cakes, and the insured's mouth was filled with cake when his body was found. Near the body was an open knife and a pistol, which had been fired one time,

and these were shown to have belonged to the deceased. It occurs to me that these facts made an issue as to whether the insured's death was accidental, if they do not conclusively show the contrary to be true.

I am therefore of the opinion that the case should have been submitted to the jury upon two questions, first, whether the premiums had been paid, and second, whether the death of the insured was accidental.

I am authorized to say that Justices McHaney and Butler concur in the views here expressed.

Stanley *v.* State.

Crim. 3837

Opinion delivered June 12, 1933.

J. P. Clayton and *Cravens, Cravens & Friedman,* for appellant.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

McHaney, J. Appellant was convicted of murder in the second degree on a charge of murder in the first degree for the killing of his nephew, Gordon Stanley, and sentenced to five years in the penitentiary. Four errors are assigned and now urged for a reversal of the judgment—two relating to requested instructions refused by the court and two relating to instructions given on the court's own motion over his objections and exceptions.

1. The first relates to requested instructions Nos. 10 and 12 refused. It is said that No. 10, "together with requested instruction No. 12, would have told the jury with reference to the plea of self defense of appellant that it was only necessary for the danger of attack from deceased to have appeared to the appellant to make it necessary to take deceased's life. In other words, that it need not appear to the jury that there was any danger, but that the appellant would have been justified in killing in self defense if it appeared to him, acting without fault or carelessness, that there was such danger." These requests were fully covered by instructions 16 and 17 given by the court, and it was not necessary or proper to multiply instructions on the same subject. Moreover, we have been unable to find any evidence in the record to support a plea of self defense or any instructions on the subject. The undisputed facts show that appellant killed the deceased without justification. "Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony." Section 2369, Crawford & Moses' Digest. Neither at the time of the killing, nor at any other time, did the deceased attack or threaten the person of appellant, nor does it appear that he intended or endeavored to commit a felony against appellant's habitation, person or property. We do not review the evidence, as no useful purpose could be served thereby. It is sufficient to say that a plea of self-defense was not supported by any evidence.

2. It is next urged that error was committed in refusing to give requested instruction No. 14, which would have told the jury that the fact that appellant had been indicted by the grand jury was not to be considered as evidence against him. While it is entirely proper to give such an instruction (*Worthem* v. *State,* 82 Ark. 321, 101 S. W. 157; *Latourette* v. *State,* 91 Ark. 65, 120 S. W. 411; *State* v. *Fox,* 122 Ark. 197, 182 S. W. 906), its refusal would not be prejudicial and would not justify a reversal, especially where instructions are properly given on the presumption of innocence, the burden of proof and reasonable doubt, as is the fact in this case.

3. The third assignment complains of the giving of instruction No. 16 relating to the law of self-defense, in that, in order for such plea to be available to him, he must have in good faith endeavored to decline further contest. What we have already said disposes of this assignment. There was no contest,—none to further decline. So, whatever error there was in this connection was in giving any instruction at all on self-defense,—an error in appellant's favor for which he cannot complain.

4. Finally it is said the court erred in giving instruction No. 20. It follows: "The law, in order to convict, does not require that the guilt of the accused shall be made out to a mathematical or absolute certainty, but it does require that it be made out to a moral certainty, which is a certainty that convinces and directs your understanding and satisfies your reason and judgment that the defendant is guilty." The complaint made of this instruction is that it did not conclude with the words "beyond a reasonable doubt." There is no merit in this criticism. Instruction No. 19 immediately preceding was on presumption of innocence and reasonable doubt, and No. 20 was a further explanation of what was required to be convinced of guilt beyond a reasonable doubt, and was as favorable to appellant as the law warrants.

Affirmed.

FRENCH *v.* STATE.

Crim. 3839

Opinion delivered June 19, 1933.

Oscar E. Ellis, for appellant.

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

JOHNSON, C. J., (after stating the facts). The first insistence is that the trial court erred in overruling appellant's motion for a continuance.

It is the well-settled law in this State that continuances are left to the sound discretion of the trial court, and that a refusal to grant a continuance is never ground for a new trial, unless it clearly appears to have been an abuse of such discretion and manifestly operates as a denial of justice. *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *Wood* v. *State,* 159 Ark. 671, 252 S. W. 897.

From the statement of facts it appears that the only material testimony offered to be established by the absent witness was that the still which was found by the officers was located one-half mile distant from appellant's home. The witness John Rogers, who was present

at the trial, testified to this same fact, therefore, the evidence of the absent witness would have been cumulative only. For this reason, if no other, the trial court was fully warranted in overruling the motion for continuance.

It is next insisted that the trial court erred in not directing a verdict of not guilty in behalf of appellant. This is based upon the theory that the still which was found by the officers had no worm attached thereto.

If juries and trial courts could not convict defendants for possessing a still merely because some necessary part thereof had been detached, future convictions would certainly be imperiled. It is for the jury to determine whether or not the defendant was in possession of a complete still, and they should take into consideration all the facts and circumstances in evidence to determine this fact, and, when they have done so, trial courts and this court will not disturb their findings merely because some material part of the still was detached and not found.

It is next insisted on behalf of appellant that he did not receive a fair and impartial trial because Ulyless Lefevers, an accepted juror in said case, was biased and had expressed an opinion before the trial that defendant was guilty. The trial court heard testimony on this question of fact and decided that the juror was not biased and had not expressed an opinion before the trial.

This court held in *Hooper* v. *State, ante* p. 88, as follows: "The trial court heard evidence on this question and decided against the contention of appellant. The testimony was in conflict. The finding of the judge on questions of fact properly submitted to him is as conclusive here as the finding of a jury." Citing a number of cases.

Lastly, it is contended that this case should be reversed because the record does not reveal the names of all the bystanders who were summoned to complete the jury. The record does show the names of all jurors accepted in this case.

Section 6378 of Crawford & Moses' Digest provides: "If a jury cannot be obtained out of said panel of regu-

lar petit jurors, bystanders shall be summoned to complete such jury, and the oath mentioned in § 6375 shall be administered to said bystanders, and the record shall contain the names of said bystanders." This section of the statute is cited as authority for appellant's contention. "The record shall contain the names of all bystanders, etc.," is directory merely and not mandatory.

At any rate, we cannot conceive appellant's rights being jeopardized by noncompliance with the quoted section of the statute. It is certainly not an irregularity about which he should complain. In a long line of decisions this court has held criminal cases will not be reversed for nonprejudicial errors. *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Perkins* v. *State,* 168 Ark. 710, 271 S. W. 326.

No prejudicial errors appearing, the judgment is affirmed.

NEAL *v.* GATZ.

4-3152

Opinion delivered June 26, 1933.

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

D. G. Beauchamp, for appellee.

JOHNSON, C. J., (after stating the facts). The question presented for determination is, will mandamus lie to compel the State Land Commissioner to accept one year's taxes, penalty and costs as the purchase price of a lot or parcel of land, where the record shows that there are two years' subsequent taxes due thereon?

Section 10,088 of Crawford & Moses' Digest provides the time and place of effecting sales on delinquent real estate.

Section 10,092 of Crawford & Moses' Digest provides the manner in which the sale is effected in event the State becomes the purchaser, and reads in part as follows: "Immediately after such sale the clerk of the county court will make out and certify to the Auditor of State a copy of each of said sale lists as recorded in said book, together with an abstract thereof showing the total valuation of the property contained in each and the total amount of taxes, penalty and cost thereon in each."

Section 10,112 of Crawford & Moses' Digest provides the procedure when the sale becomes executed in the State, and reads as follows: "Immediately after the expiration of the two years allowed by law for the redemption of land sold for taxes, the clerk shall make out a certificate of sale to the State for all lands purchased by the State, as shown by the records of such tax sale in his office which have not been redeemed, and state therein the amount of taxes, penalty and cost thereon, and cause

the same to be recorded in the recorder's office of the county, and thereupon the title to all lands embraced in such certificate shall vest in the State, and the clerk shall immediately transmit such certificate to the Commissioner of State Lands, and thereupon the said lands shall be subject to disposal, as other forfeited lands shall be."

It is apparent that the last-cited section of the statute effects title in the State only after the two-year period of redemption has expired.

When §§ 10,092 and 10,112 are harmonized and construed together, it is evident that it was the intention of the Legislature to require the county clerk to certify, in the certificate provided for in § 10,112, the total amount of taxes, penalties and costs accruing against the tract up to the date of the certificate, and not merely the one year's taxes, penalty and costs which accrued on the date of the forfeiture. The certificate provided for in § 10,092 of Crawford & Moses' Digest fully advised the State authorities of the amount of taxes, penalties and costs due for the year of delinquency, therefore the certificate provided for in § 10,112 would be unnecessary unless given the meaning and construction here given.

Prior to the execution of the certificate provided for in § 10,112 of Crawford & Moses' Digest, the State has no title in or to delinquent lands, and all redemptions prior to such certificate must be effected through the county officials of the county wherein the land lies. It is the duty of courts to harmonize conflicting provisions of statutes, and it would be a strained construction to hold that the owner would be required to pay three years' taxes, penalties and costs if he redeemed his land immediately prior to the execution of the certificate provided for in § 10,112 of Crawford & Moses' Digest, but could await until the next day and purchase from the State for one year's taxes, penalty and cost.

If, through error or mistake, the clerk of the county court has failed to certify to the State Land Commissioner the full amount of taxes, penalties and costs accrued up to the date of the certificate provided for in § 10,112 of Crawford & Moses' Digest, the State Land

Commissioner would not be bound by such error or mistake.

It is the contention of appellee that, under the authority of § 4 of act 129 of 1929, it was the duty of the State Land Commissioner to accept the taxes, penalty and cost accruing on the lot or parcel of land for the year 1929 and as evidenced by the clerk's certificate of June, 1930. Section 4 of said act reads as follows: "Sale of lots, blocks, divisions and subdivisions in or outside of cities and towns. All town and city lots and all lots, blocks, divisions and subdivisions that have been platted or sold as such outside of the corporate limit of any city or town, forfeited to the State for nonpayment of taxes or which may hereafter be so forfeited after being duly certified to the Commissioner, as now required by law, on and after January 1, 1930, shall be subject to private sales by the Commissioner for the taxes, penalties and costs charged against them as appears in the certificates of the county clerk to such Commissioner, and upon presentation to him of the receipt showing that the full amount of the taxes, penalty and costs charged against such lands has been paid to the State Treasurer in kind, the Commissioner shall execute to the purchaser a quitclaim deed, as provided in § 3 of this act, for making deed to other forfeited lands."

It is the contention of appellee that the following language of § 4: "shall be subject to private sales by the commissioner for the taxes, penalties and costs charged against them as appears in the certificates of the county clerk to such commissioner, and upon presentation to him of the receipt showing that the full amount of taxes, penalty and costs charged against such lands, etc.," makes it mandatory on the State Land Commissioner to accept one year's taxes as the full purchase price for said land.

We do not so construe § 4 of act 129 of 1929. This section, when construed in reference to the other sections of the statute, clearly contemplates that the party who offers to purchase must bid and offer the total amount of taxes, penalties and costs accrued against the land up

to the date of the certificate provided for in § 10,112 of Crawford & Moses' Digest. The section of the act uses the word "certificates," which indicates that the Legislature had in mind the certificate provided for in § 10,092 and also the certificate provided for in § 10,112 of Crawford & Moses' Digest. In addition to this, section 4 of said act uses the words "full amount of taxes, penalty and cost, charged against said land." The word "full" evidently had reference to the total amount of taxes, penalty and cost which had accrued thereon up to the date of the certificate provided for in § 10,112 of Crawford & Moses' Digest.

When § 4 of act 129 of 1929 is read in connection with §§ 10,092 and 10,112 of Crawford & Moses' Digest, it is perfectly plain that, before appellee would be entitled to the writ of mandamus against the State Land Commissioner, he should pay, or offer to pay, the full amount of taxes, penalty and cost accrued against said lands, and not merely one year's taxes, penalty and cost. This the complaint does not allege, and it therefore did not state a cause of action against the State Land Commissioner. The trial court therefore erred in overruling the demurrer, and, because thereof, the judgment is reversed and remanded.

KIRBY, J., dissents from the majority opinion, holding the last act of the Legislature meaningless as not repealing or affecting the old laws with which it is in direct conflict prescribing the method for disposition of lands forfeited to the State for taxes.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY *v.* BRUN.

4-3052

Opinion delivered June 26, 1933.

Ira D. Oglesby, for appellant.

Warner & Warner, for appellee.

MEHAFFY, J. In 1924 the Tancred-Browne Realty Company borrowed from the appellant, Massachusetts Mutual Life Insurance Company, $40,000 and executed and delivered to the appellant its promissory notes, and, to secure the payment of said notes, executed and delivered to appellant its deed of trust.

This loan was not paid, although a portion of it had been paid in 1929, but the borrower was unable to pay, and desired to renew this and borrow an additional sum, making the loan $45,000. The notes and a deed of trust were executed and delivered, the notes being signed by Fred Browne and Frank J. Brun as co-makers.

This loan was not paid, and on October 21, 1932, the appellant filed its complaint in the chancery court against the Tancred-Browne Realty Company, Fred Browne and Frank J. Brun. The realty company and Fred Browne made no defense, and a decree was entered against them for the amount of the notes, and for a foreclosure of the deed of trust.

Frank J. Brun answered, alleging that he was not personally liable on the notes, and that he was induced to sign the same through fraud, perpetrated by Mr. Bailey, agent of the appellant.

The chancery court entered a decree in favor of the plaintiff against the realty company and Fred Browne for the amount sued for, but found that Bailey was the agent of the insurance company, and Brun was induced to sign the notes through fraud and trickery, and entered a decree in favor of Brun. This appeal is by the insur-

ance company to reverse the decree of the lower court finding in favor of Brun.

There are but two questions for our consideration: First, was Bailey the agent of the lender? Second, was Brun induced to sign the note through the fraud and trickery of Bailey?

The chancery court found that Bailey was the duly authorized agent and representative of the insurance company, and that Brun, in signing the note, was acting solely on behalf of the realty company, and did not become personally liable.

The insurance company contends that Bailey was its agent for the purpose of collecting rent, but he had no authority to represent it in connection with the loan; that, in making the representations that it was alleged he made to Brun, he did not represent the insurance company and had no authority to make the representations.

The first loan, in 1924, was made a long while before Brun had any connection with the Tancred-Browne Realty Company, and there was still $32,000 of that loan unpaid. The loan made in 1929 was this same $32,000 and something more than $12,000 in addition to the $32,000. The application for the loan in 1929 was made to Mr. Pinson, of Dallas, Texas, who was in charge of the insurance company's office at that place, and was not made to Bailey or through Bailey. The evidence shows that Bailey had said to the borrowers that they had better take it up with him because the insurance company would write to him about it anyway.

The notes and deed of trust were sent by Pinson from the office at Dallas to Bailey at Fort Smith. When Bailey received the papers, he took them to the realty company to be signed on August 14. The mortgage was executed, and the notes were signed by Browne as secretary, and the deed of trust and notes were then taken to Brun in his office. Brun and a number of other witnesses who were present testified that, when Bailey came in he told Brun in substance that he, Brun, was president of the company, and that he would have to sign the notes and deed of trust as president of the company. Brun

told him he was very busy and asked him to come back. Bailey said it would only take a few minutes, and pointed out the places to sign. Brun told Bailey that he would sign it as president, but would not become personally liable, and Bailey told Brun that that was what he was to do to sign as president and not to become personally liable. Brun did not have time to read the papers, and did not read them, but signed at the place pointed out by Bailey.

The insurance company had given power of attorney to release the former deed of trust, and had also given Bailey power of attorney to satisfy or release other deeds of trust. Bailey had been connected with the insurance company for 7 or 8 years. When this suit was filed, Bailey made the affidavit attached to the complaint, as local agent of the insurance company. He testified that he made a mistake in signing the affidavit that way; that he was only their rental agent.

The insurance company furnished Bailey with forms for application for loans. The insurance company had no other representative in Fort Smith except Bailey. It called on him to make appraisement of property. Whenever a loan was made by the insurance company, the papers were sent to Bailey in order that he might have them executed and recorded. In fact, everything Bailey did in connection with this loan is shown by the evidence to have been done as a representative of the insurance company, and not as a representative of the borrower.

It is unnecessary to set out the testimony in detail on the question of agency. The court found that Bailey was the agent and representative of the insurance company, and not of the borrower. We think there is ample evidence to support the finding by the court that Bailey had authority to represent the insurance company.

It is next contended by the appellant that it was error to admit oral testimony to vary or contradict the terms of a written contract. This evidence was competent. It was not introduced for the purpose of contradicting or varying the terms of the contract, but was introduced for the purpose of showing that no contract was ever made whereby Brun became personally liable.

The testimony is clear and convincing, that, when Bailey took the papers to be signed, Brun was busy; that he stated that he would not sign so as to be personally liable; that he asked Bailey to come back when he was not so busy; that Bailey told him he was simply to sign as president, and that he would not be personally liable, and pointed out the place for Brun to sign; that Brun did not have time to read the contracts, did not read them, relied entirely upon Bailey, and signed where Bailey told him to sign.

The general rule as to the effect of signing a contract without reading, where fraud is charged, is stated in C. J. as follows:

"Of course, if the other party induces the signer to sign the paper without reading it, and to rely on his statement as to the contents, this may give the signer a right, if the statement was fraudulent, to avoid the contract as against him on the ground of fraud." 13 C. J. 371; 6 R. C. L. 630, § 49.

This court has said: "So, in the present case, if the allegations of the answer are true, it does not lie in the mouth of the plaintiff to say that the defendant had no right to rely upon the representation that the contract contained the same terms as the former lease. Defendant alleges that he relied on the statement. If that is true, it caused him not to read the contract, and he is not estopped, under those circumstances, to plead his ignorance." *Stewart* v. *Fleming,* 96 Ark. 371, 131 S. W. 955; *J. I. Case Threshing Machine Co.* v. *S. W. Veneer Co.,* 135 Ark. 607, 205 S. W. 978; *Conn. Fire Ins. Co.* v. *Wigginton,* 134 Ark. 152, 203 S. W. 844; *Catlett* v. *Bradley,* 185 Ark. 260, 47 S. W. (2d) 15; *Inter-Southern Life Ins. Co.* v. *Holzhauer,* 177 Ark. 926, 9 S. W. (2d) 307.

In another recent case decided by this court the court held that parol evidence was inadmissible, but the court said: "There is no charge of fraud or trickery in obtaining his signature to the note, but the allegation simply means that, although he signed the note, there was a contemporaneous oral agreement that he should not be bound, but that he signed for reference merely."

Randle v. *Overland Texarkana Co.,* 182 Ark. 877, 32 S. W. (2d) 1064.

In the last case cited it was expressly stated that there was no allegation of fraud or trickery. In the instant case there is the allegation of fraud, and the evidence was admissible.

In a recent case we said: "Learned counsel for appellants invoke the doctrine which has always been, and still is, adhered to by this court, that one who signs a contract, after opportunity to examine it, cannot be heard to say that he did not know what it contained."

In support of this, numerous authorities are cited, and the court continues: "But in these cases there was no circumstance tending to show that the signature of one of the parties to the contract was procured through fraud, or trickery, or inequitable conduct upon the part of the other party to the contract. These cases are clearly differentiated from the case at bar by the facts, because here there were circumstances of fraud, trickery, or inequitable conduct on the part of one of the parties to the contract which caused the other party to sign the same under a mistake of fact, without reading the contract." *Galloway* v. *Russ,* 175 Ark. 659, 300 S. W. 390.

"There is a well-recognized exception to the rule that a party is bound to know the contents of a paper which he signs; and that is where one party procures another to sign a writing by fraudulently representing that it contains the stipulation agreed upon, when, in fact, it does not, and where the party signing relies on the faith of these representations, and is thereby induced to omit the reading of the writing which he signs. It is well settled that a written contract which one party induced another to execute by false representations as to its contents is not enforceable, and the party so defrauded is not precluded from contesting the validity of the contract by the fact that he failed to read it before attaching his signature." *Tanton* v. *Martin,* 80 Kan. 22, 101 Pac. Rep. 461; *Willey* v. *Clements,* 146 Cal. 191, 79 Pac. Rep. 850.

The appellee Brun alleged fraud and trickery, and there was sufficient evidence to justify the chancery court in finding in favor of Brun.

The decree of the chancery court is affirmed.

KIRBY, J., dissents.

HOME LIFE INSURANCE COMPANY *v.* KEYS.

4-3056

Opinion delivered June 26, 1933.

T. D. Wynne, for appellant.

Ovid T. Switzer and *Y. W. Etheridge*, for appellee.

MCHANEY, J. Appellant, Home Life Insurance Company, on January 1, 1924, issued its group policy of life insurance No. 26595 to the Crossett Lumber Company and its certificate No. 847 to Claud Keys, an employee, in which it insured his life in the sum of $1,200, and in which said certificate appellee is named beneficiary. Said certificate contained, among others, this clause: "Any employee insured under this plan who shall become wholly and permanently disabled while in our employ before reaching the age of 60, either by accidental injury or disease, and is thereby permanently, continuously and wholly prevented from pursuing any and all gainful occupation, will be regarded as a claimant by the Home Life Insurance Company." The master policy provided: "The company will issue to the employer for delivery to each employee insured hereunder

an individual certificate showing the insurance protection to which such employee is entitled, the beneficiary to whom payable, together with a statement that, in case of the termination of the employment with the employer, for any cause whatsoever, such employee shall be entitled to have issued to him by the company, without further evidence of insurability, and upon application to the company within thirty-one days after such termination of employment and upon payment of the premium then applicable to the class of risk to which he belongs and to the form and amount of the policy at his attained age (nearest birthday), a policy of life insurance in any of the forms customarily issued by the company, except term insurance, in an amount equal to the amount of his protection under this policy at the time of termination. Upon termination of active employment, the insurance of any discontinued employee under this policy automatically and immediately terminates, and the company shall be released from any further liability of any kind on account of such person unless an individual policy is issued in accordance with the above provision." It was further provided therein: "On receipt by the company at its home office of due proof that any employee insured hereunder has become wholly and permanently disabled by accidental injury or disease before attaining the age of sixty years, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, the company will waive the payment of each premium applicable to the insurance on the life of such disabled employee that may become payable thereafter under this policy during such disability." The obtaining of this insurance by the Crossett Lumber Company for its employees was a gratuity on its part, it paying all premiums and not making any deduction from any employee's wages therefor. This policy was kept in force and effect until and including December 31, 1930, when it was canceled by direction of the Crossett Lumber Company. Claud Keys was stricken with tuberculosis and suffered from pellagra, so that he was compelled to quit work

at noon October 12, 1929, from and after which date he was wholly and permanently disabled from disease, and was "permanently, continuously, and wholly prevented thereby from performing any work for compensation or profit," and from which he died March 9, 1931. He made no application for another policy under the provisions of the clause first above quoted, and he made no proof of disability, although he was clearly entitled to a policy without payment of any premiums from the date of his disability, October 12, 1929. The appellant, Central States Life Insurance Company is the successor to the Home Life Insurance Company, having reinsured its business effective April 13, 1931. Proofs in support of the claim were sent appellant, Central States Life Insurance Company, under date of May 5, 1932, payment demanded and refused, and this suit followed. Each party asked an instructed verdict and no other. The court granted the prayer of appellee.

Appellant's defense, as stated by counsel, is as follows: "The defense relied on below and renewed in this court was and is that the group policy and the individual certificate were not in force and effect on and after the expiration of the grace period of thirty-one days beginning December 1, 1930, because the monthly premiums to be paid on the first day of each succeeding month were never paid after the December, 1930, payment was remitted. In other words, the group policy, being canceled at the instance of the Crossett Lumber Company, effective at midnight December 31, 1930, no premiums subsequent to those payable on the first day of December, 1930, were ever paid, in consequence of which the group policy in question, together with the individual certificate issued to Claud Keys, did not continue in force after the grace period expired on January 1, 1931."

We cannot sustain this defense. Appellee's rights do not depend on the payment of the premiums by the Crossett Lumber Company after her husband, Claud Keys, became totally and permanently disabled on October 12, 1929, because of the total and permanent dis-

ability clause above quoted, although the employer continued to pay the premiums on Claud Keys' certificate for more than a year after no premiums were required thereon if proof had been then made. If proof of disability had been made at any time prior to January 1, 1931, there could and would be no question of appellee's right of recovery. The question presented for decision is, Was the making of proof of disability a condition precedent? We hold that it was not, and that we have already so held in *Sovereign Camp W. O. W.* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567. There the clause was: " 'If such member, while younger than sixty years of age, and while the certificate is in full force and effect, has suffered bodily injury, through external, violent or accidental means, or by disease, and shall furnish satisfactory proof to the society that he is and will be permanently, totally, continuously and wholly prevented thereby for life from pursuing any and all gainful occupations or performing any work for compensation of value,' he shall be entitled to the payment of one-half the face amount of his policy." We there said: "Under our construction of paragraph 12 of the certificate quoted above, the existence of total disability during the life of the certificate was enough to create liability. Under a correct interpretation of the meaning of paragraph 12, the obligation of appellant rested upon the total disability of appellee during the life of the certificate, and not upon the receipt of the proof of disability by appellant. A similar clause or paragraph in an insurance policy was thus construed by the Circuit Court of Appeals, *Minnesota Mutual Life Ins. Co.* v. *Marshall,* 29 Fed. (2d) 977, and approved by the Supreme Court of the United States in the case of *Bergholm* v. *Peoria Life Ins. Co. of Peoria, Ill.,* 284 U. S. 489, 52 S. Ct. 230. It will be observed that no time was fixed in the paragraph construed for making the proof of total disability." In *Minnesota Mut. Life Ins. Co.* v. *Marshall,* cited *supra* as 29 Fed. (2d) 977, the court speaking through Judge Martineau, said: "However much the legal mind may differ as to the meaning of these provisions, the ordinary

layman would construe them to mean that, in the event he became disabled before his premium fell due, his insurance would be continued until his disability was removed or until his death. That is the natural and reasonable construction to be placed upon the language used in this policy. Any other construction to my mind, would be contrary to the full purpose of the contract and deprive the insured of one of the principal benefits of his policy. The right of the insured to have his premiums discontinued during disability is one that he had paid for. To make its operation depend upon the time of proof of disability, and not upon the time of disability itself, which was the real thing that he was protecting himself against, renders the provision of the policy under the construction inoperative and the right of no value."

We think this reasoning logical and unanswerable, and is in accord with sound justice. The case of *Bergholm* v. *Peoria Life Ins. Co., supra,* is not in point as the language of the disability clause is different, so found by the Supreme Court, which distinguished it from the Minnesota Mutual case which it cited and inferentially approved.

The court correctly instructed a verdict for appellee.

Affirmed.

SCHOOL DISTRICT NO. 4 *v.* MCCRARY.

4-3142

Opinion delivered June 26, 1933.

Jno. R. Thompson, for appellant.

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

McHaney, J. Appellant brought this action to recover judgment in the sum of $387.86 against appellees, who are the sureties on the county depository bond of the now defunct Lonoke County Bank, made such by proper order of the county court. The bank was found to be insolvent, and was taken over by the Bank Commissioner for liquidation in December, 1931, with the various county and school district funds on deposit therein, including that of appellant. On January 4, 1932, the county court made and entered an order placing the matter of collecting and recovering all said funds secured by the depository bond in the hands of the prosecuting attorney of that district, who was ordered to take all legal steps necessary in recovering same. Thereafter on March 7, 1932, the prosecuting attorney, with the approving order of the county court, accepted a deed of trust, executed by appellees, conveying to the county valuable lands and properties as security for the payment of all said depository funds, and in consideration therefor it was agreed that payment would be extended to December 15, 1932. This agreement was approved by order of the county court, made and entered that date. On December 5, 1932, appellees paid to the county $1,000 in cash and asked for and obtained an extension to December 1, 1933, in which to make payment, an appropriate order being made by the court to this effect.

Appellees moved to dismiss the complaint on the ground, among others, that the obligation was not then due, and that the suit was prematurely brought. All the facts above mentioned were set out in the motion and copies of all orders exhibited thereto. The court sustained the motion, dismissed the complaint, and this appeal is from that order.

Appellant states its contention for a reversal of the judgment as follows: "It is the contention of appellant that the county court had no jurisdiction or authority to make the order relied on by appellees herein, and that such order is not binding on appellant, and said order being made without authority is void and is properly attacked by this suit." This contention cannot be sus-

tained. Section 28 of article 7 of the Constitution, and § 2279, Crawford & Moses' Digest, confer such authority as was here exercised upon the county court, and we think that the question is ruled adversely to appellant's contentions in *Board of Education of Lonoke County* v. *Lonoke County,* 181 Ark. 1046, 29 S. W. (2d) 268. It was there held that the county court was vested with power and authority to enter into a contract to employ special counsel and agree upon reasonable compensation to be paid *pro rata* from the several county and school funds to enforce collection against the sureties on another depository bond of an insolvent bank. It would seem to follow as a necessary consequence that, if such court has the power to make such a contract as that, it would have the power to contract for security and fix the time of payment, or to extend the same, in the absence of any fraud or collusion between the court and the bondsmen, and there is no such allegation here. On the contrary, the court orders show they were made because of the distressed financial situation, making it impossible for the bondsmen to secure money to satisfy the bond. We think the court, in taking the deed of trust, acted for the best interests of the county and its schools, and in accepting the $1,000 and extending the time for payment, represented the best interests of the county and the school districts, including appellant, for to have said with Shylock, "I will have my bond," and demanded an immediate sale of the property covered by the trust deed, would have meant a sacrifice thereof, for it is well known that property at that time had very little market value, if any.

The circuit court correctly dismissed appellant's complaint, and its judgment must be affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* MISSOURI PACIFIC RAILWAY COMPANY.

4-3066

Opinion delivered July 3, 1933.

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Lamb & Adams, for appellant.

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

JOHNSON, C. J., (after stating the facts). It is perfectly clear from the Krebs contract of May 13, 1916, that

all the right and interest of appellant expired at the expiration of fifteen years from the date thereof, to-wit: May 13, 1931. It suffices to say that appellant enjoyed the full benefits of this contract up to the date of its expiration without let or hindrance by appellee or its predecessor in title, the Argenta Terminal Company.

It is next insisted that the contract of date April 20, 1916, between the Argenta Terminal Railroad Company and the St. Louis Southwestern Railway Company created covenants and conditions which ran with the land, and therefore appellant has a perpetual right to use this trackage without compensation. We cannot agree to this construction of the contract. We think that it is fairly inferable from this contract that it was the intent of the parties to create only a personal liability and responsibility thereunder. This, because the parties stipulated that a bond in the sum of $15,000 would be executed by the Argenta Terminal Railroad Company in favor of appellant guaranteeing the performance of the terms and conditions of this contract. If there has been a breach of this contract by the parties, then appellant would pursue its remedy against this bond.

In 22 R. C. L., at page 1094, it is said:

"Where a contract for a traffic arrangement, made between two railroad companies, declares that the contract and any damages for the breach of the same shall be a continuing lien upon the roads of the contracting parties, this does not constitute a lien running with the land, when, by the due course of law, it has passed into other hands, although it may be a valid contract personally enforceable between the parties. Although money due for unpaid services under the contract might be a lien on the income or property of the delinquent company, yet conjectural damages which might result to one company during the remainder of the time the contract had to run, by the failure of the other company to keep it, are not a specific lien on the property, which attached to it and follow it into the hands of a purchaser. By a mortgage executed by one company, on all its property, to secure its bonds, to a trust company, as trustee, the title

to the property passes to the trust company, without having attached to it the lien of the contract for the traffic arrangement."

In the case of *Detroit T. & I. R. Co.* v. *Detroit & T. S. L. R. Co.*, 6 Fed. (2d) 845, the Circuit Court of Appeals held:

"A contract between two railroad companies, by which one grants to the other the right to use certain trackage, does not run with the land, but is merely personal between the parties, and not binding on the successor of one through foreclosure proceedings, unless adopted by it."

In the case of *Kansas City Terminal Ry. Co.* v. *Central Union Trust Company of New York*, 294 Fed. 32, the court held: "Contracts between railroad companies for the joint ownership and use of a union station are ordinary executory operating contracts, and not covenants which run with the property of the several companies and follow it into the hands of subsequent purchasers."

Many other decisions of State and Federal courts might be cited to the same effect. By implication, at least, this court has announced a similar doctrine wherein it held:

"A purchaser of the roadbed, property and franchises of a railroad company is not liable for its obligations which are not liens upon the property." *Sappington* v. *L. R. M. R. & T. R. Co.*, 37 Ark. 23.

It is next insisted on behalf of appellant that, notwithstanding the Krebs contract may have terminated, and notwithstanding the court might determine that the contract of April 20, 1916, was personal between the parties, yet appellee had no right to purchase this track as it did in 1924, because of paragraphs 18, 20 and 22 of § 1, title 49 U. S. Code.

Paragraph 18 provides: "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall have been

obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation of such additional or extended line of railroad."

Paragraph 20 reads as follows:

"Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph 18 of this section, may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph 18 of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Paragraph 22 provides:

"The authority of the commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or sidetracks, located or to be located wholly within one State."

It will be noted that paragraph 22 creates an exception to the general provisions as found in paragraphs 18 and 20, in this that it exempts from the operation of paragraphs 18 and 20 "of spur, industrial, team, switching, or sidetracks, located or to be located wholly within one State."

The testimony introduced in this cause convinces us that it was never the purpose or intention of the parties who owned this small amount of trackage to engage in commerce or the transportation of freight. The Argenta Terminal Railroad Company never owned or operated any rolling stock, engines or cars; it had no operating force; it had no trackage other than this small industrial switch track, which was less than a mile in length. It never promulgated or participated in any revenues from freight over either of the railroads to which it was con-

nected. We believe a fair preponderance of the testimony shows that this trackage is nothing more nor less than an industrial or spur track and comes clearly within subdivision 22 of § 1, title 49, U. S. Code.

The question here presented as to the necessity for application to the Interstate Commerce Commission for authority to purchase or construct an extension of a railroad line was presented and decided by this court in the case of *St. Louis Southwestern Railway Company* v. *Missouri Pacific Railroad Company,* 185 Ark. 825, 49 S. W. (2d) 1054, wherein the court held:

"After a careful reading and analysis of the evidence adduced in the instant case, the court has concluded that the proposed improvement is a spur within the meaning of paragraph 22, and not an extension of the line of appellee's railroad within the meaning of paragraph 18. The proposed improvement being a spur only, it was unnecessary to obtain a certificate of convenience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing."

We think that the language used by this court quoted above is controlling in this case on the question involved.

The question as to whether or not the small trackage in controversy was an extension of line or a spur or industrial track was purely a question of fact, and, since the trial court has determined that issue in favor of appellee and its findings are supported by a preponderance of the testimony, it is binding upon this court.

Let the judgment be affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
v. ADAMS.

4-3048

Opinion delivered July 3, 1933.

[redacted]

H. T. Harrison and *Thos. S. Buzbee,* for appellant.

W. R. Donham, for appellee.

KIRBY, J., (after stating the facts). Only two questions are raised by the appeal, the sufficiency of the evidence to support the verdict, and whether the court erred in instructing the jury as to the measure of damages.

The suit being brought under the Federal Employers' Liability Act, there is no presumption of negligence, and no duty on the part of the trainmen to keep a lookout as provided for by the statutes of Arkansas, which do not apply. *C. M. & St. Paul Ry. Co.* v. *Coogan,* 271 U. S. 472; *St. L. & S. F. Ry. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. (2d) 1102. In the latter case it was said that our statute, § 8562, Crawford & Moses' Digest, has been superseded in cases of this kind. The rule of the Federal courts on the burden of proof in cases of this character controlled by the Federal Employers' Liability Act is stated by the Supreme Court of the United States in *Patton* v. *Texas & Pacific Rd. Co.,* 179 U. S. 658, 21 S. Ct. 275. See also *Penn. R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391.

The testimony shows that appellant's fireman discovered the watchman in the cut a long way off, 750 feet or more, that he recognized him and was given the high sign by the watchman. That he continued to observe him without appearing to think he was in any position of danger or peril until shortly before he stepped outside the rails of the track on the other side about the time he reached the raised platform or jigger, a place fixed by the side of the track for storing the handcars, before giving the engineer the stop signal.

The engineer said he did not understand the signal to stop given by the fireman, that it was not in use as a signal, but could tell from his excitement that something was wrong, and he began to stop the train before he reached and struck the watchman, whom he could not see from his place in the cab.

The engineer evidently did not understand the significance of the signal, since he did not apply the brake in emergency as he could have done, which might have

resulted in stopping the train before the injury, although the fireman said it was not possible to stop the train after he gave the stop signal in time to avoid striking the watchman. The watchman stepping outside of the track and then on to the handcar platform might have caused the fireman not to appreciate the danger and the necessity for giving the signal sooner; and certainly the engineer could not have known about the condition as he could not see decedent on the track at all.

The train operatives, however, saw the decedent on the track long before there was any danger to him from the place occupied and necessarily were not negligent in not sooner giving the signal and attempting to stop at that time, since it was the duty of the watchman to go through the cut, as he was doing, to the other side, the west side, that he might flag the oncoming train as it came east through the cut. As soon as he perceived or concluded that the decedent was in a place of danger which he could not likely escape from, he gave the engineer the signal and an effort was made to stop the train in time to avoid the injury, although the fireman said he did not believe that the train could have been stopped after he called the engineer's attention to the danger and the necessity for its being stopped. The fireman said, however, the decedent had reached the platform and was apparently out of the place of danger, and he assumed that he could and would escape, when he concluded otherwise and gave the signal to stop. He said the decedent came to a stop after getting on to the platform, and it may be that he thought he was out of danger and that the fireman concluded that such was the case until he finally gave the signal to stop the train.

Since the body was found 29 feet from the jigger platform back down in the cut after being struck and where the watchman was killed, the jury evidently did not believe the fireman's statement about his having reached the platform and standing thereon before the train reached him. In other words, they may have believed that the watchman was struck where he fell and before he had ever reached handcar platform, a place of

safety from which he might have escaped the danger; and that the fireman was negligent in not sooner notifying the engineer of his perilous position in order that the injury might have been averted. Under such circumstances we cannot say that there is not sufficient substantial testimony to support the verdict.

It is next insisted that the court erred in giving appellee's requested instruction No. 4 on the measure of damages, since the case was one brought under the Federal Employers' Liability Act, and that the court should have instructed the jury to diminish the damages in proportion to the negligence attributable to the decedent. The appellant requested no such instruction however and liability of the appellant to the payment of damages for the injury in question was asserted solely on the ground of failure to exercise ordinary care to prevent the injury after his peril was discovered. It seems that only such negligence as proximately contributes to the injury is to be considered, although the injury occurred in a State under the laws of which any negligence on the part of the person injured, even remotely contributing to the injury, is taken into account. The negligence to be considered in order to reduce recovery must be "causal." *Ill. Central R. Co.* v. *Porter,* 207 Fed. 311; *Seaboard Air Line Ry. Co.* v. *Tillman,* 237 U. S. 499, 35 S. Ct. 653; *K. C. S. Ry. Co.* v. *Sparks,* 144 Ark. 227, 222 S. W. 724; *St. L. S. W. Ry. Co.* v. *Simpson,* 184 Ark. 633, 43 S. W. (2d) 251. This last case it is true was reversed by the United States Supreme Court, (286 U. S. 346, 52 S. Ct. 520) but it was on the theory that the perilous position of the decedent was never discovered. See also *Gray* v. *So. Ry. Co.,* 167 N. C. 433, 83 S. E. 849; *Id.,* 241 U. S. 333, 36 S. Ct. 558; *Barnes* v. *Red River & G. Ry. Co.,* 14 La. App. 188, 128 So. 724; *Hamilton* v. *Chicago, B. & O. Ry. Co.,* 211 Iowa 924, 234 N. W. 810.

We do not regard our case of *M. P. Rd. Co.* v. *Skipper,* 174 Ark. 1083, 298 S. W. 849, as contradictory of these above cited authorities.

No error was committed in giving the instruction complained of, and on the whole case the record does not disclose any prejudicial error, and the judgment must be affirmed. It is so ordered.

WASSON *v.* EVANS.

4-3060

Opinion delivered July 3, 1933.

J. Paul Ward, for appellant

Coleman & Reeder, for appellee.

McHANEY, J. On October 30 and 31, 1930, appellee deposited the proceeds of certain insurance policies on the life of her husband in the North Arkansas Bank at Batesville, either for collection and remittance, as contended by her, or as a general deposit. Said bank was found to be insolvent, and was taken over for liquidation by the State Bank Commissioner on November 15, 1930. On or about February 27, 1931, appellee filed her claim as a common creditor of the bank, and same was allowed. On October 28, 1932, she filed this action to have her claim classified and allowed as a prior or preferred one. The Bank Commissioner interposed the plea, among others, that the claim for preference was barred by the statute of limitations § 5, act 627, of the Acts of 1923, which is as follows: "No claim shall be allowed unless proof thereof has been presented to the Commissioner within one year from date on which Commissioner takes over the assets of the liquidated bank. * * * If the Commissioner doubts the justice or the validity of any claim, he may reject the same and serve notice of such rejection upon the claimant either by depositing the same in the mail or personally. * * * An action upon a claim so rejected must be brought within six months after such notice." The trial court allowed the claim as a preferred one, and the Bank Commissioner has appealed.

We agree with appellant that the statute constitutes a bar to the reclassification of the claim. The allow-

ance of the claim on February 27, 1931, as a common one was tantamount to its disallowance as a preferred one. Appellee was advised by the Bank Commissioner that he could not allow it as a prior or preferred claim. Clearly she was required under the above statute to bring her action to establish it within six months from its disallowance. She did not do so, but waited for more than a year after the six months had expired to file her action thereon.

Reversed and remanded with directions to dismiss the action on the claim for preference.

KIRBY, J., dissents.

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

4-3055

Opinion delivered July 10, 1933.

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

Partain & Agee, for appellee.

HUMPHREYS, J. This suit was instituted by appellee against appellant in the circuit court of Crawford County under the Federal Employers' Liability Act to recover

damages for personal injuries received while engaged in interstate commerce, through the alleged negligence of its roadmaster in ordering appellee to disconnect or release a bent, twisted and sprung rail in the main track upon the assurance that it was safe to do so.

Appellee filed an answer, denying the alleged negligence on the part of its roadmaster, and pleading the affirmative defenses of contributory negligence and assumed risk by appellee.

The cause was submitted to the jury upon the issues joined and the testimony adduced by the respective parties, which resulted in a verdict and consequent judgment in favor of appellee for $20,444, from which is this appeal.

The main contention of appellant for a reversal of the judgment is that the facts are insufficient to support the verdict and judgment.

The testimony introduced on behalf of appellee tended to show that he was called about midnight by E. L. Ayles, appellant's roadmaster, to get his crew and come to Smeltzer switch near Van Buren for the purpose of clearing and repairing the track, which had been torn up by a wreck of appellant's south-bound passenger train No. 712, in which wreck the engine was turned over and the engineer and fireman were killed and the train and portions thereof had been derailed; that the roadmaster had arrived at the scene of the wreck an hour or two before appellee, and had made an inspection of the situation, and had assumed full control and charge of clearing up the wreckage and repairing said track; that, upon appellee's arrival, he proceeded with the work of clearing up said wreckage under the immediate direction and orders of the roadmaster; that, while checking up the number of ties that would be needed to repair the track, he was ordered by the roadmaster to disconnect a bent, twisted and sprung rail at the south end of the wreck from a rail in the main lines, who told him exactly how to do it; that he asked the roadmaster whether there would be any danger standing in the position he must stand to detach the rail and was assured by the roadmaster that the bent, twisted and sprung rail would fly

out to the east when detached, which would be away from him; that he did what he was told, relying upon the superior knowledge of the roadmaster; that the roadmaster had had experience in clearing up wrecks such as this during his six years' service with appellant; that he had never had any experience with such a situation as this, and had no knowledge or information except that given him by the roadmaster as to which direction the rail would spring when detached; that, as soon as he pried the rail apart under the immediate direction of the roadmaster, the detached rail swung to the east but instantly swung to the south and back to the west and practically cut his leg off above the ankle; that he did not realize the peril incident to releasing the rail. This is a statement, in substance of the testimony introduced by appellee, which was contradicted by the testimony introduced by appellant.

Based upon this conflicting testimony, the court instructed the jury to the effect that, if it found that appellee complied with the direct order of the roadmaster in disconnecting the rail, and if it found that the order was a negligent one under the circumstances, then appellee would be entitled to recover unless appellee knew of the peril of complying therewith or had equal means of knowing it, or by the exercise of ordinary care might have known it, or unless the danger was so apparent and obvious that a person of ordinary care and prudence should have observed and seen it.

The law thus declared was correct as applied to the facts, and the testimony introduced by appellee, and, if believed by the jury, was sufficient to support the judgment.

Appellant contends, however, that the verdict was excessive. Appellant was 48 years of age and was earning $117 a month when injured, and at that time was in perfect health. He was injured at 4:10 A. M. and suffered intense anguish and pain until 7:00 A. M., when his leg was amputated five inches above the ankle. He remained in the hospital for 20 days and was confined to his bed for two weeks after returning to his home. He has been unable to do any work since his injury, and is very ner-

vous and cannot sleep at night. He is still suffering intense pain. He cannot walk on his artificial limb without pain and cannot use it for more than a half a day at a time and cannot work when he has it on.

There is testimony tending to show that the flesh pad on the end of his stump is not sufficiently thick so that he can wear his artificial limb without pain and that probably another amputation may become necessary before this can be remedied.

When all these things are considered in connection with his suffering, mutilation of body, and consequent humiliation, we cannot say as a matter of law that the verdict is excessive or that it was inspired by prejudice.

No instruction on comparative negligence was requested by appellant, so the verdict cannot be reduced on that account, even if the testimony reflected any negligence on the part of appellee.

No error appearing, the judgment is affirmed.

Justices SMITH and MCHANEY are of the opinion that the judgment is excessive and should be reduced.

STATE USE GREENE COUNTY *v.* MCCOY.

4-3702

Opinion delivered July 10, 1933.

D. G. Beauchamp, for appellant.

Jeff Bratton, for appellee.

HUMPHREYS, J. This case went off on demurrer to the complaint in the trial court, and an appeal was duly prosecuted to this court from the decree of the chancery court dismissing appellant's complaint on the ground that the allegations thereof were insufficient to confer jurisdiction of the cause of action upon said court.

The purpose of the complaint was to recover all amounts from appellee, R. V. McCoy, and his bondsmen, in excess of $5,000 per annum, which came into his hands as treasurer of Greene County. The gist of the complaint cannot be better or more tersely expressed than by copying herein paragraphs 2 and 3 of the complaint, as follows:

"2. That said defendant, R. V. McCoy, for and during the year from July 1, 1929, to June 30, 1930, and from July 1, 1930, to December 1, 1930, collected and received and unlawfully appropriated and converted to his own use large sums of money as fees, salaries, emoluments, commissions and perquisites of office largely in excess of five thousand ($5,000) dollars per annum, which he has failed and refused to pay into the county treasury of Greene County as he was required to do by article 19, § 23, of the Constitution of the State of Arkansas and the enabling statute enacted pursuant thereto. Sections 4633-44, Crawford & Moses' Digest.

"3. Plaintiffs further state that, during said time from July 1, 1929, to June 30, 1930, and from July 1, 1930, to December 31, 1930, the said defendant, R. V. McCoy, was county treasurer of Greene County, State of Arkansas, and as such treasurer transacted in said office a large volume of business. The amount and description of the different items of fees, salaries, emoluments, commissions and perquisites of office are derived from numerous and different sources and render the account so difficult and intricate that the plaintiffs are unable to state the amount due the treasury of Greene County, Arkansas, therefrom, but believe and allege that the sum so received is approximately two thousand

($2,000) dollars and that the accounts are so voluminous and complicated that it is necessary for a master to be appointed to state the account and that the plaintiffs have no adequate remedy at law."

In sustaining the demurrer to the complaint, the chancellor proceeded upon the theory that it was first necessary that a settlement should be made by the treasurer with the county court and that the settlement should reflect the amount that came into the treasurer's hands in excess of $5,000 per annum before a taxpayer might bring suit against him and his bondsmen for the excess. We find no statute conferring jurisdiction on the county court, and none is conferred upon him by the Constitution, to make such an examination and declare the result thereof. It is true quarterly and annual statements are required to be made, but, irrespective of what they may show, no provision is made for the county court to render any judgment against the officer for amounts received by him in excess of $5,000 per annum. This excess is required to be paid into Greene County by the treasurer under article 19, § 23, of the Constitution of the State of Arkansas and the Enabling Act passed pursuant thereto. Sections 4633-44 of Crawford & Moses' Digest. If the officer fails to pay the excess into the county, it follows that it is recoverable from him in a court of general jurisdiction. It is the duty of the court in which the suit is brought to ascertain the excess above $5,000 per annum and the necessary expenses of his office, and if it requires an investigation into complicated accounts to make the ascertainment, a court of chancery would be the proper court in which to institute the action. The principle announced in the case of *Poinsett County* v. *Landers,* 183 Ark. 1138, 40 S. W. (2d) 432, governs the instant case.

A good cause of action was alleged, and the trial court erred in sustaining the demurrer thereto and in dismissing appellant's complaint. The decree is therefore reversed, and the cause is remanded for further proceedings in accordance with law and equity.

FORT SMITH *v.* WATSON.

4-3164

Opinion delivered July 10, 1933.

[redacted]

Fadjo Cravens, for appellant.

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

HUMPHREYS, J. Appellee brought this suit against appellant to recover the gasoline tax imposed by act 65 of the Acts of the General Assembly of 1929 for the amount of gasoline used by the city of Fort Smith (appellant) in propelling motor vehicles owned and operated by said city on the public roads and highways of the State for its, the city's, governmental purposes in the year 1933, which tax amounted to $776.98. The complaint alleged and the demurrer admitted that said city in the year 1933 received in this State and used gasoline in propelling its motor vehicles for its governmental purposes, on which no tax had been paid. The circuit court overruled the demurrer to the complaint, and appellant refused to plead further but stood on its demurrer; whereupon judgment was rendered against appellant for the amount sued for, from which is this appeal.

Two questions were presented by this appeal:

First, is gasoline purchased by the appellant for governmental purposes subject to the tax imposed by the act aforesaid?

Second, if the gasoline so purchased is subject to tax, is the appellant city the one required by the statute to pay the same?

(1) It is argued that, by act 65 of the Acts of the General Assembly of 1929, the Legislature did not intend to impose the tax upon gasoline used in propelling the motor vehicles over the roads and highways because the act does not specifically and expressly require the cities to pay the tax. The act in question is a general act covering the whole subject involved, and contains but one exemption, which is as follows:

"Motor vehicles belonging to the United States Government, and used in its business exclusively, shall not be required to pay any motor vehicle fuel tax or exhibit a State license plate, but in lieu of a State license plate shall have exhibited thereon a license plate in a form provided by the State Highway Commission showing that they are United States Government motor vehicles." Had the Legislature intended to exempt its political subdivisions from the payment of the tax, it would have included same in this exemption. It follows that the Legislature intended for its political subdivisions to pay the tax. This identical question was decided by this court in the case of *Blackwood* v. *Sibeck,* 180 Ark. 815, 23 S. W. (2d) 259. This court ruled in that case that, by exempting motor vehicles belonging to the United States Government from the payment of a license fee, no other vehicles were intended to be exempt. The exemption from the license fee and gasoline taxes appear in the same section (§ 35) of the act. The interpretation placed on this act heretofore and now finds support in the cases of *Crockett* v. *Salt Lake County,* 72 Utah 337, 270 Pac. 144; *City of Portland* v. *Kozer,* 108 Or. 375, 217 Pac. 833; *City of Louisville* v. *Cromwell,* 233 Ky. 828, 27 S. W. 377.

(2) It is argued that, even if gasoline used by the city in propelling its motor vehicles over the roads and highways is subject to the tax, the city cannot be made to pay same directly to the State, but must pay it to the manufacturer or wholesaler who, in turn, must pay it to the State. The record is silent as to where the city of Fort Smith got the gasoline, but it is admitted that it was used by said city without the payment of the tax to the State by any one. Under these circumstances, the

city must be regarded as a wholesaler under paragraph 20 of § 30 of said act. That section defines the term wholesaler as used in the act to include any person, firm, partnership, corporation, or association of persons "who receive for consumption in propelling motor vehicles on the public highways motor vehicle fuel on which the tax has not been paid." A similar question as to what constituted a retailer under the Utah statute defining retailers was settled adversely to the contention of appellant in the case of *Crockett* v. *Salt Lake County, supra.* The Utah court said "Some question is made in the argument of appellants that the court ruled that Salt Lake County is neither a retail dealer nor a distributor as defined by the Gasoline Tax Law, but also ruled that the county is liable for the tax with interest and penalty. It is true that the court did not find specifically that the county is a distributor or retail dealer, but the court did find that the defendant county purchased the gasoline in the State of California and caused same to be shipped into this State and used it within this State. That finding fixed the status of the county as a retail dealer as that term is defined in subdivision D above quoted."

The judgment is therefore affirmed.

CALDWELL *v.* ST. LOUIS JOINT STOCK LAND BANK.

4-3054

Opinion delivered July 10, 1933.

Clinton L. Caldwell, pro se.

W. E. Rhea and *G. B. Segraves,* of St. Louis, for appellee.

KIRBY, J., (after stating the facts). The appellant has also attempted and sought to inject the following questions in this appeal:

(1) The authority of the Federal Farm Loan Board to appoint a receiver for the insolvent land bank.

(2) That the appointment of S. L. Cantley as receiver was not proved sufficiently.

(3) And that he is appealing from the decree of foreclosure as well as from the decree of confirmation.

(1) The Federal Farm Loan Board had authority to appoint a receiver for the St. Louis Joint Stock Land Bank (2) which could be proved, as was done in this case, by a certified copy of the minutes of the Federal Farm Loan Board duly attested and under its seal showing the appointment of Cantley as receiver. Section 661, title 28, USCA. The St. Louis Joint Stock Land Bank was organized under the provisions of the Federal Farm Loan Act, and was, at the time appellant borrowed the money from the bank and on June 1, 1932, under the supervision

of the Federal Farm Loan Board; and, having failed to pay interest on its bonds on June 1, 1932, the Farm Loan Board declared it insolvent and appointed S. L. Cantley receiver for it, as it was authorized under the law to do. Sections 961-963, title 12, USCA. See also 7 C. J. § 830, p. 845.

(3) The bank had obtained a decree of foreclosure before this receiver was appointed. The sale was advertised by the commissioner as the decree provided, and, no one having bid sufficiently high, the receiver thought it necessary to buy the property in for the trust. The appellant was present at the sale and did not claim it was not fairly conducted. The appeal does not reach to the decree of foreclosure, but relates only to the order confirming the commissioner's sale. The case was submitted on November 22, 1931, and the decree rendered and entered on April 17, 1932, and the transcript was not lodged in the Supreme Court until March 25, 1933, more than 11 months after the decree was entered, and, as the transcript was not lodged here within 6 months after the entry of the decree, nothing but the order confirming the sale can be considered. *Smith* v. *First Nat. Bank of DeWitt,* 119 Ark. 235, 177 S. W. 895.

Appellant offered no proof in support of paragraphs 1 to 11 of his exceptions to the commissioner's report, and the court was justified in confirming the sale, and no question can be raised as to these matters on the appeal.

Appellee filed a demurrer to paragraph 12 of appellant's exceptions to the report of the commissioner, and said demurrer was sustained, and this paragraph stricken out, and the appeal questions the correctness of the chancellor's ruling thereon. Said paragraph 12 of the exceptions charges that the appellee ruthlessly, oppressively and fraudulently aided and contributed to the destruction of the land market in the Osceola district not as a conspirator but as an integral part of the land bank system all chartered and controlled by, operated as a unit by, and, in the event of insolvency, liquidated by, the Federal Farm Loan Board, a government bureau of which the President of the United States is the re-

sponsible head. The 62 Federal and joint stock land banks are government instruments as are their bonds government instrumentalities.

This paragraph also contains a cross section or summary of the pertinent operations of the 62 land banks, the appellee bank included, for the years 1930 and 1931, as shown by the annual reports of the Federal Farm Loan Board, showing the business and operations thereof, the cash collections, the mortgage loans, etc.

Appellant insists that the facts admitted by the demurrer reveal that the Government, in attempting to operate through the land banks "what is purely a socialistic experiment, has destroyed the country's land market, or, if it be not the prime cause, it has at least materially aided and contributed to its destruction, has sacrificed debtors' farms, at salvage sales rather than judicial sales, for a negligible yield on account of the mortgage debts, has stripped farmers of the means to answer the demands of their stricken creditors, has wrecked the public whose fortunes are linked with both, has impaired local governments dependent on vanishing tax collections, and has impoverished an army of small tax bondholders with local tax treasuries unequal to their burden. With families, paupers and children waifs and consequent impaired citizenship, the vicious cycle can not end in 100 years, if ever."

He insists that the impairment or loss of value of his lands caused by the operation of the land bank system is indicated by its value on January 1, 1930, alleged under the appraisal to have been $24,000 or $150 per acre. The provisions of the loan act authorizing the loan of $7,000 herein necessarily implied a government appraisal of not less than $14,000 or $87.50 per acre at the date of the mortgage in 1922, while the receiver avers that $23 per acre, for which the land sold, is a fair price for it. "There is no evidence of its decline in value prior to January 1, 1930, nor is there any other evidence on the subject in the record. These two appraisals by government agencies should be sufficient to measure the very considerable impairment and loss inflicted on ap-

pellant by government land banks, including appellee land bank."

The court did not err in sustaining the demurrer to this exception, which does not admit, of course, any facts that are not well pleaded and the necessary inferences deducible therefrom. There was no testimony introduced tending to show any unfair practice or conduct in the sale of the lands at the time advertised for the sale and at which appellant was present, nor any evidence tending to show that said lands did not bring a fair price, as the chancellor found to be the case. On the whole case, we find no error sufficient to warrant setting aside the sale. The rule has often been declared in such matters and recently. See *Adams* v. *Spillyards, ante* p. 641; *Federal Land Bank* v. *Floyd, ante* p. 616; *Federal Land Bank* v. *Ballentine,* 186 Ark. 141, 52 S. W. (2d) 965.

The decree is affirmed.

WATKINS *v.* PURNELL.

4-3074

Opinion delivered July 10, 1933.

Brundidge & Neelly, for appellant.

Tom W. Campbell, for appellee.

MEHAFFY, J. On October 30, 1920, L. D. Robinett, a farmer living near Kensett, White County, Arkansas, was struck and fatally injured by a locomotive engine on the Missouri Pacific Railroad and died from the effects of said injury a few hours later.

On December 10, 1920, appellant J. F. Watkins was appointed by the probate court of White County, administrator of the estate of said L. D. Robinett, deceased, and executed and filed his administrator's bond in the sum of $5,500, and appellants J. H. Dreener and L. E. Moore, signed the administrator's bond as sureties.

On the same day that Watkins was appointed administrator, he filed in the circuit court of Pulaski County, Arkansas, a complaint against the Missouri Pacific Railroad Company, alleging the injury and death of said Robinett caused by the negligence of said railroad company.

Robinett left surviving him his widow, Maud Robinett, and two sons, Ewell, four years old, and Chester, six months old, as his next of kin.

There was a verdict and judgment in favor of the administrator against the railroad company for $2,000 in favor of the next of kin, and $750 in favor of the estate of Robinett, and the said administrator collected said sums on December 10, 1920.

No guardian was appointed for the minor children of L. D. Robinett until February 8, 1932, at which time W. F. Mitchell was duly appointed their guardian and curator, by the probate court of White County.

On May 3, 1932, W. F. Mitchell, as guardian and curator of the minor heirs of Robinett, deceased, brought suit in the chancery court of White County against J. F. Watkins, J. H. Deener and L. E. Moore upon the administrator's bond, for a recovery on behalf of said minor children, of $2,000, which appellant Watkins, as administrator, had collected from the railroad company in favor of the next of kin of the said L. D. Robinett.

After the suit was brought, but before it was tried in chancery court, Mitchell died, and Frank L. Purnell, appellee, was by the probate court of White County, appointed guardian and curator of the minor children in place of Mitchell, and Frank L. Purnell, as guardian, was substituted for Mitchell as party plaintiff.

J. F. Watkins, the administrator, filed separate answer denying the material allegations of the complaint and alleging that all the money received by him as administrator of said estate was duly paid over and accounted for in his settlement with the White Probate Court; that all of said money was expended for the support, education and maintenance of said minors; that $1,100 was used for the purchase of a home, consisting of 10 acres of land, which was conveyed to the minors by deed; that the purchase of said home was made by the authority of the White Probate Court, and that all of the money was used for the benefit of said minor children.

The bond executed by Watkins and his sureties was an administrator's bond in the usual and proper form.

J. H. Deener and L. E. Moore, sureties on the administrator's bond, filed separate answer denying the material allegations in the complaint, and denying that they were liable for the sum of $2,000, or any other sum. They alleged that they could only be responsible for $750, the amount paid to the administrator, and that this amount was duly paid out under the orders of the probate court.

The following is the settlement filed in the probate court by the administrator:

"State of Arkansas, County of White.

"In The White Probate Court.

"April Term, 1923.

"On this 28th day of April, 1923, comes J. F. Watkins on the administratorship of the estate of L. D. Robinett and files his account current for first and final settlement of his account as aforesaid and charges himself with the following articles:

"Date	On What Account	Amount
12-13-1920	To ck. from Mo. Pac. Ry. Co.	$2,750.00
	Inventory of Personal property	453.00
		$3,203.00
12-15-1920	By livestock and implements covered by inventory sold to A. R. Mills to apply on account	453.00
12-15-1920	Ck. to Mrs. Robinett for living expenses	75.00
12-23-1920	Ck. to Mrs. Robinett for living expenses	50.00
1-13-1921	Ck. to G. O. Yingling filing claim and copy of letters	1.35
1-18-1921	Ck. to Mrs. Robinett for house rent for 1921	100.00
1-18-1921	Ck. A. Crawford as appraiser	1.50
1-18-1921	Ck. A. P. Mills for claim	125.56
1-26-1921	Ck. Mrs. Robinett board for children	40.00

1-27-1921	A. P. Mills balance store account	312.45
2- 3-1921	Ck. C. V. Tapscott claim	36.00
2- 9-1921	Ck. Mrs. Jessie West claim rent	94.50
1-17- 21	Ck. Stewart & Son monument	90.00
4-11-1921	Ck. Mrs. Robinett living exp. for child	50.00
4-25-1921	Ck. Mrs. Robinett living exp. for child	50.00
4-25-1921	Ck. J. A. Spencer claim	12.85
5-16-1921	Ck. Mrs. Robinett for children	40.00
5-30-1921	Ck. Robt. Stewart claim	34.90
6-25-1921	Ck. Mrs. Robinett for children	30.00
8- 6-1921	Ck. Mrs. Robinett for children	40.00
8-18-1921	Ck. Mrs. Robinett for cow bought	35.00
9- 2-1921	H. M. Williams payment on land	500.00
9- 6-1921	H. M. Williams balance on land	598.50
9-14-1921	Mrs. Robinett for mule and wagon	65.00
10-20-1921	Mrs. Robinett for supplies for children	15.00
12- 3-1921	Mrs. Robinett for supplies for children	20.00
1-11-1922	Mrs. Robinett for supplies for children	25.00
2-11-1922	Mrs. Robinett for supplies for children	25.00
3-25-1922	Mrs. Robinett for supplies for children	25.00
4-28-1922	Mrs. Robinett for supplies for children	25.00
5-30-1922	Mrs. Robinett for supplies for children	25.00
1-28-1923	Mrs. Robinett for supplies for children	25.00
9- 7-1923	Taxes paid	.81
4-28-1923	J. F. Watkins 5% commission and exp. to Little Rock two trips, and other expenses	181.52
		$3,203.00"

The evidence showed that Watkins as administrator, had received the $2,750 as alleged, and that he had paid it out as shown by his settlement with the probate court.

Mrs. Maud Stewart, the widow of L. D. Robinett, testified that he was killed by the Missouri Pacific, left the two children above-named, one four years old and the other 4 months old; that said children at the time of the trial were 16 and 12 years of age; that she married again a short time after her husband was killed; the children lived with her; she drew some money from the administrator for the support of the children, but did not know how much; that she had no place to live, and the administrator paid rent on a house for her and the children for about a year after the death of her husband; that Mr. Watkins then bought a place for them, and they live on it; that he paid $1,100 for the place.

J. F. Watkins testified that the settlement introduced showed the amounts he had paid out, for which he held the original checks; that Mrs. Robinett and Mr. Stewart came to him and told him about the place they wanted to buy. That they were having to pay rent all the time. That the place was well worth the money, and that Judge White, the judge of the probate court, told him it was the best thing to do to purchase the place. There was no order of the probate court, but he purchased on the verbal order of Judge White.

The bond of the administrator was introduced by agreement. It was also agreed that if Judge White were present he would testify to substantially the same facts testified to by Watkins with reference to the purchase of the home. It was also agreed that Mrs. Stewart, mother of the children, had had the care and custody of the children since the death of their father, and that there was no guardian appointed until February 8, 1932.

After hearing the testimony the chancellor entered a decree against the appellants for $1,333.33 with interest at 6 per cent. per annum from February 8, 1932, the date of the appointment of the guardian, the principal and interest amounting to $1,379.95.

The principles of law are well settled. We have had considerable difficulty, however, in reaching a conclusion as to what decree should have been rendered under the facts in this case.

"The law is thoroughly well settled that the administrator, as such, has nothing to do with the support and education of the minor children of his intestate, and, if nothing more appeared in this case than that the administrator had done so, then he would have no right to make this charge against the estate of his intestate." *Alcorn* v. *Alcorn,* 183 Ark. 342, 35 S. W. (2d) 1027.

It was also said in the above case in substance that the administrator should, from time to time, have received orders from the probate court as to what expenditures were proper. If he had done this, he would have been protected. By failing to obtain this authority, he made expenditures for the purposes stated at his peril, and subject to the right of the court to review them when he made report thereof. It was also said in substance that neither an administrator nor a guardian may expend the minor's estate in the manner that it was shown to have been expended by the evidence. The expenditures, even for the purpose of maintenance and education, must be made under the direction of the court, and made in conformity to his station in life, and the value of his estate. Numerous authorities are cited and reviewed in the Alcorn case, *supra,* and we do not deem it necessary to discuss them here. Whatever expenditures for the minor children were made by the administrator were made at his peril, and the burden of proof would be upon him to show that they were necessary and proper expenditures, taking into consideration their station in life, and the value of their estate.

The administrator had no right to purchase the home, and the court correctly so held. The decree of the lower court subrogating the administrator to the rights of Ewell Robinett and Chester Robinett, and divesting the title and interest of said minors from them, and vesting same in defendants, is correct.

Of the $2,000 collected for the benefit of the next of kin, one-third would belong to the widow, and two-thirds, or $1,333.33, would belong to the children. The $750 for the benefit of the estate was less than the amount paid for discharging the debts of the estate. There was, however, $453 of personal property left, and the widow and

minor children would be entitled to $300 of this amount making a total of $1,533.33. Crawford & Moses' Digest, § 80.

The undisputed proof shows that there was expended for the widow and children, $560. This was evidently the amount expended on the children, and the amount due the widow for care, custody, and labor in caring for the children. This $560 deducted from $1,533.33 leaves a balance of $973.33, which the guardian is entitled to recover for the children.

The decree of the chancery court is therefore modified and affirmed, for $973.33, with interest at 6 per cent. per annum from February 8, 1932.

The sureties on the bond contend that they are not liable because the $2,000 did not belong to the estate. They, however, signed Watkins' bond as administrator, and he sued for and collected the money as administrator. They are therefore liable for the amount of money due from the administrator to the minors.

The judgment will be modified and affirmed for $973.33. It is so ordered.

TAPLEY *v.* FUTRELL.

4-3176

Opinion delivered July 10, 1933.

R. E. Wiley, for appellant.

Coleman & Riddick, for appellee.

MEHAFFY, J. The Legislature of 1933 passed act 167. The title of the act is: "An Act to Refund All State Highway Obligations." Section 1 of the act reads as follows:

"The issuance of Arkansas State Bonds, hereinafter called State Bonds, is hereby authorized in a total sum equal to the aggregate of the entire outstanding indebtedness of the State on account of the construction and maintenance of the State Highway System, including all State Highway Notes or Bonds, Toll-Bridge Bonds, Revenue Bonds, valid outstanding Road District Bonds on which the State has been paying interest under act No. 11 of the Acts of 1927 and act No. 65 of the Acts of 1929, hereinafter called Road District Bonds, Certificates of Indebtedness issued or authorized under act No. 8, approved October 3, 1928, and act No. 85 of 1931, Short Term Notes issued under act No. 15, approved April 14, 1932, all valid claims against the State Highway Commission, and all warrants and vouchers issued by the State Highway Commission prior to February 1, 1933, together with the interest on the respective obligations and claims. Such bonds shall be the direct obligation of the State, for the payment of which, principal and interest, the full faith and credit of the State, and all its resources are hereby pledged. They shall be dated May 1, 1933, shall be payable in twenty-five years, and shall bear interest at the rate of three per cent. per annum, the interest to be payable semi-annually, and to be evidenced by attached interest coupons."

The appellant, O. E. Tapley, the owner of a State Highway Bond issued under act No. 11 of 1927, brought this suit as a citizen and taxpayer, alleging that act 167 was in violation of § 1, article 16, of the Constitution of the State, which reads as follows:

"Neither the State nor any city, county, town or other municipality in this State shall ever loan its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the present existing indebtedness, and the State shall never issue any interest-bearing treasury warrants or scrip."

Appellant also alleged that the act violated § 12 of article 12, which reads as follows:

"Except as herein otherwise provided, the State shall never assume or pay the debt or liability of any county, town, city or other corporation whatever, unless such debt or liability shall have been created to repel invasion, suppress insurrection or to provide for the public welfare and defense. Nor shall the indebtedness of any corporation to the State ever be released or in any manner discharged save by payment into the public treasury."

He prayed for an order restraining J. M. Futrell, as Governor, Roy V. Leonard, as Treasurer, and Griffin Smith, as State Comptroller, composing the Refunding Board, from exchanging Arkansas State Bonds issued under act No. 167 of 1933 for any Road District Bonds on which the State has been paying interest under act No. 11 of the Acts of 1927, and act No. 65 of 1929.

The appellees filed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer with leave to amend. The appellant elected to stand on his complaint, refused to amend, and his complaint was dismissed for want of equity. The case is here on appeal.

This suit challenges the constitutionality of act 167 of 1933 in so far as the act authorizes the Refunding Board to exchange Arkansas State Bonds for Road District Bonds, the payment of which the State has assumed under act No. 11 of 1927 and act No. 65 of 1929.

Section 5 of act 167 provides that the holder of valid Road District Bonds and other bonds may deposit the same with the State Treasurer for exchange for a State Bond of equal face value.

Section 8 of the act provides that the Governor, State Treasurer and State Comptroller shall constitute a Refunding Board with powers necessary to carry out the provisions of the act.

The only question for our consideration in this case is whether act 167 violates the Constitution in authorizing the Refunding Board to exchange State Bonds for Road Improvement District Bonds.

It is first contended that the act violates § 1 of article 16 of the Constitution and § 12 of article 12 of the Constitution. The appellant calls attention to numerous authorities of other courts. We do not discuss them for the reason that the questions argued by appellant have been definitely settled by decisions of this court.

Section 1 of article 16 prohibits the State, city, county, town or municipality loaning its credit for any purpose, and also prohibits the county, town or municipality issuing interest-bearing evidences of indebtedness.

In the case of *Hays* v. *McDaniel,* 130 Ark. 52, 196 S. W. 934, we said: "It is said that the word 'municipality' here employed, includes the State. But we do not agree with counsel in this contention. If it be conceded that the word 'municipality' has sometimes been used by courts and textwriters as of sufficient breadth to include a sovereign State, it does not follow that it was so employed here. The framers of the Constitution were dealing with a subject of the highest importance, and evidently chose their language with great discrimination, and we can not assume that they intended the word 'municipality' to embrace the State. To do so would render meaningless and wholly unnecessary

the third clause of this section, which provides that the State shall never issue any interest-bearing treasury warrants or scrip. This second clause inhibits the issuance of any interest-bearing evidences of indebtedness. Treasury warrants and scrip are evidences of indebtedness, and it would have been an idle thing to do to prohibit the State, along with the counties, cities and towns therein, from issuing any interest-bearing evidences of indebtedness, and then, in the following clause of the same section, to repeat the inhibition against the issuance of a form of indebtedness which was inhibited under the preceding clause. * * *

"The State, acting through its Legislature, may borrow money for its own uses unless that right is denied to it by the Constitution, and the only inhibition against the State there contained, in this respect, is that it shall not issue any interest-bearing treasury warrants or scrip."

The above case definitely settles the proposition against the contention of the appellant. This question was also discussed and decided in the case of *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9. We there said: "The General Assembly has plenary powers to contract for and create interest-bearing evidences of indebtedness on the part of the State, except to issue interest-bearing warrants or scrip." We also held in the Bush-Martineau case, *supra,* that a road improvement district was not a corporation within the meaning of this section of the Constitution.

Many of these road improvement districts were created by the Legislature. Section 2 of article 12 of the Constitution provides: "The General Assembly shall pass no special act conferring corporate powers, except for charitable, educational, penal or reformatory purposes, where the corporations created are to be and remain under the patronage of the State." The Legislature therefore could not, by a special act, create a corporation.

Section 6 of article 12 provides that corporations may be formed under general laws. It is clear that, under the Constitution, road improvement districts, either

created by the Legislature itself or created under the authority of the Legislature, are not corporations within the meaning of § 12 of article 12 of the Constitution.

The appellant discusses at length the history of public roads as internal improvements, and the story of the disasters which follow the enactment by the Legislatures of laws for the building of public roads.

The disasters came largely, if not altogether, from undertaking to build public roads which were really internal improvements, by local improvement districts, to be paid for by the property owners of the locality, instead of making the improvements directly by the State.

This system of road building had been tried and abandoned by other nations more than 100 years before we adopted the system here. Instead of profiting by their experience, we made the experiment ourselves, and the disasters discussed by the appellant followed.

It was to relieve this intolerable condition brought about by these local improvement districts that the State finally took over the road system itself, including the roads constructed by local improvement districts. These roads, while not constructed directly by the State, were constructed under the authority of the State, and, whether intended at the time to be so or not, they are for the benefit of the entire State.

After the decisions by this court above referred to, this question was before the court again in the case of *Williams* v. *Parnell,* 185 Ark. 1105, 51 S. W. (2d) 863. The court in that case approved the cases formerly decided by this court, and held that not only could the State borrow money and issue notes therefor, but that highways might be constructed by the State itself or by governmental agencies; that public highways are for public use, and there is no reason why the power of taxation by the State may not be exercised in their behalf.

We therefore hold that the questions argued by the appellant have been definitely settled by the decisions of this court. Act No. 167 is not in violation of any provision of our Constitution, and is therefore a valid enactment.

Every question raised has been settled by the former decisions of this court against the contentions of the appellant.

When a provision of the Constitution has been construed by the court, it should be followed by the court, because if we hold that the Constitution means one thing at one time and a different thing at another time, no one would know what might happen in future decisions.

"A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may be so changed as perhaps to make a different rule in the case seem desirable." Cooley's Constitutional Limitations, (8th ed.) vol. 1, 123; *Carter* v. *Cain,* 179 Ark. 79, 14 S. W. (2d) 250; *South Carolina* v. *U. S.,* 199 U. S. 437, 26 S. Ct. 110; *Dred Scott* v. *Sanford,* 19 How. 393; *Cory* v. *Carter,* 48 Ind. 327, 17 Am. Rep. 738.

It is contended also by the appellant that the act provides for loaning credit and issuing interest-bearing evidences of indebtedness of the State, contrary to our Constitution. This question is completely answered against the contention of the appellant in the cases already cited. It is also contended that State purposes, within the meaning of the rule of *Hays* v. *McDaniel, supra,* do not include public roads. The other cases cited in this opinion, especially the case of *Williams* v. *Parnell, supra,* do include public roads.

We therefore conclude that the act in question does not violate any provision of the Constitution. The decree of the chancery court is therefore affirmed.

COMMERCIAL WAREHOUSE *v.* STATE.

Crim. 3848

Opinion delivered July 10, 1933.

House & Moses and *Richard C. Butler,* for appellant.

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

McHANEY, J. Appellant was convicted on a charge of overloading one of its trucks and operating same over the streets of Little Rock. The truck was rated by the manufacturer as a 2½-ton truck, and appellant had paid a license fee thereon based upon such tonnage. At the time the truck was stopped and the driver arrested, it was carrying 5½ tons. The license fee for a 2½-ton truck and which appellant paid is $90. The license fee for a 6-ton truck is $400. See act 36, Acts 1933. Section 24 of act 65 of 1929, subsection (N), makes it unlawful for any person to operate a vehicle on the public roads in this State without having paid the fee required by this act. If appellant could obtain a license for a 2½-ton truck and then haul 5 or 6 ton loads, it would escape the payment of the higher license fee required by law for such loads. The object of the lawmakers seems to have been to require the payment of license fees in proportion to the load capacity of the vehicles, because the heavier the load, the more the damage is to the highways over which it operates. Therefore, if appellant wishes to operate its truck on a 2½-ton license, it should limit its load to 2½ tons. If it wishes to have a greater tonnage, then it should get a license covering the greater load. It would not be thought proper to operate a Cadillac automobile with a Ford license, yet the same principle is involved.

Affirmed.

SMITH *v.* WATKINS.

4-3076

Opinion delivered July 10, 1933.

Pearce & Whitley, for appellant.

Ezra Garner, for appellee.

McHANEY, J. Appellee recovered judgments against appellants in the justice of the peace court as follows: April 21, 1928, against Smith $267.01, against Decia Hill $129.17. Against Necie and Elliott Flowers $287.97, against Branton or Bratton $221.25. Executions were later issued on said judgments, placed in the hands of proper officials, and were returned *nulla bona*. On March 22, 1932, transcripts of all four judgments were filed in the circuit clerk's office, and on the same day executions issued thereon, placed in the hands of the sheriff who made a levy on April 14, 1932, and on May 14, 1932, sold the undivided interest of appellants in and to 320 acres of land formerly belonging to J. N. Smith, now deceased, who was the father of the judgment debtors. J. N. Smith

died intestate, leaving surviving him his widow and appellants, all of whom resided upon said land, but no dower or homestead had ever been assigned to the widow, Cassie Smith, at the time of the levy and sale.

Appellants brought this action in the chancery court praying a cancellation of the sale made by the sheriff, as a cloud on their title, decreeing to them their homestead rights in said lands as remaindermen. They also sought a cancellation of the judgment against Necie Flowers and a restating of the account between Decie Hill and appellee. Appellee demurred to the complaint, the court sustained the demurrer, and this appeal followed.

The court correctly sustained the demurrer for want of jurisdiction. Three of the judgments in the justice of the peace court were upon personal service, and in the case of Necie Flowers the record shows she appeared in court and confessed judgment. No motion was made in either case to set aside the judgment. No appeal was prayed or prosecuted. Appellants had a full, complete and adequate remedy at law, and the complaint, as to Necie Flowers and Decie Hill, constitutes a collateral attack on the judgment of the justice court against them.

As to the claim of homestead right of appellants, the complaint alleges that they "were living on a tract of 320 acres of land held by appellants as tenants in common with five other heirs of J. N. Smith, deceased, who owned said tract of land at the time of his death"; that they were so living in separate homes, each the head of a family, when said judgments were lodged in the clerk's office and the executions were levied; that subsequent to the levy, but prior to sale, Cassie Smith, April 29, 1932, conveyed to them and the other heirs all her dower and homestead rights to said lands. At the time of the levy, the mother was a life tenant in possession with dower and homestead rights unassigned, and she could have claimed the lands exempt as against any of her creditors. The heirs were living on said land in separate houses, perhaps as tenants of the mother, but certainly not more than remaindermen subject to the life

estate. No particular tract of the 320 acres was owned by any of them until the termination of the life estate, and a partition of the land among the nine heirs, four of whom are appellants here. The lien of the judgments attached to the interest of appellants from the date the transcriptions were filed with the circuit clerk. As we said in *Brooks* v. *Goodwin,* 123 Ark. 607, 186 S. W. 67: "It is apparent that the occupancy must be accompanied by a present claim of a right to occupy, and one cannot occupy an estate in remainder as a residence. The owner of a particular estate alone has that present right of occupancy essential to impress the homestead character upon land."

The language of the Constitution under which the homestead right is here asserted is: "The homestead outside of any city, town or village owned and occupied as a residence shall consist of not exceeding * * *" etc. Appellants did not own the residences occupied by them, although they had a future expectancy to own each a one-ninth interest in the land. At the time the lien of the judgments attached and at the time of levy no homestead rights had or could have attached or been set apart to them. The case is ruled by *Brooks* v. *Goodwin, supra.* See also *Taylor* v. *Greene,* 186 Ark. 817, 56 S. W. (2d) 432, and cases there cited.

We find no error, so the decree is affirmed.

City National Bank *v.* Friedman.

4-3068

Opinion delivered July 10, 1933.

Joseph R. Brown and *James B. McDonough,* for appellant.

Cravens, Cravens & Friedman, for appellee.

BUTLER, J. The appellants brought this suit to recover judgment on a promissory note given by Fred Browne and others, and for foreclosure of a mortgage on property in Fort Smith given to secure the same. They also caused a garnishment to be issued on Paving District No. 16, which was served July 13, 1932.

The garnishee answered admitting that it held $123.-60 due Tancred-Browne Realty Company, a corporation of which Fred Browne is president, and $417.55 due Fred Browne individually, but that Lewis Friedman claimed the funds so held. Friedman intervened claiming to have purchased the funds from Fred Browne in his individual capacity and as president of the Tancred-Browne Realty Company. There was a judgment in his favor from which is this appeal.

The appellants contend that the funds in the hands of the garnishee had never been assigned to the intervener; that, if there had been an assignment, such assignment was never accepted by the garnishee, and that this want of acceptance rendered the attempted transfer of the funds ineffectual. Appellants also contend that the court erred in refusing to let them establish by the intervener on his cross-examination the fact that at the time of the purported assignment Browne was in serious financial

difficulties, and that Friedman was familiar with this condition. They argue that this was proper testimony, and, if admitted, would have established a fraudulent intent or collusion between Browne and Friedman to defeat Browne's creditors in the collection of their debts. Appellants lastly contend that the court erred in permitting Friedman to testify over the objection of the appellants that the money passing from him to Browne was intended as a purchase price of the funds in the hands of the garnishee, and not as a loan from him to Browne.

The evidence establishes the following facts: Browne was the owner of certain property in Paving District No. 16, and Tancred-Browne Realty Company was also the owner of property therein. They were entitled to a refund. Friedman had made some investigation regarding the refund, and knew the amounts which were due Browne and the realty company. Browne was in need of immediate cash on June 29, 1932, and, acting for himself and the realty company, sold to the appellee, Friedman, claims for a refund from said district for 75 cents on the dollar. This amounted to $400 in cash which Friedman there and then paid Browne. On the same day Browne addressed a letter to the commissioners of the district, attention Henry C. Lane, collector, as follows: "Please pay to Lewis Friedman the amount due me on the refund in the above district."

On July 2, 1932, Browne called the attention of Friedman to the fact that he had not given him an order for the realty company refund which was included in the purchase made on June 29th. Accordingly Browne addressed another letter to the commissioners, signing it Tancred-Browne Realty Company by Fred Browne, president, as follows: "Please deliver to Lewis Friedman check due us on refund in above district."

Friedman delivered these two letters to Henry C. Lane, collector and acting secretary of the commission, in the office of the commissioners, who filed them on the same dates they were written. Lane stated that he told Mr. George Dodd, the regular attorney for the city of Fort Smith, about these letters, but that he did not re-

member the date; that the commission did not have a meeting until July 16 but it was his recollection that Dodd was informed of the filing of the letters before the answer of the garnishee was made. He also stated that he told the commissioners of the filing of the orders after they had been filed, but was not able to fix any given time when this information was communicated to them.

Mr. Dodd and Mr. Henderson, one of the commissioners, testified in the case. Dodd stated that he had not heard of Friedman's claim until after the writs of garnishment were served; that he is the attorney for Paving District No. 16; that he usually attended the meetings of the commissioners, but that they might have had a meeting at which he was not present; that they had never had a meeting at which he was present when they discussed the assignment of the refunds.

Mr. Henderson stated that he had never seen the orders from Fred Browne to the district to pay the refunds to Friedman, and that the orders were never presented at a meeting of the commission prior to the date the garnishment was served; that the orders had not been accepted by him; that some time before the 15th of July, 1932, something was said, "In there one day about an order"; that he had never seen the orders, but knew they had been given, but that they had never been acted on by the board.

At the date of the purchase by Friedman from Browne of the refund, Browne was in serious financial difficulties. The appellants offered to show by Friedman that he knew of Browne's financial plight, but the court held this testimony immaterial, and sustained an objection to it.

This is the state of the case upon which the appellant's contentions are based, and with which we do not agree. The principle governing is stated in *Moore & Moore* v. *Robinson,* 35 Ark. at page 297, as follows: "It was not necessary that it should have been accepted by the appellants. To constitute an assignment of a debt, or other chose in action, in equity, no particular form is necessary, and it may be by parol. Judge Story says:

'If A, having a debt due to him from B, should order it to be paid to C, the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debts. In each case, a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it'."

In the instant case the evidence is uncontradicted that the transaction between Browne and Friedman was a purchase by the latter of the refund, and the court did not err when it permitted Friedman to so testify, and that it was not a loan, for he was simply stating a fact. The rule stated in *Moore* v. *Robinson, supra,* is thus stated in 5 C. J. p. 922, § 83, note 70: "Where draft or order is drawn in favor of a third person for the whole of a particular fund or debt, it will operate as an equitable assignment, * * * and, after notice of such is communicated to the drawee, it will bind the debt in his hands." Here it is undisputed that the orders were filed with the secretary of the commission, and this served to give it notice of the assignment of the refund to Friedman, whether the individual commissioners were actually informed of this or not. The only reason for giving any notice of an assignment of a debt to the debtor is to direct him to whom it should be paid and thus protect him from any subsequent claims by the assignor.

We are of the opinion that the court properly held the evidence of Friedman's knowledge of Browne's financial condition immaterial, in the absence of some evidence that the purchase of the refund was only colorable and made with the intent of aiding Browne in defeating his debts. *Wood* v. *Keith,* 60 Ark. 425, 30 S. W. 756. The facts justified the conclusion reached by the trial court, and its decree is affirmed.

T. M. DOVER MERCANTILE COMPANY *v.* DOVER.

4-3079

Opinion delivered July 10, 1933.

W. N. Martin and *Hardin & Barton,* for appellant.

Abe Collins, for appellees.

BUTLER, J. This suit was instituted against appellant company by J. A. Dover, Mrs. Daisy Morrow, Mrs. Flora Weaver, Mrs. Oza Butler, James Freeman Dover (minor son of F. D. Dover, deceased) and Mrs. Lima Dover, widow of F. D. Dover. They allege that the appellant was indebted to the estate of T. M. Dover, deceased, for two items of $59.20 and $70, arbitrary charges against the Dover estate made under the direction of M. J. Dover, president of the Dover Mercantile Company; that said company was indebted for $300 rent for the year 1932 on the store building, for the dividends collected on stock of the Berry Dry Goods Company and for the $4,050 received from the sale of the dry goods company stock belonging to said estate, for which they prayed judgment for the amount of their respective interests therein.

The mercantile company answered denying the allegations of the complaint and averring in effect that the dry goods company stock was a part of the assets of the Dover Mercantile Company; that the items complained of were proper charges, and it was not indebted to the estate for any rent. It further alleged that the plaintiffs had previously sold all of their right, title and interest in the said corporation, and prayed that their complaint be dismissed for want of equity. The facts sufficiently appear in the decree of the trial court as follows: "This cause was submitted to the court for trial and determination upon the complaint with the interrogatories propounded to the defendants by the plaintiff attached thereto, the answer of the defendant, together with its answers to said interrogatories and the amendment to the answer of the defendant, all of which papers are on file herein, upon the deposition of A. Y. Berry and upon oral and documentary evidence taken in open court at the time, from a careful consideration of all of which the court finds that T. M. Dover, who formerly resided at Hatfield, in Polk County, Arkansas, departed this life intestate, on the 18th day of February, 1917, leaving surviving him as his sole and only heirs at law, his wife, America Dover, who departed this life in 1927,

and the following children: M. J. Dover, Mrs. Dora Carper, Mrs. Dovie Hilton, E. M. Dover and all of the above named plaintiffs, save and except Joseph Freeman Dover and Mrs. Lima Dover, who are the sole surviving heirs at law of F. D. Dover, who was the son of said T. M. Dover, but who has departed this life since the death of said T. M. Dover, and that all of the indebtedness of the estate of said T. M. Dover and F. D. Dover and America Dover, has been fully paid.

"That the defendant corporation, T. M. Dover Mercantile Company, was organized on or about March 1, 1917, by taking over the merchandise, notes and accounts belonging to the estate of the said T. M. Dover to amount of $30,000, which property constituted all of the assets of said corporation, which issued 300 shares of stock of the par value of $100 each, 23 shares of which were issued to each of said children of said T. M. Dover, deceased, and 93 shares of which were issued to said America Dover, widow of the said T. M. Dover, deceased. That at the time of the death of said T. M. Dover, deceased, he was the owner of 120 shares of stock of the par value of $25 each in the Berry-Beall Dry Goods Company of Fort Smith, Arkansas, a corporation, now known as the Berry Dry Goods Company; that said stock in said corporation was never owned by the defendant, T. M. Dover Mercantile Company, but at all times remained the property of said heirs of said T. M. Dover, deceased, but that the defendant, T. M. Dover Mercantile Company, has at all times since its organization acted as the agent or trustee for all of the said heirs at law of said T. M. Dover, deceased, in the handling of said stock in said Berry Dry Goods Company, collecting the dividends thereon and in the collection of rents on property owned by said heirs at law of said T. M. Dover, deceased.

"That on March 10, 1926, said defendant, T. M. Dover Mercantile Company, without any right or authority, had the stock of T. M. Dover, deceased, in said Berry Dry Goods Company transferred to said defendant on the books of said Berry Dry Goods Company, and on April 19, 1928, sold said stock to A. Y. Berry and received

therefor the sum of $4,050; that on February 23, 1926, it collected a dividend on said stock amounting to $240, but has not accounted to any of the plaintiffs herein for their portion of the proceeds collected from the sale of said stock and said dividends, although due demand has been made therefor, said demand having been made on March 1, 1932; that the plaintiff J. A. Dover did not knowingly treat said items as assets of the defendant; but that the proof is not sufficient to establish the allegations of the complaint that the defendant ever received the other dividends on said stock mentioned therein.

"That on February 15, 1929, said defendant charged the heirs at law of said T. M. Dover, deceased, with $59.20 on account of a loss sustained by said corporation on the note and account of one Ola Barnes, to whom it has sold merchandise without any of the said heirs at law of said T. M. Dover being in any way bound therefor; that on February 15, 1929, said defendant corporation, also without any right or authority, charged the heirs at law of said T. M. Dover, deceased, with $70 as commission on $700 rent money collected by the defendant for said heirs at law of said T. M. Dover, deceased, $600 of which was rents paid by said corporation on the buildings occupied by it and belonging to said heirs at law of said T. M. Dover, deceased; that both of said last-mentioned charges are arbitrary and unauthorized, and that the plaintiffs herein should have and recover of and from the defendant their portion of said sum of $4,290 collected by the defendant from the sale of said stock in the Berry Dry Goods Company and the dividend collected thereon as well as said sums of $59.20 and said item of $70, together with interest thereon at the rate of 6 per cent. per annum, to this date, amounting to $187.76, making a grand total of principal and interest amounting to $4,606.96.

"That the sum of $300, together with improvements made by the defendant on the store buildings occupied by it was a sufficient rental to be paid by it for said buildings for the year 1931, and that the plaintiffs are not entitled to recover anything on said item.

"That the plaintiff, Mrs. Daisy Morrow, sold all of her interest in the T. M. Dover Mercantile Company and Berry Dry Goods Company to Mrs. Dora Carper, save and except her 1/9 interest in said estate belonging to her mother; that the plaintiff Mrs. Oza Butler, likewise sold all of her interest in said T. M. Dover Mercantile Company and Berry Dry Goods Company, save and except her 1/9 interest in said 1/3 interest of her mother in said property to the plaintiff, J. A. Dover; that the plaintiff, J. A. Dover, still owns all the interest in said estate he has ever owned, together with said interest so purchased from the plaintiff, Mrs. Oza Butler, save and except his stock in T. M. Dover Mercantile Company, or 5/27 of all the amounts involved herein; that the plaintiff, Mrs. Flora Weaver, sold her interest in the real estate belonging to said estate of said T. M. Dover, deceased, and in the T. M. Dover Mercantile Company to M. J. Dover, but has never parted with her interest in the dividends sued for herein, but is not entitled to participate in the amounts allowed herein on said items of $59.20 and $70 because she has sold her interest in said real estate; and that the plaintiff, Mrs. Lima Dover, and Joseph Freeman Dover, still retain all interest in the amounts involved herein which were formerly owned by said F. D. Dover, now deceased.

"It is therefore by the court considered, ordered and decreed that the plaintiffs have of and recover from the defendant, T. M. Dover Mercantile Company, as follows: Mrs. Daisy Morrow the sum of $170.62, Mrs. Oza Butler the sum of $170.62, J. A. Dover the sum of $853.10, Mrs. Flora Weaver the sum of $496.91 and Mrs. Lima Dover and Joseph Freeman Dover the sum of $511.86, all of said sums to bear interest from this date until paid at the rate of 6 per cent. per annum; and that the plaintiffs recover of and from the defendant all the costs of this action, for which let execution issue.

"The plaintiffs and the defendant each duly object and except to each of said orders, rulings and findings of the court, in so far as they are against them, respectively, and pray and are granted an appeal to the Supreme

Court. And each side is hereby given 120 days within which to file a bill of exceptions.

The appellant, T. M. Dover Mercantile Company, first insists that the finding of fact by the chancellor is against the preponderance of the evidence; second, that the plaintiffs are barred by laches and limitation; and, third, that the plaintiffs, and especially A. J. Dover, are estopped from asserting any right to the amounts claimed.

On the question as to the ownership by the Dover Mercantile Company of the dry goods company stock, the principal question in the case, M. J. Dover testified that at all times the dry goods company stock was treated and used as a part of the assets of the Mercantile Company, and that this was with the full knowledge and assent of all the heirs—his mother in her lifetime and his brothers and sisters, including the plaintiffs. He perhaps might have so intended it, but all of the heirs testified that they did not so understand it and presumed that the Mercantile Company was handling the dry goods company stock for the benefit of the estate, just as it was renting the farms and managing the other property left by T. M. Dover which was not included in the corporation formed shortly after his death. It is manifest that M. J. Dover was the guiding spirit in the management of the affairs of the family after the death of the father. He was fully trusted by his mother and by his brothers and sisters, and they relied upon his business experience and ability. We are constrained to think that he, in fact, managed the corporation and the Dover estate with unusual ability, and we find no evidence of any actual fraud intended or practiced by him. Under his guidance the farms were made to produce annually an adequate revenue, and the assets of the corporation more than doubled in value under his administration, having in its treasury on January 1, 1928, more cash than the value of its entire assets in the beginning. But it is also apparent that he managed the entire business as if it were his own, without consulting his brothers and sisters, and who, if they had anything at all to do with the business, did just as he bade them.

It is practically undisputed that the dry goods company stock was not included in the assets of the corporation at the time of its formation, but remained a part of the Dover estate, just as the lands and other property, and the inference is warranted that, in the transfer of the stock to the Mercantile Company and its sale, M. J. Dover was acting purely on his own initiative and without any adequate knowledge on the part of his brothers and sisters of what he did or what his intentions were. Therefore it cannot be said that the finding of the chancellor is against the preponderance of the evidence on the question of the ownership of the Dry Goods Company stock, for the act of M. J. Dover in having the stock transferred in the name of the Dover Mercantile Company and the subsequent sale could not change the ownership without the knowledge and consent of the other heirs, and, if the stock was the property of the estate, then the $240 dividend item was correctly charged against the mercantile company.

M. J. Dover, as president of the mercantile company, attended to all the business of the heirs with respect to their farms. These services were no doubt valuable, but they appear to have been voluntary, and he served without compensation either expected by him or consented to by the heirs. The $70 item as commissions, considering the work he did for the heirs, is not at all unreasonable, the trouble is he had no authority to make this charge. Likewise, as to the item of $59.20, loss sustained on account of one of the tenants, as there was no agreement on their part shown to assume or pay this account, it, too, was an improper charge.

The doctrine of laches invoked by the appellant has no application in this case, for, as pointed out by the appellees, it was not pleaded, as a defense to the action in the trial court. We are also of the opinion that, under the facts which will be discussed on the question of limitation, there was no unreasonable delay or such delay as has prejudiced any of the rights of the appellant.

The contention that the statute of limitation applies and bars plaintiffs' action is the one which has given us

the most difficulty. After a careful deliberation, we conclude that, under the peculiar facts of this case, it has no application. The chancellor found that the mercantile company had at all times, since its organization, acted as the agent or trustee for the heirs at law of T. M. Dover in handling the stock of the dry goods company, collecting the dividends thereon and collecting rents on the property owned by the said heirs at law. This finding is fully warranted by the testimony, and not only are these the facts, but it is evident the mercantile company not only collected the rents, but managed the farms and other property of the Dover estate.

It is well settled that one receiving money as an agent for another, or which is to be applied to some particular purpose, is not necessarily a trustee of an express trust within the rule exempting such from the operation of the statute of limitation, but such a trust may arise where the agent assumes, or is given duties and responsibilities beyond those incident to the ordinary relationship of principal and agent, and therefore, while not technically a trustee of an express trust, may become substantially one.

"An action by a principal against his agent * * * is one of those to which the statute of limitation is applicable unless the agent is something more than a mere agent to conduct business for his principal and remit to him goods or moneys received on his account. * * * But the duties of an agent are often much wider than those above alluded to; he is often more than an agent, and is a trustee, or has duties similar to those of a trustee; and in such case an action against him is not barred by the statute of limitations." In Re *Sharpe,* [1892] 1 Ch. Div., p. 168; *Commissioners* v. *Lash,* 89 N. C. 159; *Oliver* v. *Hammond,* 85 Ga. 323, 11 S. E. 655; *Shepherd* v. *Shepherd's Estate,* 108 Mich. 82, 65 N. W. 580 *Dovey* v. *Shaltz,* 104 Neb. 108, 175 N. W. 888.

The corporation began to function in the early part of 1917. None of the girls had any knowledge at all of the conduct of the business. J. A. Dover was about 18 years old and worked as an ordinary clerk in the busi-

ness for several years until about 1922 when he was given charge of the books. The only knowledge he had of the conduct of the business was just what he might gain from the entries he made on the books. He was the one who entered the two items of stock dividends on the books of the company, one to the credit of Mrs. Dover and one to the credit of the mercantile company, and he had an opportunity of knowing of the entry made on the books of the company immediately after the sale of the dry goods company stock, but it is not clear that he realized the significance of these entries or that he knew what they imported. He testified that he did not know just how the dry goods company stock was to be handled. From 1917 down to the sale of the dry goods company stock in 1928, annual dividends were remitted to the Dover Mercantile Company, but only two items entered. What became of these dividends is uncertain. There is no contention made that M. J. Dover got them personally and the inference seems to be that they were given to Mrs. Dover, the mother, or used for her convenience. During all this time the Dover Mercantile Company, acting through M. J. Dover, was the continuous general agent and manager of the property of the Dover estate. It was therefore something more than a mere agent and sustained such relation to the heirs as to raise its position from that of a mere agent to one of trusteeship, and thus makes applicable the rule announced in the authorities cited *supra*.

We do not overlook the cases cited by the appellants, and especially the case of *U. S. F. & G. Co.* v. *Smith,* 103 Ark. 145, 147 S. W. 54, where it was held that the statute of limitations would run against a claim of the principal for money collected by its agent which said agent had failed to pay over. In that case, however, the agency was not a continuous general agency, nor was the agent clothed with the management of the property of its principal generally, as in the case at bar. In the instant case no cause of action arose in favor of the plaintiffs, the agency being a continuous one, until they became apprised of the fact that the trustee intended to convert

the moneys in its hands belonging to the plaintiffs, and this appears not to have been known until demand was made upon it to account for the funds thus held and converted, and the demand was refused.

The observations we have made dispose of the plea of estoppel. Under the circumstances of the case, as they understood the facts to be, the plaintiffs were not required to sooner assert their rights, for they were under no duty to speak until they became apprised of the intention of the mercantile company to convert their funds to its use. Also there is nothing to show that their failure to sooner assert their claims has led to any change for the worse in appellant's position. Therefore the plaintiffs were not estopped to maintain this action. *Geren* v. *Calderera*, 99 Ark. 260, 138 S. W. 335.

The court found that Mrs. Flora Weaver sold her interest in the estate of T. M. Dover, deceased, and in the Dover Mercantile Company, except her interest in the dividend item, to M. J. Dover. In entering the decree for the amount due Mrs. Weaver, this finding of fact was overlooked, and the judgment in her favor should have been for the sum of $165.66. In that respect the decree will be modified.

There was no evidence to show that the mercantile company received any benefits from the annual dividends paid by the dry goods company except one item of $240, and there was evidence that the reduction of rent on the store building was compensated by improvements made by the mercantile company. From other circumstances it does not appear equitable to allow interest as claimed by appellees.

The decree will be modified as to the amount adjudged to Mrs. Weaver, and in all else is affirmed.

JOHNSON, C. J., disqualified and not participating.

HAMPTON *v.* STATE.

Crim. 3846

Opinion delivered September 25, 1933.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

SMITH, J. At the trial from which this appeal comes appellant sought to challenge three citizens who were present as veniremen, for the reason that they had been members of a regular panel within two years prior to that date. Appellant had exhausted the challenges allowed him by law, and sought to challenge these veniremen for the reason stated. The court denied his right to do so, and these jurors served at the trial. Appellant was convicted, and has appealed.

The Attorney General has confessed error, upon the authority of the case of *Beavers* v. *State, ante* p. 722, 61 S. W. (2d) 1113, in which case we construed act 135 of the Acts of 1931, page 363, entitled, "An Act to regulate jury service." We there held that under this Act of 1931 it was ground for peremptory challenge that a juror had served on a regular panel of a petit jury or of a grand jury within two years next preceding the time he is called for jury service, and that this disqualification for service applied to special jurors as well as to regular jurors.

It is not service as a special juror which disqualifies. The person rendered ineligible under the Act of 1931 is one who has served on a grand or petit jury during a regular term of court, and this ineligibility continues for two years thereafter, and for that period of time disqualifies for further jury service, either as a regular or as a special juror.

Appellant should have been permitted, therefore, to challenge these jurors, and the confession of error will be sustained, and the judgment is reversed and the cause remanded for a new trial.

SUTTON *v.* STATE.

Crim. 3847

Opinion delivered September 25, 1933.

Robert Bailey, for appellant.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted by the grand jury of Pope County for killing W. K. Smith, and on the 8th day of April, 1933, was tried upon the charge and convicted of involuntary manslaughter, and as a punishment therefor was adjudged to serve a term of one year in the State penitentiary.

On trial of the cause, the dying declaration of W. K. Smith concerning the tragedy was admitted in evidence over the objection and exception of appellant. The objection to the admission thereof was that neither it nor any of the evidence in the case tended to show that W. K. Smith believed that he was *in extremis,* and that his death was impending when he made the declaration.

Over the objection and exception of appellant, the trial court submitted the issue to the jury of whether the declaration was made by W. K. Smith under the belief that he was going to die as a result of the wounds he had received at the hands of appellant.

The admission of the declaration and the submission of the issue of whether it was made under belief of impending death is urged by appellant as reversible error.

The declaration itself contains the following statement: "I realize that I may die from my injuries and make the statement at 9:34 A. M., October 23, 1932."

The record reflects that, before signing the declaration, Smith never said that he was going to die or that he expected to die, but, on the contrary, said he was going to do his damndest to get well, and that he was not going to give up until he had to, and that at the time he asked the sheriff for permission to carry a gun. The record also reflects that, when asked if he realized that he was as liable to die as to get well, he replied: "Any damn fool would know that."

The rule is that, in order for dying declarations to be admissible as evidence, they must have been made under a sense of impending death, and that they are inadmissible if the declarant at the time had any expectation or hope of recovering. Greenleaf on Evidence, Fifteenth Edition, § 158; *Stewart* v. *State,* 148 Ark. 540, 230 S. W. 590.

The undisputed testimony in the instant case reflects that at the time the declaration was made the deceased retained the hope that he might recover, and that he had made up his mind to fight for his life.

The declaration was inadmissible under all the facts and circumstances in the case.

After the trial judge erroneously admitted the declaration, he should have admitted the testimony to the effect that the declarant, W. K. Smith, had served a term in the penitentiary. His testimony contained in the declaration was subject to impeachment the same as the testimony of any other witness. It is provided by § 4145 of Crawford & Moses' Digest that: "No person shall be

disqualified to testify in any action, civil or criminal, pending in any of the courts of this State by reason of having been convicted of any felony or other crime whatsoever, but evidence of his former conviction of any crime by a court of this or any other State or territory of the United States shall be admissible for the purpose of going to his credibility or the weight to be given to his testimony."

On account of the errors indicated, the judgment is reversed, and the cause is remanded for a new trial.

McPherson *v.* State.

Crim. 3849

Opinion delivered September 25, 1933.

[redacted]

Mark E. Woolsey, for appellant.

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

KIRBY, J., (after stating the facts). It is uniformly held that a court of record may correct mistakes in its record which did not arise from the judicial acts of the court but from the mistakes of its recording officers. *Smith* v. *Wallis-McKinney Coal Co.,* 140 Ark. 218, 215 S. W. 385. It is also thoroughly settled that it is within the court's discretion to enter a *nunc pro tunc* order correcting the record at a subsequent term in criminal as well as civil cases. *Richardson* v. *State,* 169 Ark. 167, 273 S. W. 367; *Goddard* v. *State,* 78 Ark. 226, 95 S. W. 476; *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80, and *Hydrick* v. *State,* 103 Ark. 4, 145 S. W. 542.

The evidence was ample to justify the court in making the order *nunc pro tunc* sentencing the appellant on the pleas of guilty already long entered, and it does not appear that any discretion was abused in so doing. It was established that appellant had pleaded guilty to the two indictments in question, and it is not necessary to consider the demurrer or any plea of former conviction or the plea that more than two terms of court had elapsed since the return of the indictments without appellant having been brought to trial. The pleas of guilty formerly entered precluded any consideration of the questions attempted to be raised by these three pleas at the time of the rendition of the judgment.

It is true the judgment did not follow until long after the pleas of guilty were entered in these two cases, but the prosecution had not been abandoned nor the cases dismissed, as appears from the testimony, and appellant could not have been prejudiced by the failure of the court to sooner enter judgment and sentence against him. *Stocks* v. *State,* 171 Ark. 835, 286 S. W. 975.

Neither was any showing made of abuse of discretion in refusing to allow the defendant to withdraw his pleas

of guilty and enter pleas of not guilty to the said indictments. *Estes* v. *State,* 180 Ark. 633, 22 S. W. (2d) 36.

It may be that appellant had the impression at the time the pleas of guilty were entered that these two cases against him would be dismissed or *nol prossed* upon entry of judgment in the other seven cases in which pleas of guilty were made, but the evidence herein discloses that there was no such agreement made by the State at the time or any conduct that would warrant such belief on his part, and, there being no error in the record, the testimony being amply sufficient to support the court's findings, the judgment must be affirmed. It is so ordered.

DRIVER *v.* DRIVER.

4-3075

Opinion delivered September 25, 1933.

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

L. C. B. Young and *A. F. Barham,* for appellee.

MEHAFFY, J. The appellant, Janice V. Driver, was the former wife of the appellee, William Walter Driver. She was granted a divorce from him in April, 1929, in Missouri, where she resided at that time.

She thereafter brought suit against him in the chancery court of Mississippi County, Arkansas, for support and maintenance of their child, and the court found that Janice V. Driver had expended $2,138 for the maintenance and support of the child, and that William Walter Driver had expended $35 for the same purpose.

A decree was rendered in favor of Janice V. Driver against William Walter Driver for the sum of $1,069, but the court dismissed without prejudice her complaint for future maintenance. An attachment had been issued, and this was dissolved without prejudice. Thereafter an execution was issued on the decree and levied on all the interest of Driver in and to certain property described in the decree.

This action was brought by William Walter Driver and C. C. Bowen, trustee, against the sheriff and Janice V. Driver to enjoin the sale under execution.

The contention of the appellees in this case is that the title to the property is vested in Bowen as trustee, and that Driver has no interest in it subject to execution.

It was alleged by appellees in their complaint that Abner Driver, father of appellee Driver, made a will before his death bequeathing to the said appellee Driver the land in controversy; that the will created a spendthrift trust with the said C. C. Bowen as trustee holding title to and absolute control and possession of all the property bequeathed by Abner Driver to the appellee Driver; that the court held in the decree in favor of appellant for $1,069; that this property was not the property of William Walter Driver and not subject to be sold

for the payment of his debts; that, notwithstanding this holding of the court, appellant caused execution to be issued and served by the sheriff of Mississippi County, and that the lands were advertised as the property of appellee Driver. It was alleged that Driver had no title and no interest subject to sale for the payment of said judgment or any part thereof.

A temporary restraining order was issued. Appellants filed demurrer to the complaint, and thereafter the appellees filed an amendment to their complaint alleging that the court held in the former suit that the title to the property attached was not in a position that it can be reached by the process of that court, and hence on that ground the attachment was dissolved. Sale was made under the execution. Appellants filed answer to the amended complaint.

The court rendered a decree finding that the title to the land was in C. C. Bowen as trustee and not subject to sale under execution for the debts of said Driver; that the sale was void and constituted a cloud on appellee's title; that the sale should be vacated and a permanent injunction issued.

The eighth paragraph of the will of Abner Driver is as follows:

"I give and devise to my son, William Walter Driver, and to his heirs the following real estate: East one-half of the southeast quarter of section 23, township 15 north, range 10 east, containing 80 acres, northwest quarter of the southeast quarter of section 23, township 15 north, range 10 east, containing 40 acres and that part of the southeast quarter of the northeast quarter of section 23, township 15 north, range 10 east, lying south of the county road containing 25 acres more or less and known as the Allen, L. M. Richardson and M. N. Gowan and Tom Ray tracts. All debts owed to me by the tenants on the lands set apart to William Walter Driver at the time of my decease shall go to the said William Walter Driver."

Thereafter Abner Driver made Codicil No. 2 to his last will and testament, which reads as follows: "I appoint, designate and name C. C. Bowen as trustee for

my son, Cooper Driver, to take, have, hold, manage, care for and keep all and singular the property herein willed to Cooper Driver, or that may descend to or be inherited by him from my estate; to keep the same for and during the natural life of said Cooper Driver free from his control, supervision or management.

"And I hereby constitute, designate and appoint C. C. Bowen as trustee for my son, William Walter Driver and my daughter, Ruth Driver Florida, respectively; to take, receive, manage and control all and singular the property herein devised to each of them, and all other property received and inherited by them from my estate; to keep and control the said property until my said children arrive respectively at the age of 35 years, at which time my said trustee is to give to each of said children, respectively, one-half of his or her property so had, held or received by him and not otherwise disposed of, for his or her necessities during said time by my said trustee. It being my intention to put the said property in trust, free from the control of my said three children, free from any debts, contracts or obligations they may have made or may hereafter make. And it is my intention and desire that the residue and remaining one-half of said estate so willed to my two children, William Walter Driver and Ruth Driver Florida, respectively, shall be and remain in trust for and during the period of their natural lives.

"It is my desire that, in case of the death, resignation, incapacity or refusal of the said C. C. Bowen to act as trustee for my said children or any of them, that the chancery judge of this chancery district shall appoint some discreet, suitable person to act in the room and stead of said C. C. Bowen, and it is my desire that the said C. C. Bowen shall serve in the capacity of such trustee without bond, but that any successor to said C. C. Bowen shall be required by the judge so appointing him to give bond in sufficient sum to protect the property so passing into his hands.

"And I will and desire that my said trustee, C. C. Bowen, or any successor he may have as herein provided for shall have full power to manage, control, collect rents,

pay taxes and sell and convey by sufficient deeds any and all property conveyed by this will to any of my said children, at any time he deems for their advantage and to reinvest the proceeds therefrom from time to time in such property or securities as he deems to their advantage and to their best interest, protection and security.

"And my said trustee, C. C. Bowen, and his successor or successors in this trust is directed to pay to each of my said three children any part or all of the income from the respective property belonging to each for his or her support during the time of this trust, and, if at any time in his judgment it becomes necessary to use part of the property beyond the income that he may sell and dispose of such part as he deems best and pay and deliver the proceeds or a suitable part thereof to any such child or children.

"And I will and desire that should any one of my three said children, Cooper Driver, William Walter Driver and Ruth Driver Florida, die without heirs of their body lawfully begotten that all and singular of the property willed and devised and bequeathed to each or any of them so dying without issue, shall revert to and become a part of my estate and be classed as a residuary part thereof and descend to my wife, M. E. Driver, if then living and if not living, then to my children then living, in equal parts and to the heirs of such children as may have died, per stirpes and not per capita.

"It is my will and desire that any property real, personal or mixed, not devised and disposed of in my will, shall descend to and become the absolute property of my wife, M. E. Driver."

The first question for us to determine is whether paragraph eight of the original will, copied above, is revoked by the codicil.

"The cardinal rule of testamentary construction is to ascertain the intent of the testator and give effect to it, unless the testator attempts to accomplish a purpose, or to make a disposition contrary to some rule of law or public policy. All rules of construction are designed to ascertain and give effect to the intention of the testator." 28 R. C. L., 211; *Lavenue* v. *Lewis,* 185

Ark. 159, 46 S. W. (2d) 649; *Fine* v. *McGowan,* 186 Ark. 1035, 57 S. W. (2d) 565; *Union Trust Co.* v. *Madigan,* 183 Ark. 159, 35 S. W. (2d) 349; *First Nat. Bank of Ft. Smith* v. *Marre,* 183 Ark. 699, 38 S. W. (2d) 14.

The general rule is 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 may be given to the same provisions all embodied in a will. This is due to the fact that the mere making 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 last expression of the testator's desires, is to be given precedence.

A revocation by a codicil of a gift in the will, extends only so far as the will is inconsistent with the codicil. 28 R. C. L. 199.

By the original will William Walter Driver was given the property described in the decree in fee simple. The codicil, which is set out above, is clearly inconsistent with paragraph eight of the original will. The codicil appoints Bowen as trustee and directs him to take, receive, manage and control the property bequeathed to William Walter Driver in the original will, and the testator says in the codicil that it is his intention to put the said property in trust free from the control of his children, and free from debts, contracts, or obligations that they may have made, or may hereafter make. He also says in the codicil that Bowen, the trustee, shall have full power to manage, control, collect rents, pay taxes, and sell and convey by sufficient deeds any and all property conveyed by his will at any time that he, the trustee, deems for their advantage. The codicil also provides that, if one of the children die without heirs of their body,

all the property devised and bequeathed to them shall revert to and become a part of his estate, etc.

While it is not stated expressly in the codicil that it is the intention of the testator to revoke paragraph eight of the original will, yet we think that such intention is manifest from the codicil and the language used therein.

The word "take," in the sense used in the codicil, evidently means to take as trustee, as owner. One is said to take an estate by descent, or by purchase. It means to lay hold of, to seize, to deprive one of possession of, to assume ownership. *City of Durham* v. *Wright,* 190 N. C. 568, 130 S. E. 161.

Our Constitution provides that private property shall not be taken, appropriated or damaged for public use, without just compensation therefor. Taken, as used in the Constitution, means to deprive the owner of the property, to seize it, and assume ownership.

We think the word "take" as used in the codicil, means the same thing, and that it was the intention of the testator that Bowen, the trustee, should take the property just as Driver himself would have taken it under paragraph eight if the codicil had not been executed. When the entire codicil is read, it seems clear to us that the testator intended to revoke paragraph eight when he executed the codicil. He refers in the codicil to the property willed to his children, but he evidently means the property bequeathed in the original will.

Appellant argues that the case of *Bowlin* v. *Citizens' Bank & Trust Co.,* 131 Ark. 97, 198 S. W. 288, is not in point because the property in that case was bequeathed direct to the trustee, and appellant says: "If in this case the land had been bequeathed direct to the trustee as in the Bowlin case, instead of merely giving the trustee the power to manage, control, collect, etc., we would not be here contending that the land is subject to execution against Driver."

If, under the codicil, we are correct in holding that Bowen was to take this property as trustee, and that paragraph eight of the original will was modified to that extent, then the situation would be the same as if it had

been bequeathed to Bowen as trustee, and we are of opinion that the codicil placed the legal title in Bowen as trustee, and that it cannot be sold under execution. We think the Bowlin case above cited is controlling here.

Numerous authorities are cited and discussed by counsel. We do not review these cases because we hold that the codicil is inconsistent with the original will, and revoked its provisions so far as there is a conflict. It is not necessary that there should be express words of revocation in order that the codicil may revoke the provisions of the original will.

"The provisions of a will may be revoked, when these are legal, in express terms, or by inconsistent or repugnant provisions of a later, with an earlier instrument. The codicil does not, in its terms, revoke the will. The revocation of a will by a codicil because of repugnant provisions is a rule of necessity, and operates only so far as it may effectuate the intention of the testatrix. Revocation is altogether a matter of intent." *Russell* v. *Hartley,* 83 Conn. 654, 78 Atl. 320.

"It does not, however, require an express revocation to make the intent to revoke clear. It is sufficient that the intent to make a disposition of the estate, which is inconsistent with the prior gift, is made clear as the original gift." *Frelinghuysen* v. *N. Y. Life Ins. & Trust Co.,* 31 R. I. 150, 77 Atl. 98, A. & E. Ann. Cas. 1912B, 237; *Anderson* v. *Williams,* 262 Ill. 308, 104 N. E. 659, A. & E. Ann. Cases, 1915B, 720.

When a will and codicil are inconsistent or repugnant in their provisions, the codicil, being the latest expression of the testator's desires, is to be given precedence. If the provisions of the will and the codicil are conflicting, the codicil governs. *Little Rock* v. *Lenon,* 186 Ark. 460, 54 S. W. (2d) 287.

Since we hold that the codicil revokes the provisions of the will, we deem it unnecessary to discuss or decide the other questions discussed by counsel.

The decree of the chancery court is affirmed.

ARKANSAS QUICKSILVER COMPANY *v.* MCGHEE.

4-3086

Opinion delivered September 25, 1933.

McRae & Tompkins, for appellant.

J. H. Lookadoo, for appellee.

MEHAFFY, J. This is an action by an employee, John F. McGhee, to recover damages for personal injuries which he sustained while employed by the appellant as a helper to the foreman and hammerman. The appellant was at the time operating cinnabar mines in Pike County, Arkansas, for the recovery of quicksilver.

The method of operating was to drill holes in the rock, and shatter and break the rock with charges of dynamite. After these blasts were fired the rock shattered would be collected and loaded on cars to be carried to the smelters. After the blasts were fired, it was necessary for the workmen to clean up and load the shattered rock, and it was often necessary to pry or pick down the broken rock from the face of the wall in which the dynamite had been fired. These workers were called "muckers."

At the time of the injury, the foreman pointed out the pick and told the appellee to take this pick and knock

the rock loose while the foreman filled up the tank. Under the orders of the foreman, the appellee picked up the pick and started work. The pick had a warped handle, and, while appellee was picking at the crevice, he hit on the side of the crevice and struck a rock which hit him in the eye. The crooked handle caused him to miss the crevice.

There is no dispute in the evidence about the handle of the pick being warped, and about the foreman directing him to take that particular pick and go to work. There is some conflict in the evidence as to whether this was the correct or usual method of performing this work. Most of the witnesses testified that the usual method was to use a crowbar and prize the rocks out.

The appellee had never used the pick before, did not know that the handle was warped, and had no opportunity to examine it, but, in obedience to the order of the foreman, immediately took the pick and began to work. Appellee had worked several months as a mucker, cleaning up the loose rock, but had worked about ten or twelve days helping on the jack hammer.

The sight of the injured eye was impaired, but not destroyed. There was a jury trial, a verdict and judgment for appellee for $10,000, and the case is here on appeal.

Appellant contends that the court should have directed a verdict for it, and states that the appellee testified that there was nothing wrong with the pick. He did not, however, testify that there was nothing wrong with the handle, and all the proof shows that the handle was warped, or crooked.

It is also contended that the appellee testified that the accident was not caused by the negligence of any one else; that no one else caused him to be hurt.

The appellee testified that there was nothing wrong with the pick, but he was asked if the handle was in good condition, and he said it was not. Witness testified that he told Bird that the pick was all right, but that the handle was crooked.

The statement presented to the witness contained the following: "The accident was not caused by the negli-

gence of any one else; that is, no one else caused me to get hurt. I was doing what my driller told me to do when the accident happened."

After reading this statement to appellee, he was asked if that was correct, and appellee replied: "Yes, sir, I was doing exactly what he told me to do."

The witness, in his evidence, makes it perfectly plain that the injury was caused by his undertaking to do what the foreman told him to do, and with a pick which had a defective handle, and that this defect in the handle caused him to miss the crevice, and strike the rock which hit him in the eye.

It is contended, however, that the defect in the handle of the pick was open, patent and visible.

Appellant calls attention to numerous authorities to the effect that an employee is bound to take notice of obvious defects, and this is generally true, but this court has not held that, where an employee is ordered by his superior to use a certain tool without any opportunity to observe its condition, he must take notice of a defect like the one in the pick handle. Moreover, the other witnesses that testified that the handle was warped also testified that you could not notice it if you did not look at it specially.

The rule approved by this court in *Owosso Mfg. Co.* v. *Drennan,* 182 Ark. 389, 31 S. W. (2d) 762, is as follows:

"One of the first duties of the servant is obedience. 'It is a fundamental of the relation of master and servant that the servant shall yield obedience to the master, and this obedience an employee may properly accord, even when confronted with perils that otherwise should be avoided. In any case, but more plainly when a command is sudden and there is little or no time for reflection and deliberation, the employee may not set up his judgment against that of his recognized superiors; on the contrary, he may rely upon their advice, assurances and commands, notwithstanding many misgivings of his own. It by no means follows that, because he could justify disobedience of the order, he is barred of recovery for injuries received in obeying. He is not required to balance

the degree of danger and decide whether it is safe for him to act, but he is relieved in a measure of the usual obligation of exercising vigilance to detect and avoid danger. Ordinarily, he may assume that the employer has superior knowledge and rely thereon, especially when the act is one that could be made safe by the exercise of special care on the part of the employer. The employee may assume that such care will be taken. Again, it is a psychological truth that employees form a habit of obedience that overcomes independent thought and action, depriving them of power to exercise intelligence that otherwise would protect them'."

The appellant insists that this was a simple tool, and that the master was under no duty to inspect it. This is the general rule, but applicable only where the employer has exercised ordinary care to furnish tools that are reasonably safe.

This case, so far as this question is concerned, is controlled by the principles announced in *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. (2d) 1043. The authorities are reviewed in the two cases mentioned, and it would be useless to review them again.

Whether the master was guilty of negligence in ordering appellee to use the pick with a defective handle, and whether this caused the injury, were questions for the jury, and there is ample evidence to sustain the finding of the jury on these issues.

It is next contended that the court erred in giving certain instructions and in giving conflicting instructions. We do not set out the instructions, but we have very carefully examined them, and have reached the conclusion that there was no error in instructing the jury, and that there is no conflict in the instructions.

The appellant next contends that the verdict is excessive, and we agree with the appellant in this contention. The evidence shows that the eye was injured, but not destroyed, and that the sight was permanently and seriously impaired. The appellee was thirty-seven years of age, and there is no evidence that the impairment of his vision will decrease his earning capacity or prevent him from engaging in any ordinary occupation.

We have therefore concluded that the judgment should be reduced to $5,000, and affirmed for that amount. It is so ordered.

HOOKS *v.* GENERAL TRANSFER & STORAGE COMPANY.

4-3038

Opinion delivered September 25, 1933.

[redacted]

F. E. West and *J. P. Kerby,* for appellant.

Cockrill, Armistead & Rector, for appellee.

JOHNSON, C. J., (after stating the facts). From the foregoing statement of facts, it is perfectly apparent that there was a sharp conflict in the testimony as to which truck had the right-of-way in the intersection at Main Street and Washington Avenue at the time of the collision. The damage or injuries to the respective trucks caused by the impact was an important circumstance in determining the rate of speed the trucks were making at the time of the collision. It was the contention of the appellee that the impact between the two trucks was slight and caused but little damage. On the other hand, it was the contention of appellant that the impact between the two trucks was great, and that the ice truck was badly damaged by reason of the collision. Appellant further contended, and introduced testimony in support of it, that the impact was of such force as to produce the injury to his back about which he now complains. Some of appellant's witnesses testified that appellant's truck was knocked ten feet by the impact. Other witnesses testified that the steering rod was broken loose from the car and

the ice truck was otherwise badly damaged. For the reason aforesaid, one of the main issues to be determined by the jury was the enormity or insignificance of the collision.

One contention for reversal of the case is that the trial court permitted appellee to introduce in testimony photographs of the two trucks taken a week or ten days after the collision and at a time when the damage had been repaired. Appellant objected to the introduction of these photographs at the time, and stated specifically that the trucks were not in the same condition, at the time the photographs were taken that they were immediately after the collision. The trial court overruled this objection and permitted the introduction of the photographs. In doing this the trial court erred, which calls for a reversal of the case.

It is a well-established rule of law that when the situation and surrounding circumstances are subject to change, photographs, to be admissible as evidence, must have been taken at the time of the transaction or before the situation and circumstances have undergone a change.

Section 359, art. "Evidence," 10 R. C. L., p. 1157, states the rule as follows: "When the situation and surrounding circumstances are subject to change, photographs, to be admissible as evidence, must have been taken at the time of the transaction or before the situation and circumstances have undergone a change."

According to the uncontradicted testimony in this case, the photographs of the two trucks which were in the collision were not taken until a week or ten days after the collision, and at that time appellant's ice truck had been fully repaired. We cannot say to what extent the jury may have been influenced by this incompetent testimony.

The photographs were evidently introduced for the purpose of showing that the trucks were not badly damaged by the collision. If the photographs were introduced for any other purpose, their effect should have been limited by proper instructions by the court.

Other alleged errors are brought forward and insisted upon for a reversal of the case, but we do not deem them of sufficient importance to discuss in this opinion.

For the error indicated, let the judgment of the circuit court be reversed, and the cause be remanded for a new trial.

GEISREITER *v.* STANDARD LUMBER COMPANY.

4-3082

Opinion delivered September 25, 1933.

M. Danaher and *Palmer Danaher,* for appellant.

Rowell & Rowell, W. B. Alexander, M. L. Reinberger and *Bridges, McGaughy & Bridges,* for appellee.

McHANEY, J. Under date of June 16, 1931, appellants, Mary G. Miller and Frank W. Berry, as trustees for appellant S. Geisreiter, leased to K. M. Hall a lot or parcel of land 50 feet north and south by 120 feet east and west, in the northeast corner of block 49, Dexter Harding's Addition to Pine Bluff, Arkansas, at a monthly rental of $30, payable July 1, 1931, and on the first day of each month thereafter for a term of five years. The lease contained these clauses, among others:

"The lessee agrees to erect a building upon the land, to be used by him for the sale of ice cream, frozen custards, drinks, cigars, cigarettes and kindred lines, and not to use the premises for any other purpose, without written agreement of lessors. The lessee shall have the right, within thirty days after the expiration of this lease,

or its termination otherwise, to remove the building, provided all rent due at the time shall have been paid."

Hall entered into possession and immediately began the erection of the building mentioned in the lease, purchasing certain building material and supplies from appellees, which were actually used in the construction thereof. He failed to pay appellees in full for the material so purchased, and within 90 days from the date of the last item on each of their respective accounts they filed in the office of the circuit clerk affidavits for liens on the building and leasehold interest in the land, describing the property in the affidavit of Standard Lumber Company as "leasehold and building situate on northeast corner of block 49, Dexter Harding's Addition," etc., and in the affidavit of Taylor Electric Company as "northeast corner 50 by 120 feet of block 49, Dexter Harding's Addition, and the building located thereon." No complaint is made of the description of the land in the affidavit of the other appellee, Barton-Mansfield Company.

Thereafter, on February 2, 1932, appellees, Standard Lumber Company and Taylor Electric Company, filed suit in the chancery court to foreclose their liens on the building, the leasehold and the land. Barton-Mansfield Company intervened and sought a foreclosure of its lien. Appellants defended on the grounds hereafter discussed. Hall defaulted in the payment of rent, and on January 5, 1932, appellants brought an unlawful detainer action in the circuit court against him for possession of the property and for judgment for the rent due, which resulted in a judgment in their favor for possession and $120 for rent, and interest on April 20, 1932. Appellees were not made parties to this proceeding, although their affidavits for liens were on file in the proper office.

The decree in this case gave judgment against Hall in favor of appellees for their respective claims which was declared to be a lien upon the building only, prior to the rights of appellants. No lien was fixed upon the leasehold or upon the land itself. This appeal challenges the rights of appellees to a lien on the building.

The relationship between appellants and Hall was not that of owner and contractor, as appellants contend, but only that of lessors and lessee, and we fail to see how they can get any comfort out of the case of *People's Building & Loan Ass'n* v. *Leslie Lumber Co.,* 183 Ark. 800, 38 S. W. (2d) 759. While it is true that we there held that the relationship between the owner of property and the purchaser thereof under an executory contract of sale and purchase, requiring the purchaser to make certain improvements, was that of owner and contractor and not principal and agent (See also *Wildwood Amusement Co.* v. *Stout Lumber Co.,* 178 Ark. 977, 12 S. W. (2d) 911), it is also true that we held in the same case that, "where a contract for sale of land stipulated that certain improvements should be made, a materialman's lien was superior to the vendor's lien for the purchase money," and that he could not defeat such lien by a stipulation that the vendee should not create any lien on the property. Syllabi 4 and 5.

Here, as we construe the lease, the lessors did not require the lessee to erect the building in question, but consented or stipulated that Hall might do so. The building was to be Hall's with the right to remove upon termination of the lease with all rents paid. This case is more nearly like that of *Hawkins* v. *Faubel,* 182 Ark. 304, 31 S. W. (2d) 401, where we held that the lessor, by merely consenting that the lessee may make certain improvements, does not subject the fee to a mechanic's lien, but only the leasehold estate. In other words, in order to reach the fee, the contract must be with the owner or his agent. Appellees had no contract with the owners of the fee, appellants, but only with their lessee, who was not their agent. Therefore no notice to appellants was necessary, as the fee was not involved.

Appellants also contend that the descriptions in the affidavits of two appellees (the lumber company and the electric company) were defective. We cannot agree. In *Brown* v. *Turnage Hardware Co.,* 181 Ark. 606, 26 S. W. (2d) 1114, the late Chief Justice HART, speaking for the court, said: "We have frequently held that the statute

should receive a liberal construction to effectuate its remedial purposes. All that is necessary is that a person of ordinary understanding should be able to find and recognize the premises intended by the description. The mere fact that more land was embraced in the claim filed by appellee under the statute and in the decree rendered by the court will not of itself invalidate the lien; but it will be good to the extent recognized by the statute. It is sufficient that the description points out and indicates the premises so that, by applying it to the land, the structure into which the materials are placed can be found and identified. *Arkmo Lbr. Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901; *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353; and *Georgia State Savings Ass'n* v. *Marrs,* 178 Ark. 18, 9 S. W. (2d) 785."

A comparison of the descriptions in the affidavits with that in the lease shows that no person could be mistaken about the identity of the property, or at least "a person of ordinary understanding should be able to find and recognize the premises intended by the description." We therefore hold that the descriptions were sufficiently definite, and, as said in the case last cited, "to hold otherwise would subject substance to form, and deny the lien to persons clearly entitled thereto under the statute."

It is next urged that the affidavits for liens were not filed in time to cover all the items on the respective accounts. There is no evidence in this record that each separate purchase was made on a separate contract. The accounts themselves show them to be open running accounts, and all the material and supplies for which liens are claimed were purchased within a short space of time. For instance, the Standard Lumber Company furnished material from June 17 to July 2, a period of 15 days, and something was furnished nearly every day. The Electric Company furnished material and labor from June 22 to October 6, and its affidavit for lien was filed October 19, 1931. Barton-Mansfield Company sold material from June 19 to August 12, and its affidavit was filed September 29, 1931.

Under such conditions we have many times held that the 90 days begins to run from the date of the last debit item on the account. *Ferguson Lumber Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353; *Whitener* v. *Purifoy,* 177 Ark. 39, 5 S. W. (2d) 724; *Planters' Cotton Oil Co.* v. *Galloway,* 170 Ark. 712, 288 S. W. 999.

Other incidental questions are argued for a reversal, which we find without merit. Since there is no cross-appeal from the refusal of the court to declare a lien on the leasehold interest, we do not discuss this matter. We find no reversible error, so the decree must be affirmed.

[redacted]

GIBSON *v.* MOORE.

4-3061

Opinion delivered October 2, 1933.

[redacted]

[redacted]

[redacted]

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

C. T. Carpenter, for appellant.

JOHNSON, C. J., (after stating the facts). Section 6074 of Crawford & Moses' Digest in effect provides, that beneficiaries may be changed in accordance with the

laws, rules or regulations of the society. It is perfectly evident that any change of beneficiary in a policy of insurance issued by a fraternal benefit society must be done in substantial compliance with the constitution and bylaws of such society.

It is perfectly evident that § 212 of the bylaws of the society was not substantially complied with. In effect this bylaw provides that the "surrender clause on the back of her benefit certificate, designating therein the change desired, and sign the same in the presence of two witnesses, one of whom may be any camp recorder or a notary public or any other person authorized by law to administer oaths." It is not even contended that the surrender clause on this certificate was executed by the insured.

In behalf of appellant, it is insisted that the purported letter written by the insured requesting the change of beneficiary was a substantial compliance with the constitution and bylaws of the society. The case of *Robinson* v. *Robinson,* 121 Ark. 276, 181 S. W. 300, is quoted from in support of this position. The pertinent quotation in this opinion is "the established rule and the one adopted in this State is that the change of beneficiary cannot be made by the insured, unless there is a substantial compliance with the bylaws and regulations of the society."

No substantial compliance with the bylaws of the society in effecting a change of beneficiary is shown in the instant case. The purported letter written by the insured to the secretary of the local lodge was not acknowledged before any officer and was not signed by the requisite witnesses. The fact is the secretary of the subordinate lodge positively denies receiving any such letter. The rule in the Robinson case is sound, but the facts in the instant case do not come within it.

Again, § 212 of the bylaws further provides "no change in the designation of beneficiaries shall be effected until a substitute certificate has been written by the supreme recorder and within the lifetime of the member, and until such time the old certificate shall be in force."

The rule quoted above further provides: "Any attempt by a member to change the payee of the benefits under her benefit certificate by will or other testamentary document, or by contract, agreement, assignment, or otherwise than by strict compliance with the provisions of this section, shall be absolutely null and void." According to the record, as we understand it, the only substantial thing done by the insured in reference to effecting a change of beneficiary was to pay the fifty cent fee demanded therefor. This cannot be construed as a substantial compliance with the bylaws referred to. The chancellor was eminently correct in holding that no change of beneficiary had been effected.

It is next insisted, on behalf of appellant, that the trial court erred in refusing to grant him a continuance of the cause. It is said that S. O. Gibson is a poor man and had no money with which to employ counsel and pay the expense of litigation. This is not cause for a continuance under our statute. It suffices to say that the trial court did not abuse its discretion in denying the continuance.

No error appearing, the judgment is affirmed.

ILLINOIS STANDARD MORTGAGE CORPORATION *v.* COLLINS.

4-3095

Opinion delivered October 2, 1933.

[redacted]

Roy Penix, Robert S. Keebler and *Stickley, Exby, Moriarity & Pierce,* for appellant.

Basil Baker, for appellees.

JOHNSON, C. J., (after stating the facts). We find it unnecessary to discuss the many interesting questions discussed by counsel. The question of estoppel is decisive of all issues here presented. The testimony shows conclusively that at all the times here in controversy E. W. Collins was president of the Homebuilders' Corporation and an active member of the board of directors of the Young Men's Building & Loan Association. During the same period of time G. G. Brooks was the secretary of the Young Men's Building & Loan Association and the Homebuilders' Corporation, and, in addition thereto, Brooks was the supervising manager of all the business of both corporations. During the same period of time and in the absence of Brooks from the office, Collins had charge of the affairs of both corporations. Collins and Brooks executed the application for the loan which is secured by appellant's mortgage. In conformity therewith, they jointly executed the mortgage and notes which accompanied it. The proceeds of the loan was remitted by appellant to Collins and Brooks, and it in turn paid it over to the Homebuilders' Corporation, and it is fairly inferable that this identical money was paid over by the Homebuilders' Corporation to the Young Men's Building & Loan Association. The fact is, we think no other reasonable inference can be drawn from the testimony. It would be inequitable and unjust to permit the Young Men's Building & Loan Association to take appellant's money delivered on the faith of a first mortgage, then assert a superior claim and right under a mortgage which

would have been released had attention been directed to it. Under the facts and circumstances of this case, we are convinced that the Young Men's Building & Loan Association received and accepted appellant's money with the full knowledge and information that appellant thought it was receiving a first mortgage on the property in controversy, and this based upon the solemn representations of G. G. Brooks, who was then the supervising manager and secretary of the Young Men's Building & Loan Association, to the effect that appellant's mortgage was a first mortgage against the property in controversy. Equity holds a person to a representation made or position assumed, where otherwise inequitable consequences would result to another who has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity. It needs neither a consideration nor a legal obligation to support it. See § 19, vol. 10 R. C. L., p. 689. Again, acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, would and should create an estoppel. See § 22, 10 R. C. L., p. 694. There can be no question in the instant case but that knowledge of Brooks was knowledge to the Young Men's Building & Loan Association.

This court has held that, "if a creditor of a fraudulent grantor, with knowledge of the fraud, accepts from the grantee the purchase price agreed to be paid for the land, he thereby affirms the sale, and waives right to complain of the fraud." *Millington* v. *Hill,* 47 Ark. 301, 1 S. W. 547. This rule has full application to the facts of this case. The Young Men's Building & Loan Association had full knowledge that an application was being made to appellant for a loan on the property which it now claims adversely and with this knowledge accepted the proceeds of the loan. By doing this, it is estopped in asserting rights under its mortgage of 1925 superior to that of appellant.

For the reasons aforesaid, the decree is reversed, and the cause is remanded with directions that the property be sold and the proceeds arising therefrom be disbursed;

first, to the costs attending the sale; secondly, to appellant in the aggregate sum due it under its notes and mortgages, and, if any balance remain, same to be paid to the Young Men's Building & Loan Association.

HINTON *v.* ELLIOTT.

4-3097

Opinion delivered October 2, 1933.

Cravens, Cravens & Friedman, for appellant.

A. M. Dobbs and *D. L. Ford,* for appellee.

SMITH, J. This appeal is from the order of the chancery court of the Fort Smith District of Sebastian County refusing to confirm a commissioner's sale made pursuant to the decree of the court foreclosing a mortgage on a house and lot in the city of Fort Smith. Exceptions were filed to the commissioner's report by both the plaintiff and defendants in the foreclosure suit.

Upon the hearing of the exceptions filed by both the plaintiffs and the defendants, the following testimony was offered: The property was purchased by one of the defendants in 1922 for $9,000, and has since been occupied by her as a residence. The house is a two-story frame building, has nine rooms and a hall, has an attic and a furnace in the basement. The property is now

assessed for general taxes at $2,750, which is supposed to be fifty per cent. of its value.

The purchaser borrowed $4,000 from the Lyman Real Estate Company, evidenced by four notes each for $1,000, and executed a mortgage on the house and lot as security therefor. The real estate company sold one of these notes to R. L. Elliott, another to M. Davis, and two of them to Mary B. Martin, and executed an assignment of the notes and of the mortgage securing them to these purchasers.

The foreclosure suit was brought by the holders of these notes. The decree adjudged the balance due on the notes, and ordered the foreclosure of the mortgage securing them, and appointed the clerk of the court as commissioner to execute the decree, who was "* * * hereby directed and ordered to sell said land above-described in the manner and form as provided by law for the sale of lands under attachment."

Two real estate men familiar with city values placed the market value of the property, even at the present price level, at from three thousand to forty-five hundred dollars, and representatives of the plaintiffs, offered to bid at a resale three thousand dollars for the property. It was sold at the commissioner's sale to W. L. Hinton for $525, on October 22, 1932.

The defendants in the foreclosure suit excepted to the confirmation of the report of sale for the reason that the property was not sold in the manner provided by law for the sale of real estate under attachment, the law requiring such sales to be upon a credit of not less than three or more than twelve months for real property, or on installments equivalent to not more than twelve months' credit on the whole. Such sales are made subject to confirmation of the court, and from such a sale a right of redemption exists. *Beard* v. *Wilson,* 52 Ark. 290, 12 S. W. 567.

It is pointed out in the exceptions of the defendants that if it be said that the direction to sell as under an attachment is a misprision of the clerk, and that it was intended that the property be sold as under execution,

the law in regard to execution sales was not complied with, in that no notice of the sale was posted upon the property to be sold, in which defendants resided, and that, had this been done, defendants would have been advised of the sale, whereas the property was sold without defendants being aware that it had even been advertised for sale. The right to redeem from execution sales is conferred by statute. Section 4329, Crawford & Moses' Digest. Defendants also allege that the property sold for a grossly inadequate price.

Mary B. Martin and M. Davis, owners of three of the four notes for $1,000 each, alleged that they had no knowledge of the sale, and that they relied upon Elliott, the owner of the fourth note, to notify them of the sale, and he failed to do so, and that, if they had been aware of the sale, they would have bid enough for the property to protect their interests. They also alleged that the sale was for a grossly inadequate price.

The purchaser at the sale intervened in the court below, and has appealed from the finding and decree of the court refusing to confirm the commissioner's sale to him.

In refusing to confirm the report of sale the court made the finding of fact that the property had been sold for a grossly inadequate price, and that on a resale the property would bring at least three thousand dollars. This finding is abundantly supported by the testimony.

The court also found that the notice of sale was published in a paper not having general circulation in the Fort Smith District of Sebastian County, and that defendants had no notice of the sale. We are of the opinion that the testimony in the record before us does not support the finding that the newspaper did not have general circulation, but does support the finding that defendants did not have notice of the sale.

In the early case of *Brittin* v. *Handy,* 20 Ark. 381, it was said that "we understand the rule to be, in reference to judicial sales, that in the absence of all fraud and unfairness, mere inadequacy of price, however gross, does not invalidate the sale," and this court has many

times since ordered the confirmation of sales where the showing only had been made that the property had been sold for a grossly inadequate price.

We concur in the conclusion of the chancellor that the commissioner's report should not be confirmed, but not for the reason stated by him. This, however, is not of controlling importance, as we try the case here *de novo*. The inadequacy of the price, and the fact that the property will bring much more upon a resale, did not authorize the relief granted. The finding that the newspaper in which the notice of sale was published did not have a general circulation in the Fort Smith District of Sebastian County would, if supported by the testimony, warrant the action of the court, for in such case the defendants would not have had the notice contemplated by law. But neither exceptor raised such objection, and we do not think the testimony supports that finding of fact. *Smith* v. *First National Bank of DeWitt,* 119 Ark. 235, 177 S. W. 895.

We are of the opinion, however, that the directions of the court in the decree of foreclosure as to the manner of sale might have confused prospective purchasers, and thus have affected the price for which the property was sold, and this fact, in conjunction with the grossly inadequate price at which the property sold, warranted the court in refusing to confirm the sale. As we have said, sales under executions or attachments are subject to redemption, and the directions of the decree in this respect are confusing. While confirmation of judicial sales will not be denied for inadequacy alone, yet, where there is gross inadequacy, the courts seize upon slight additional circumstances which render confirmation inequitable and therefore deny that relief. *Stevenson* v. *Gault,* 131 Ark. 397, 199 S. W. 112; *Moore* v. *McJudkins,* 136 Ark. 292, 206 S. W. 445.

We concur in the conclusion of the chancellor that the sale should not be confirmed, and that decree is therefore affirmed.

CLAY COUNTY ICE COMPANY *v.* LITTLEFIELD.

4-3085

Opinion delivered October 2, 1933.

Oliver & Oliver, for appellant.

C. T. Carpenter, for appellee.

SMITH, J. The facts in this case, which are few and simple, are as follows. Appellees Littlefield and Companiotte owned lots 3 and 4, respectively, in block 12, of the town of Corning, and have resided thereon for a number of years. Long after appellees had built their residences on the lots referred to the Corning Ice & Electric Company erected, in 1929, an ice, electric light and bottling plant in the same block on lots directly opposite those of appellees. In September, 1930, after the plant had been in operation for some time, Littlefield brought suit against the ice company for damages to his property resulting from the operation of the plant, and recovered a judgment for a thousand dollars. Later Companiotte brought a similar suit, and recovered judgment for the same amount. This last suit appears not to have been contested.

The Corning Ice & Light Company was adjudged a bankrupt, and an execution which issued upon the judgment was placed in the hands of the sheriff, who made a *nulla bona* return thereon. At the sale of the Ice & Light Company's assets in the bankruptcy proceeding the holders of bonds issued by the Ice & Light Company, which were secured by a deed of trust on the property,

bought it, and thereafter operated the plant after changing its name to the Clay County Ice Company.

The reorganized company abandoned the light plant, and continued operation of the ice plant, and it was shown that whereas the old company had operated two engines twenty-four hours a day, the new company operated only one engine, and that for a portion only of the day. It may be said, however, without reciting the testimony, that the court was fully warranted in finding that the vibration, smoke, and ammonia fumes connected with the plant, constituted it a nuisance.

The law of the case was declared in *Bickley* v. *Morgan Utilities Co., Inc.,* 173 Ark. 1038, 294 S. W. 38, where it was held, to quote a headnote, that "The operation of an ice plant in a residential district *held* a nuisance and should be restrained, where it materially injured property and annoyed the residents, regardless of how well it was constructed or conducted."

The appellant ice company insists that relief by way of a restraining order abating the nuisance should not have been granted, but that appellees should have been remitted to an action at law, as any damage could have been thus compensated, and that relief by the award of damages only should have been granted because of the disproportionate hardship which abating the nuisance will inflict. The case of *City of Harrisonville* v. *Dickson Clay Mfg. Co.,* 53 Supreme Court Reporter (U. S.) 602, is cited in support of that contention. We think, however, under the rule announced in the Bickley case, *supra,* that appellees are entitled, under the facts of the instant case, to the relief granted. The court found the fact to be that the operation of the plant is a nuisance, "has damaged the property of the plaintiffs, interferes with their enjoyment thereof, and probably is also injurious to the health of plaintiffs and their families." If this finding be true—and the testimony supports it—other property owners in the same residential section would suffer in the same manner, if not to the same extent, and the relief granted was properly awarded.

It is insisted that appellees estopped themselves from asking the relief granted them. The basis of this contention is that they signed a certain petition and a certain agreement. The petition reads as follows:

"We the undersigned citizens of Corning, Arkansas, and users of ice, respectfully request that the Corning Ice Company proceed as rapidly as possible with the construction of the plant which has just been started, in order that there may be no question about our being supplied with ice in a satisfactory manner the ensuing summer."

The agreement reads as follows: "If W. F. Moody, or his assigns, will, pursuant to the terms of ordinance No. 196, make arrangements to furnish light and power to the inhabitants of Corning at a rate which is less than that which is now being charged, we, the undersigned promise that we will become customers and buy current from him."

One of the appellees testified that he was assured by an official of the Corning Ice & Light Company, before the plant had been constructed, that it would be without objectionable features; but we think there is nothing in the petition which estops a signer thereof from raising the question that the plant had not been properly constructed or was not properly operated and had become a nuisance.

The agreement to use light and power if it be furnished at a rate less than which the signers were then being charged cannot be construed as a written assent that a nuisance might be maintained.

The decree appears to be correct, and it is therefore affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY
v. COOK.

4-3101

Opinion delivered October 2, 1933.

Thos. S. Buzbee, for appellant.

D. D. Glover and *W. H. Glover,* for appellee.

HUMPHREYS, J. Appellee, in his own right and as administrator of the estate of his son, Rayburn Earl Cook, brought suit in the circuit court of Dallas County against appellant to recover damages for the death of his son caused through the alleged negligence of its motorman operating its motor car by failing to keep a lookout; by failing to discover the peril of deceased; by failing to blow the whistle or ring the bell, or to give any signal whatever to warn deceased of his impending danger.

Appellant filed an answer denying each allegation of negligence and alleging that the death of deceased was the result of his own negligence, averring the truth to be that the deceased laid down flat on the ends of ties outside of the rail and that, although appellant's motorman was keeping a constant lookout and saw something along the side of the track, he could not and did not realize that it was an animate object and did not think it would interfere with the running of the motor car until he came so close to it that it was impossible for him to stop the motor car in time to prevent the injury and death of deceased.

The cause was submitted to the jury upon the pleadings, testimony, and instructions of the court, which resulted in a verdict and judgment in favor of appellee for $1,500 for the loss of services of his son, and to him as administrator of deceased's estate for $500, from which is this appeal.

Appellant's first contention for a reversal of the judgment is that the verdict and consequent judgment are not supported by any substantial evidence. The argument is made that the motorman was the only eyewitness to the tragedy, and that his testimony throughout was consistent and uncontradicted, and was to the effect that the deceased was killed without any fault or negligence on his part. He testified that the motor car was moving at a speed of about forty-five miles an hour in a southerly direction on a practically straight track; that he was keeping a constant lookout and did not discover that deceased, who was lying flat down on the ends of the ties outside the rail, was animate until he was within two hundred feet of him; that he immediately applied the emergency brakes and gave three blasts of the whistle, but was unable to stop the motor car before running over him; that the motor car stopped about two hundred feet after it passed over the body; that he backed up and stopped opposite the body and on alighting found the boy dead; that he blew the whistle for the crossing south of where the body was lying at the proper place, and that about the time he did so he discovered that the object he had seen before he blew the whistle for the crossing was alive; that up to that time he thought the object he had seen was a piece of paper.

It is undisputed that the boy was killed about one mile south of Bunn, and that the track was practically straight between the two points, the curve therein being so slight it would not obstruct the view, and that there was nothing else on the right-of-way to obstruct the view. Evidence was introduced by appellee to the effect that the motorman did not blow the whistle as he stated for the crossing south of where the boy was sitting or lying and tended to show that about ten or fifteen minutes

before the train passed, the boy was sitting on the edge of the track; also evidence showing that subsequent tests were made which revealed that a person standing at Bunn could see and distinguish a man at the point where the boy was killed either sitting or lying down, and that one standing where the boy was killed could see and distinguish a small dog at Bunn; also evidence to the effect that the deceased did not die immediately as stated by the motorman.

We think the evidence introduced by appellee detailed, in substance, above was amply sufficient to warrant the jury in finding that, had the motorman been keeping a proper lookout, he could, in the exercise of ordinary care, have distinguished the deceased from a piece of newspaper when he first observed the object, at which time he could have stopped the motor car and prevented the injury and death.

Appellant next contends for a reversal of the judgment because the court gave appellee's instruction No. 5, which is as follows:

"You are instructed that if you find from a preponderance of the evidence in this case that the operator of said motor car discovered an object on or dangerously near its track, and that he could not tell whether it was animate or inanimate, that it became and was his duty to exercise ordinary care to bring said motor car under control so as to avoid striking said object or person as it was found to be, and if it negligently failed to do this and thereby caused the death of the said Rayburn Earl Cook, it will be your duty and you are instructed to find for the plaintiff."

Appellant argues that the instruction was not within the allegations of negligence. The instruction was responsive to the issue tendered by appellant in its answer, and within the issue invoked by appellee under the lookout statute. Appellant introduced evidence in support of the issue tendered. It was therefore proper to instruct the jury relative to the issue and evidence introduced. It certainly is the intent of the lookout statute to require those operating trains when they dis-

cover an object on or dangerously near the track to exercise ordinary care to ascertain whether the object is animate or inanimate, and during the interval of doubt to put the train in control so as to stop same in the event the object proves to be animate. Unless this is the rule, the lookout statute would amount to nothing. Appellant argues, however, that the instruction ignores the defense of contributory negligence. Contributory negligence is no longer a defense in this State for a personal injury or death caused by the running of trains except for diminishing the damages in proportion to such negligence. Section 8575 of Crawford & Moses' Digest. Appellant asked no instruction on comparative negligence pursuant to said statute. Appellant also argues that said instruction No. 5 is in conflict with instructions Nos. 3 and 4 given at the request of appellant. We have not been favored with any more than a suggestion that an irreconcilable conflict exists between the instructions. After a careful reading of them, we are unable to discover any conflict.

No error appearing, the judgment is affirmed.

DEWEY PORTLAND CEMENT COMPANY *v.* BENTON COUNTY LUMBER COMPANY.

4-3100

Opinion delivered October 2, 1933.

[redacted]

J. T. McGill and *Raymond W. Moore,* for appellant.

Vol T. Lindsey, for appellee.

MEHAFFY, J. Fred S. Wetzel, as receiver of the Benton County National Bank, brought suit against Benton County Lumber Company to recover on some notes executed by said company to said bank, and E. P. Knott was appointed receiver, and has since operated the business, and is attempting to pay claims against said company out of its earnings.

The appellant filed an intervention, alleging that the Benton County Lumber Company was indebted to it in the sum of $2,349.73; that $555.98 was for two carloads of cement sold and delivered by the intervener to the Benton County Lumber Company, plus interest of $22.18, and the balance of $3,500 is alleged to be due under a written agreement executed on June 29, 1927.

The written agreement is as follows:

"This agreement, entered into this 29th day of June, 1927, by and between Dewey Portland Cement Company, a West Virginia corporation, party of the first part, and Benton County Lumber Company, an Arkansas corporation, party of the second part, witnesseth:

"Whereas party of the second part owes party of the first part the sum of thirty-five hundred dollars ($3,500) for cement shipped by first party to second party which was used by E. H. Locher Company, contractors, in the construction of paving in the city of

Bentonville, Arkansas, in what is known as Paving District Number One;

And whereas party of the second part has not received payment for said cement from E. H. Locher, it is agreed as follows:

"Party of the first part agrees, in consideration for agreements herein made by second party, that in the event party of the first part is compelled to take legal action to collect the sum of thirty-five hundred dollars ($3,500) above referred to, for which said second party holds a negotiable note dated Bentonville, Arkansas, June 9, 1927, and due on or before October 1, 1927, the said note being signed by E. H. Locher Company, E. H. Locher, individually, and Tom Eads, the said E. H. Locher and said Tom Eads being partners doing business under the firm name of E. H. Locher Company, then in such event, first party agrees to pay one-half the expense of such legal action.

"First party further agrees, that in the event the second party is unable to collect the amount due on the note hereinbefore referred to, that it will stand one-half the part of said amount which second party is unable to collect.

"In consideration of the foregoing agreement by first party, second party agrees to use diligent efforts to collect said amount of thirty-five hundred dollars ($3,500), and in any event to collect the same, if not sooner collected, from the last estimate that may be due E. H. Locher Company from the city of Bentonville, Arkansas, for work done on Paving Improvement District Number Three therein, an assignment for which was made to second party by said contractors under date of June 9, 1927, which will be approved by the board of commissioners. Second party agrees that, as soon as collection of this amount is made, that it will immediately pay the same to first party.

"In further consideration for foregoing agreement of first party, second party agrees to use his best efforts to see that only cement manufactured by first party is

used in the work known as Paving Improvement District Number Three of the city of Bentonville, Arkansas."

The Benton County Lumber Company and E. P. Knott, receiver, filed answer denying the allegations of the intervention, and further stated that the Dewey Portland Cement Company sold the cement to Locher and Eads; that the Benton County Lumber Company acted merely as agent for the intervener; that the Benton County Lumber Company did not become liable for any amount; that the note was taken, made payable to the Benton County Lumber Company as agent for the appellant, and was so understood by it at the time; that suit was brought on the note, a judgment obtained, and assigned to the appellant.

On July 12, 1930, the judgment in favor of the Benton County Lumber Company was assigned to appellant, and appellant thereafter brought suit on the judgment, claiming that it was the absolute owner, and obtained a judgment in its name.

The principal question for our consideration is the proper construction to be placed on the contract above set out.

"Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties, and give effect to that intention if it can be done consistently with legal principles." 6 R. C. L. 835; *Mo. & N. Ark. Rd. Co.* v. *Fowler,* 173 Ark. 772, 293 S. W. 47.

In construing a contract, however, and ascertaining the intention of the parties, the contract must be construed as a whole, nothing being treated as surplusage, if any meaning reasonable and consistent with the rest can be given it. *Hughes* v. *El Dorado Union Oil Co.,* 160 Ark. 342, 254 S. W. 663.

Courts may acquaint themselves with the persons and circumstances that are the subject of the statements in written agreements, and are entitled to place themselves in the same situations as the parties who made the contract, so as to view the circumstances as they viewed them, in order to ascertain the intention of the parties

from the language used. *U. S. Fidelity & Guaranty Co.* v. *Sellers,* 160 Ark. 599, 255 S. W. 26; *Wells* v. *Moore,* 163 Ark. 542, 260 S. W. 411; *Desha* v. *Erwin,* 168 Ark. 555, 270 S. W. 965; *Inter-Southern Life Ins. Co.* v. *Shutt,* 175 Ark. 1161, 1 S. W. (2d) 801.

Another rule of construction is that, where there is any doubt as to the meaning of the contract, it will be resolved against the party who prepared the contract. *Bracy Bros. Hdw. Store* v. *Herman-McCain Const. Co.,* 163 Ark. 133, 259 S. W. 384; *McClain* v. *Reliance Life Ins. Co.,* 170 Ark. 478, 280 S. W. 15; *Marley* v. *Hackler,* 176 Ark. 238, 3 S. W. (2d) 20; *Silbernagel & Co.* v. *Taliaferro,* 186 Ark. 470, 53 S. W. (2d) 999; *Walden* v. *Fallis,* 171 Ark. 11, 283 S. W. 17, 45 A. L. R. 1396.

The note executed to the Benton County Lumber Company was dated June 9, 1927, and the cement furnished to the contractors must have been furnished sometime before the date of the note. The contract relied on by appellant was dated June 29, 1927. The contract shows that the appellee is indebted to the appellant in the sum of $3,500 for cement shipped to E. H. Locher Company, contractors, and the appellant agreed in that contract, in the event that appellee was compelled to take legal action to collect the note, the appellant would pay half the expense of such legal action. It further agreed that if the appellee was unable to collect the amount of the note, it, the appellant, would stand one-half the part of said amount which the appellee was unable to collect. It was also provided in the contract that the last estimate for work done on the improvement district was assigned to the appellee, and appellee agreed, as soon as this was collected, to pay the appellant. Appellee also agreed in the contract to use its best efforts to see that only cement manufactured by the appellant was used in district No. 3.

It was the contention of the appellee that it acted as agent for the appellant. This is denied by the appellant in its evidence, as shown by the testimony of its vice-president.

Numerous letters were introduced in evidence, which we do not set out at length, but on June 17, 1927, the ap-

pellee wrote to the appellant inclosing a check for $2,268.20, with the $3,500 note, in full settlement of its account with appellant. The note was indorsed "without recourse." It was also stated in this letter that the appellee would do what it could in the matter of collecting the note.

On June 20, 1927, the appellant wrote to the appellee declining to accept the note with the indorsement without recourse, and requested the appellee to erase these words, and to indorse the note without these words, but appellant stated in that letter, not that it was holding the appellee liable, but: "The reason for declining to accept said note is that we are not on the ground in a position to make collection, while you are, and furthermore being you saw fit to accept this note, doubtless you know it is easily collectible, and, as a matter of fact, you realize it is by you, but it might become a rather difficult matter for us."

The note was then indorsed in the manner suggested by the appellant. Thereafter, at the request of the appellant, the judgment obtained by appellee on said note was assigned to the appellant, the assignment being prepared by the appellant. The judgment was for $4,251.15, and they prepared the assignment so as to require the appellee to assign said judgment to the appellant company absolutely. In that assignment was included not only the $3,500, but all other moneys recoverable under said judgment.

After the assignment of this judgment to it absolutely, appellant brought suit on this judgment in its name in Oklahoma, and recovered a judgment against the contractors.

From the time the cement, for which the $3,500 note was given, was sold, sometime before June 9, 1927, until this suit was filed, appellant never took any steps to collect from the appellee, and it is not denied that Mr. Forsman, who dealt with appellee, understood that while the note was taken to appellee, it was not to be liable for the amount.

In appellee's letter of June 17th is this statement: "The note is indorsed without recourse, which is in line with our conversation with Mr. Forsman." This is not denied anywhere, and it is not denied that Mr. Forsman had the right to make the agreement.

The evidence shows that the appellant is engaged in the manufacture and sale of cement, and that the appellee was engaged in the manufacture and sale of lumber and supplies. It was selling material to the improvement districts, and it required in the contract that it wrote that the appellee should use its best efforts to see that only cement manufactured by appellant was used in the work known as Paving District No. 3 of Bentonville, Arkansas.

It appears from the record that in their dealings they were mutually assisting each other, and, while the case is not entirely free from difficulty, yet the intention of the parties under the contract is a question of fact to be determined not only from the contract, but from the acts and conduct of the parties, and all the circumstances surrounding the transactions. These facts were considered by the chancellor, who found in favor of the appellee, and we think his finding was not against the preponderance of the evidence.

In addition to this, however, it may be said that, whether the contract should be construed as the chancellor construed it or as the appellant contends it should be construed, we think the acts of the parties, after the judgment was obtained by appellee, show that the parties themselves changed the contract, if it meant what appellant claims it meant.

"It is well settled in this State that parties to a written contract may, subsequent to its execution, modify it, and substitute a valid oral agreement therefor." *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49; *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S. W. 379; *Am. Tr. Co.* v. *McKee,* 173 Ark. 147, 293 S. W. 50; *J. C. Englemen, Inc.,* v. *Briscoe,* 172 Ark. 1088, 291 S. W. 795.

It is not necessary that a contract be expressly rescinded, and another one substituted, but it may be implied from the acts of the parties and circumstances.

"The cancellation or rescission of a written contract may be oral, or by implied agreement, which may be shown by the acts of the parties and the surrounding circumstances. So a rescission may be implied where the first agreement has never been followed, or acted on for a length of time." 13 C. J. 601; *Hunt* v. *Woods,* 168 Ark. 407, 270 S. W. 505.

We think the chancellor was justified in finding that when the appellant did not, from 1927 to 1930, demand payment from appellee, and when it requested the assignment of a judgment for more than $4,000 to be assigned to it absolutely, neither party regarded this as a debt against the appellee.

We have called attention to the fact that when appellant objected to the manner of the indorsement of the note, it did not claim any liability against the appellee, but gave a wholly different reason for wanting the note indorsed as it suggested. Appellee wrote to appellant at the time that the representative of the appellant understood that the note was to be indorsed without recourse.

When all the facts and circumstances are considered, we cannot say that the finding of the chancellor is not supported by the evidence.

The decree is affirmed.

JOHNSON, C. J., and BUTLER, J., dissent.

JOHNSON, C. J., (dissenting). I cannot agree with the majority. Until now, I had understood the rule to be that parties could make contracts in the form and manner desired and that such contracts would be enforced by the courts, except when against public policy or when unlawful *per se.* In my opinion this court has now made a contract independently of the wishes of the parties.

The uncontradicted testimony in this case shows that prior to June 9, 1927 the Benton County Lumber Company purchased of and from the appellant, Dewey Portland Cement Company, a great quantity of cement, which the Benton County Lumber Company had delivered to

the contracting firm of E. H. Locher Company. On June 9, 1927 the Benton County Lumber Company accepted a note from E. H. Locher Company for the sum of $3,500 in payment of the current account then due. This note was made payable to the Benton County Lumber Company. On June 17, 1927 the Benton County Lumber Company remitted this $3,500 note to appellant at Kansas City together with a check for $2,268.20 and the first paragraph in this letter reads as follows: "We enclose ck. for $2,268.20 with the $3,500 note made by E. H. Locher Company in full settlement of our account to date." On June 20, 1927, appellant Cement Company, returned the Locher Company note with the following letter:

"June 20, 1927.

"Benton County Lumber Company,
"Bentonville, Arkansas.

"Atten. Mr. C. M. McKee

"Gentlemen:

"This will acknowledge your longhand letter of June 17th together with assignment signed by E. H. Locher and Tom Eads, also the same parties' note for $3,500 in your favor but endorsed by you to this Company without recourse.

"Observed you state the assignment should be returned to file with the Commissioners of the District, therefore I am enclosing same with this letter. I am also returning the note and must decline to accept same unless you are willing to eradicate the words on the back of said note 'without recourse.'

"After the two words mentioned are eradicated you should then make a notation on the back of the note above as follows: 'The words "without recourse," eliminated by the undersigned,' and then said note should be signed again the same as it is now signed. The reason for declining to accept said note is that we are not on the ground in a position to make collection, while you are, and furthermore being you saw fit to accept this note, doubtless you know it is easily collectible, and as a matter of fact you realize it is by you, but it might become a rather difficult matter for us.

"However, if you desire to handle the matter as we wish and return the note endorsed as we suggested, we will then give your account credit for $3,500.00.

"Yours respectfully,

"President."

Immediately after the receipt of this letter on June 20, wherein the note in controversy was returned to the Benton County Lumber Company, the parties met in person and executed the contract which is the basis of the intervention in this case. This contract or agreement was executed on the 29th day of June, 1927, just nine days after appellant's letter was written refusing to accept the note in payment of the account. The first paragraph of this contract of date June 29, 1927 reads as follows:

"This agreement entered into this 29th day of June, 1927 by and between Dewey Portland Cement Company, a West Virginia Corporation, party of the first part, and Benton County Lumber Company, an Arkansas corporation, party of the second part, witnesseth: 'Whereas, party of the second part owes party of the first part the sum of $3,500, etc.'' The contract further provides as follows:

"Party of the first part agrees, in consideration for agreements herein made by second party, that, in the event party of the first part is compelled to take legal action to collect the sum of Thirty-Five Hundred Dollars ($3500.00) above referred to, for which said second party hold a negotiable note dated Bentonville, Arkansas, June 9th, 1927 and due on or before October 1, 1927, the said note being signed by E. H. Locher Company, E. H. Locher, individually, and Tom Eads, the said E. H. Locher and said Tom Eads being partners doing business under the firm name of E. H. Locher Company, then in such event, first party agrees to pay one-half the expense of such legal action.

"First party further agrees that, in the event the second party is unable to collect the amount due on the note hereinbefore referred to, that it will stand one-half the part of said amount which second party is unable to collect."

This contract of June 29, 1927, speaks for itself and needs no construction. There can be no doubt but that the parties at that time admitted that the Benton County Lumber Company was indebted to the appellant, Cement Company, in the sum of $3500. Therefore, it must be conceded that the Lumber Company was not acting as agent of the Cement Company at that time. The contract further provides in effect that, if collection is not effected on the thirty-five hundred dollar note, the parties to the contract will divide the loss. This contract needs no construction. If the English language means anything, it means this and only this. You may turn it as you will or twist it as you may, but no other sensible construction can be given the language used. In conformity with the contract, the Benton County Lumber Company brought the note back to Arkansas and instituted suit thereon in its own name, which finally resulted in a judgment in its behalf against the contractors for the full amount sued for. The Benton County Lumber Company did not effect collection of the note, and when it determined that it was without its power to effect collection in Arkansas, it transferred its judgment to appellant with the expressed intention of permitting appellants to endeavor to collect the judgment in the courts of Oklahoma. The majority opinion holds that the mere transfer of this judgment from the Benton County Lumber Company to the Cement Company extinguished the contract of June 29, 1927. No authority is cited for this position, and I assert with confidence that none can be found. The sole purpose of this transfer of judgment from the Benton County Lumber Company to appellants was in furtherance of the contract of June 29, 1927, and not antagonistic thereto. It was the evident purpose of the Benton County Lumber Company and appellants to endeavor to collect this note from the makers and everything that has been done in reference thereto has been in strict compliance with the contract. The construction placed upon this assignment by the majority opinion is a novelty in so far as legal jurisprudence is concerned in this State.

The majority opinion quotes from appellee's letter, dated June 17, 1927, as follows: "The note is indorsed without recourse, which is in line with our conversation with Mr. Forsman." The opinion then says: "This is not denied anywhere, and it is not denied that Mr. Forsman had the right to make the agreement." This language is indeed strange. This letter of June 17 was answered by appellant on June 20 and acceptance of this note was definitely declined and refused. The fact is this note was returned to the Benton County Lumber Company on that date with the definite advice that appellant would not accept this note indorsed "without recourse." After appellant had refused the acceptance of the note, the parties met personally and negotiated and executed the contract, which is the basis of the intervention. It is "hornbook" law in this State that all negotiations leading up to a contract are merged therein. This elementary principle of law is wholly ignored in the majority opinion. The majority opinion says that the parties were mutually assisting each other in an endeavor to collect this note, and, continuing, uses this language: "And while the case is not entirely free from difficulty, yet the intention of the parties under this contract is a question of fact to be determined not only from the contract, but from the acts and conduct of the parties, and all the circumstances surrounding the transaction." I cannot subscribe to this doctrine. I understand the rule to be that contracts must be construed according to the language used in the contract, unless the same is ambiguous. There is no ambiguity in this contract. It is plain, certain and in the most simple language.

It is next said in the majority opinion: "We think the acts of the parties, after the judgment was obtained by the appellee, shows that the parties themselves changed the contract." Just what acts of the parties are referred to are not pointed out in the opinion. The only thing that was done was the execution of an assignment of the judgment by the Benton County Lumber Company to appellants, after the Benton County Lumber Company was thoroughly convinced that it could not effect collection of the judgment in Arkansas. This assign-

ment of the judgment was done as much for the benefit of the Benton County Lumber Company as it was for the benefit of the Cement Company. Not one penny consideration passed between the parties for this transfer or assignment. It is perfectly evident that this assignment was executed for the common purpose of collecting this judgment for the benefit of both parties. It is next stated in the opinion that "it is well settled in this State that parties to a written contract may, subsequently to its execution, modify it and substitute an oral agreement therefor." Just how, when or where this contract was modified is not pointed out in the opinion or just where or when any oral agreement was effected in substitution of this contract is not pointed out. The record in the case will be searched in vain for any act or circumstance of the parties, which could be construed as a modification or substitution for the contract of June 27, 1927, other than the mere transfer and assignment of the judgment from the Benton County Lumber Company to appellants. Lastly, it is stated in the opinion: "We think the chancellor was justified in finding that when the appellant did not, from 1927 to 1930, demand payment from appellee, and when it requested the assignment of a judgment for more than $4,000 to be assigned to it absolutely, neither party regarded this as a debt against the appellee." Just how this conclusion can be reached is beyond my power of comprehension. The purpose of the contract of June 29, 1927 was to give the Benton County Lumber Company full opportunity to collect this judgment and remit one-half thereof to the Cement Company, and because the Lumber Company took three years in endeavoring to effect this collection, without protest from appellants, this is seized upon by this court to bar appellant's right of recovery in this action. Under the contract the duty rested upon appellee to effect collection of this note. In furtherance thereof it filed a suit against the contractors, and the same was prosecuted through the Supreme Court of the State. Appellant patiently waited until this suit was finally determined in the Arkansas courts. Thereafter it requested an assignment of the judgment of the Arkansas courts to it that it might assist the Benton

County Lumber Company in effecting collection from the contractors in Oklahoma. Appellant spent its money, its time, and its energies in assisting the Benton County Lumber Company in effecting this collection, and now by the majority opinion it is penalized to the extent of the full liability of the Lumber Company under this contract.

Stating the proposition in a more concise and simple manner: appellee owed appellants on account $3500 on June 17, 1927. This is true because appellee so admitted in its letter of June 17; it so admitted in its solemn contract of June 29, 1927. By entering into this contract of June 29, appellee paid and satisfied one-half this debt by agreeing to assist appellants in procuring future business from the contractors. The other half of the debt was agreed to be paid by appellee by collecting same from the contractors. After three years' time and protracted litigation, appellee failed to effect the collection in Arkansas. Thereupon, the Arkansas judgment was assigned by appellee to appellants, not in payment of any sum to appellants under the contract of June 29, but for the purpose of procuring the assistance of appellants in an efficient endeavor to collect the judgments from the contractors in the courts of Oklahoma. Not one word of testimony can be found in this record indicating that this assignment was executed or accepted by appellants in satisfaction of its debt as evidenced by the contract of June 29, 1927.

This court has held that "the giving of notes for a debt is no payment of a debt, unless it be so agreed by the parties." *Daniel* v. *Gordy,* 84 Ark. 218, 105 S. W. 256. There is not one word of testimony in this record indicating that the Cement Company accepted the assignment of this judgment in payment of this debt. Again, this court is definitely committed to the rule that the burden of proof rests upon the party who pleads payment. *Owens* v. *Chandler,* 16 Ark. 651. In so far as I am advised, this case has been followed consistently since its pronouncement. Notwithstanding the burden of proof was on appellee to show by facts and circumstances that this

indebtedness had been paid, it did not introduce one word of testimony in support of it.

For the reasons aforesaid, I respectfully dissent from the majority opinion.

SCHLOSBERG *v.* DOUP.

4-3091

Opinion delivered October 2, 1933.

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

L. DeWoody Lyle and *A. F. Triplett,* for appellee.

McHaney, J. This lawsuit grows out of an automobile accident at Fifth and Maple streets in the city of Pine Bluff, about 9. A. M. Sunday, July 3, 1932. Appellants were guests in the car of their son, Walter Schlosberg, which was being driven by the latter's wife, residents of California, and all were on a common mission, to visit another son of appellants, residing in Little Rock, to spend July 4th. Harry, his child, and his father were riding in the rumble seat of the coupe, and his wife and mother were in the front seat. They were traveling west on Fifth, following and overtaking an ice delivery truck of appellee, driven by Ralph Wardlow, at a very moderate rate of speed, traveling in the same direction. As they approached Maple Street and some distance before reaching the intersection, Wardlow, driver of the truck, held out his left hand to indicate that he would turn to the right or north, as he was on his way to the ice plant of appellee to replenish his supply of ice for delivery. In doing so, he swerved his truck somewhat to the left to miss the corner of the curb and turned to the right into Maple Street. The driver of the coupe, being a resident of California, misunderstood the left-hand signal given by Wardlow, thought it indicated a left-hand turn only, as it did under the law of her State, turned her car slightly to the right and proceeded into the intersection where a collision occurred, and the right front wheel of the coupe was forced upon the curb, causing the alleged injuries of which appellants complain. This suit was thereafter instituted to recover damages therefor, but a trial to a jury resulted in a verdict and judgment in appellee's favor. Hence this appeal.

For a reversal of the judgment, many errors of the trial court are assigned and argued at length, two relating to the admission of certain testimony; two to the refusal of the court to give requested instructions 9 and 10; and four to the action of the court in giving appellee's instructions 6, 6½, 10½ and 12.

1. During the course of the trial two witnesses for appellee testified that three whiskey bottles were taken out of the coupe by one of the Schlosberg men and dropped in the weeds, two empty pints and one full half pint. Lubertha Moon testified that she saw this and was corroborated by Willie Moore, all without objection. Appellee learned of this fact, had Willie Moore bring the bottles to his office, and they were placed in evidence over appellant's objection. Assuming, without deciding, that this was error because the bottles were not properly identified and that appellee's testimony regarding them was in the nature of hearsay, either in whole or in part, we cannot agree that it resulted in any prejudice to appellants. As above stated, no objection was made to the positive testimony of an eyewitness that she saw one of the men take the bottles out of the car and drop them in the weeds. Wardlow and appellee testified they smelled whiskey on Harry, and appellee was quite positive Max had been drinking also. We therefore hold that, if this was error, it was harmless.

The same thing is true relative to the other testimony complained of as having been erroneously admitted. Appellee was charged in the municipal court with some offense growing out of the accident, where a trial was had July 7, four days after the accident. Appellant Max was a witness in that trial. Appellee was asked in this case if he observed Max in that case and if his movements indicated that he was injured. Over objections, he answered that in his opinion he was not injured. Wardlow and Harper were both permitted to so testify, both before and after appellee did so, without objection, so no prejudice could have resulted in any event.

2. Error is also assigned for the refusal of the court to give requested instructions 9 and 10. No. 10 deals with the duty of a driver involved in an accident to give his name, license number, etc., and render assistance to the operator or persons injured in the other car, and, inasmuch as all this was immediately discovered, No. 10 was properly refused. Moreover, failure to comply with

the law in these regards bears no proximate relation to the cause of the collision. 2 Blashfield, 1216.

Requested instruction No. 9 follows: "You are instructed that, if you find from the preponderance of the testimony that the plaintiff's automobile was following the defendant's truck, and that, as both vehicles approached the intersection of Fifth and Maple streets, the driver of the truck extended his arm horizontally from the left, swerved his truck to the left, and then, suddenly and without warning, turned his car to the right directly in front of the plaintiff's automobile, allowing the driver of plaintiff's automobile insufficient time and space in which to stop or turn aside and avoid the collision, causing the collision and injuring the plaintiffs, without fault or carelessness on their part, then the defendant would be liable."

In so far as this instruction is correct, it is covered by instruction No. 5, given by the court. This instruction is open to the further objection that it is argumentative and indefinite, especially the clause, "swerved his truck to the left, and then, suddenly and without warning, turned his car to the right," etc. What distance to the left before turning to the right would it take to constitute negligence? What is meant by "suddenly and without warning turned his truck to the right?" All the witnesses agree that the truck was traveling very slowly, and that a signal warning was given that might have meant any one of four things: (1) That he would turn to the left, (2) turn to the right, (3) slow down, and (4) stop. Under such circumstances, the driver of the car behind must take notice of the signal and bring his car under control accordingly. *Madison-Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. (2d) 729; *Universal Automobile Ins. Co.* v. *Denton,* 185 Ark. 899, 50 S. W. (2d) 592; Act 223, Acts 1927, p. 721, § 13.

In 5 Blashfield on Automobiles, p. 58, it is said: "Automobile driver's slight swing to right after signal for left turn is not usually negligence." We know as a matter of common knowledge that many drivers swing or swerve to the left before making a right turn to avoid striking the corner and to enable them to come into the

proper lane of traffic on the intersecting street without obstructing traffic in the opposite lane. No error was committed in refusing request No. 9.

3. The other assignments of error relate to the giving of instructions 6, 6½, 10½ and 12 at appellee's request. It would greatly extend this opinion to set them out and comment on them separately, and, as we see it, serve no useful purpose. We have carefully considered them, together with all other instructions given and refused, as well as the argument of learned counsel. We cannot agree with them that error was committed as alleged. We think the court fully and fairly instructed the jury. Its finding was against appellants, and we must permit it to stand.

Affirmed.

GAINES *v.* GAINES.

4-3098

Opinion delivered October 2, 1933.

Martin, Wootton & Martin, for appellant.
A. T. Davies, for appellee.

McHaney, J. On June 27, 1932, appellee, a resident of Hot Springs, Garland County, Arkansas, filed suit for divorce against appellant, alleging that they were married in 1897, separated in 1916, because of appellant's mistreatment of him, such mistreatment rendering his condition intolerable, and that they have not lived together as husband and wife since that time. Other statutory allegations were made. On the same day, June 27, an attorney *ad litem* was appointed by the court to notify appellant of the pendency of the action, she being a nonresident of this State, and a warning order was issued and published for the time and in the manner prescribed by law. On July 15, 1932, the attorney *ad litem* addressed a registered letter to appellant at Gray Court, South Carolina, advising her of the pendency of the action, the court in which pending, and inclosing a copy of the complaint. He advised her that as attorney *ad litem* it was simply his duty to endeavor to notify her that suit was pending in the court, and asked her to notify him of receipt of the notice. This notice was not received by her until July 20, and on July 27, a decree of divorce was granted appellee without contest from her. On August 2, 1932, she received a copy of the divorce decree, and thereafter on September 3, she filed her petition to set aside the decree. She alleged that fraud was practiced on her and the court in that the attorney *ad litem* fraudulently failed to notify her promptly, and that fraud was practiced in the taking of depositions in behalf of appellee without notice to her. She attached an answer to her petition in which she denied appellee's ground of divorce alleged in his complaint, set up a number of separations or desertions of her by him, and that he left her in December, 1915, and has continued to live separate and apart from her since that time without just cause. On October 31, 1932, she filed an amendment to her petition alleging that she was never legally served with process; that the court had no jurisdiction to grant the divorce decree on July 27, for the reason that the 30 days provided by law for her to interpose a defense had not elapsed; that the attorney

ad litem had negligently and fraudulently failed to perform his duties as required by law; and that depositions on behalf of appellee were improperly admitted. All these allegations were denied by appellee. By agreement, the statements and allegations in the verified petition to set aside the decree were accepted and considered as evidence in the case. The court made specific findings against appellant on all contentions, and on November 1, 1932, entered a decree denying the petition. The case is here on appeal.

We assume, for the decision of this case, that the court had the power to set aside the decree. Appellant seems to proceed on the theory that the term had expired and relies for authority of the court on § 6290, Crawford & Moses' Digest, subdivision 4, "For fraud practiced by the successful party in the obtaining of the judgment or order." But, whether the term had expired or not, we assume the court had jurisdiction to set the decree aside.

However, we are of the opinion that the court did not err in refusing to do so. It is contended by appellant that fraud was practiced by appellee upon the court and her in the procurement of the decree, in that the attorney *ad litem* was negligent in not notifying her after his appointment on June 27 until July 15, and that he failed to perform the duties imposed upon him by law. The statute, § 6261, Crawford & Moses' Digest, provides that: "Before a judgment is rendered against a defendant constructively summoned, and who has not appeared, it shall be necessary: First. An attorney be appointed at least thirty days before the judgment to defend for the defendant and inform him of the action and of such other matters as may be useful to him in preparing for a defense. Section 6262 makes it his duty, "before an order for his compensation is made," to "make a written statement of all that he has done in the case, which shall be signed by him and filed with the papers of the action." The statute does not require him to inform the defendant immediately after his appointment, and we are unwilling to so hold, or that the delay in

notifying appellant in this case was negligence on his part, or that, if negligence, it was such as amounted to fraud, in the absence of any showing of fraud or collusion between him and appellee. We think the attorney *ad litem* substantially complied with the statute. He made his report of what he had done, attaching the registry receipt of notice showing appellant had received it July 20, seven days before the decree, and that he had received no response thereto. All this was before the court when the decree was rendered, and it is difficult to see how appellant or the court was or could have been deceived by any action or nonaction of said attorney. She received the notice July 20, but took no action, not even the acknowledgment of its receipt. She received copy of the decree on August 2, but took no action until September 3, when she filed her petition to vacate the decree, and not until October 31 did she question the jurisdiction of the court by an amendment to her petition.

Notice was posted in the clerk's office on July 1, 1932, addressed to appellant and the attorney *ad litem* that on July 14, depositions of witnesses would be taken on interrogatories in Chester, South Carolina, on behalf of appellee, and on July 11, a commission was issued to any person authorized to take depositions out of this State. A deposition was taken in Chester, South Carolina, on July 14, as certified by the officer, but the envelope in which the deposition was returned was postmarked the 13th. The court found that the certificate of the officer controlled, and we agree. This deposition was taken before she had actual notice of the suit. Other depositions were taken in Hot Springs on July 21, on a notice posted in the clerk's office. It is contended that these depositions were improperly received and considered as evidence. It occurs to us that this is a question that could only be raised on appeal from the decree and not on a petition to vacate the decree and an appeal from an adverse decision.

It is finally contended that the court was without jurisdiction, as 30 days had not elapsed from the appoint-

ment of the attorney *ad litem.* Section 1208, Crawford & Moses' Digest, provides: "The defense to any complaint or cross-complaint must be filed before noon of the first day the court meets in regular or adjourned session after service: * * * Third. In the case of constructive service, where publication of the warning order has been made as required by law, and thirty days has elapsed since the making of the order and the appointment of the attorney *ad litem.*" The appellant had until noon of the 31st day after the warning order was made and attorney *ad litem* appointed. The order was made, and the attorney was appointed on June 27, and the decree was rendered July 27, in the afternoon thereof. There were four days in June counting the 27th and 26 in July, exclusive of the 27th, making 30 days. The decree was therefore rendered after the time had expired for appellant to plead.

Nothing in our case of *Frank* v. *Frank,* 175 Ark. 285, 298 S. W. 1026, is to the contrary. There the attorney *ad litem* was appointed on the day the decree was rendered.

But, assuming that the decree was prematurely entered, and that the court was in error in doing so, "the remedy to correct the error was by appeal and not by motion to vacate the decree after the adjournment of the court," as was said in *Old American Ins. Co.* v. *Perry,* 167 Ark. 198, 266 S. W. 943. See also *Sager* v. *American Inv. Co.,* 170 Ark. 568, 280 S. W. 654. If the court had waited another day before entering the decree, or for that matter for 30 days, the situation would have been the same, for appellant did nothing, so far as this record discloses, looking to a defense of the action.

No error appearing, the decree must be affirmed. It is so ordered.

BUTLER, J., concurs.

FAWCETT *v.* RHYNE.

4-3083

Opinion delivered October 2, 1933.

Lake, Lake & Carlton, for appellant.

Abe Collins, for appellee.

BUTLER, J. Mrs. Guinn owned a parcel of land in the village of Ben Lomond, irregular in shape, containing several acres. She sold this land to B. W. and D. R. Fawcett, conveying the same to them by deed which it was subsequently found misdescribed the property intended to be and actually conveyed. The Fawcett brothers took possession of this land; on certain parcels thereof erected their homes, and on others store buildings and conveyed several parcels of it to others. After a time, except as to their homestead lots and the parcels before conveyed to others, they conveyed the property to J. A. Hughes by mortgage deed to secure an indebtedness. This mortgage was afterward foreclosed, a sale made by the commissioner of the court under the decree of foreclosure, report of sale made and confirmed, and a deed made to the purchaser, J. A. Hughes. This title passed by mesne conveyances to Mrs. Allie Rhyne. The purchasers under the foreclosure sale took actual possession of the property, and this possession continued until it became the property of Mrs. Rhyne, who also took possession and remained in such possession continuously until the present.

Mrs. Rhyne established her home on a part of the property, and B. W. Fawcett continued to live on a part of the original Guinn tract near her. A controversy, the particulars of which are not important, arose between the two which resulted in Mrs. Rhyne instituting an action in the circuit court to establish her title to a small portion of the original Guinn tract which was in dispute between her and Fawcett. She based her title on the decree under foreclosure sale and deeds thereunder and on a quitclaim deed from a Mrs. Smith, sole surviving heir of Mrs. Guinn, deceased. Fawcett answered deny-

ing Mrs. Rhyne's title under the muniments of title exhibited, averred title in himself by mesne conveyances from Mrs. Guinn. (D. R. Fawcett had long previously conveyed to B. W. Fawcett his interest in the Guinn tract.) He alleged there was a mistake in the description of the land made in his conveyances; that upon the execution of the deed under which he claimed he took possession of the land "built a home and established his residence with that of his family thereon, and at all times thereafter until the filing of this action he has occupied the lands so conveyed peaceably, etc.," except as to certain tracts which he and his co-tenant, D. R. Fawcett, had previously conveyed to others. He further alleged that he had "used and occupied openly, adversely and without interruption a strip of land 46 feet wide on the north end of said land, and extending from the west boundary line of his grant and west 109 feet to the west line of land conveyed to Rebecca Fawcett, as hereinbefore referred to; also a parcel of land connected with the strip just referred to on the south 19 feet wide and extending in a southerly direction from the strip just mentioned along and parallel with the west line of the land so conveyed to Rebecca Fawcett a distance of 60 feet, more or less, to the northeast corner of the property conveyed to A. J. Clingan, as hereinbefore referred to, at which point the width is reduced to 14 feet and so continues in a southerly direction to the southwest corner of the said Rebecca Fawcett land."

Continuing, he averred that the said strips just described had been in his exclusive possession and used solely and exclusively as a roadway and means of ingress and egress from certain roads and highways into his residence, outhouses and other inclosures, and that he had no other way of ingress and egress therefrom or thereto during all the time of his possession, and that no other person had any right or interest in the same. He prayed that his answer be considered a cross-complaint, the cause transferred to equity, the complaint dismissed, the deeds under which he claimed reformed

so as to correctly describe the land, and his title and interest in the land so described quieted and confirmed.

To this answer, Mrs. Rhyne replied denying that B. W. Fawcett was entitled to have his deed reformed; denied that he had had possession and use of the lands described in his answer in the manner claimed, or that he was entitled to the relief prayed. Afterward, she filed an amendment to her complaint averring that the only ground actually in controversy was a triangular shaped tract in the northwest corner of the lands described in the complaint, which she specifically described, and prayed as in her original complaint.

To the complaint, as amended, the defendant filed an answer and cross-complaint denying that the only land actually in controversy was the strip mentioned in plaintiff's amendment, or that same was the only land to which he claimed title. By way of cross-complaint, he stated that, if it was the purpose of plaintiff to abandon her claim to other parts of said lands, the defendant joined issue as to her right to recover the land described in the amendment to the complaint, and denied that she had any title to any part of the land described in any of her pleadings. Further answering, the defendant alleged that it was impossible for him to know the extent of the lands claimed by plaintiff, but denied that she had any legal right or title to any part of the same by virtue of the conveyances under which she claimed, or otherwise. He prayed that the complaint be dismissed, or if the court should be of the opinion that plaintiff was entitled to any part of the land, that the same be definitely ascertained and described in the decree of the court, and that defendant's interest in the remainder be confirmed in him.

Replying to the amendment to the cross-complaint, Mrs. Rhyne alleged that it was not her intention to abandon title to any of the lands described in the deed from Mrs. Smith, but that she claimed title to all of it, especially to the south 60 feet thereof; she averred that the allegations of the defendant's amendment to his cross-complaint were so indefinite as to make it im-

possible for her to tell whether or not he intended to assert any claim to the south 60 feet described in Mrs. Smith's deed to her, and, if so, that said claim was barred by reason of the seven-year statute of limitation, which statute she invoked.

The pleadings in that case are voluminous, and the parts hereinbefore quoted or referred to appear to be those pertinent to the question which we shall hereafter consider.

Testimony was taken on the pleadings and the case was heard by the court and a decision reached, and on the 14th day of December, 1931, the decree was made and entered. To set out the decree in full would unduly extend this opinion, but it recites the pleadings, the documentary evidence and the testimony of the witnesses on which it was based. It finds that the original deed from Mrs. Guinn incorrectly described the land sought to be conveyed, that this defect in description continued under the deeds made subsequently under which B. W. Fawcett claimed title, and that all of said deeds should be reformed. It recited the execution of the mortgage deed and proceedings thereunder and the execution of the deeds in pursuance thereof to Mrs. Rhyne and her predecessors in title, and found that she and they had been in possession of the property adversely for more than seven years, and that the true description of the property in the mortgage was as described in the deed of Mrs. Smith. (It will be noted that in the pleadings filed by Mrs. Rhyne there was no allegation of misdescription in the mortgage from Fawcetts to Hughes, the decree and proceedings thereunder and deeds based thereon, or prayer for their reformation.)

The court further found that Fawcett was in the occupancy and had acquired by adverse user title to a strip of land 18 feet wide lying immediately east of the lands owned by Mrs. Rhyne, and that his title in the same should be confirmed. Continuing, the court made the further recital that plaintiff in open court disclaimed any title to the lands described in the deed from D. R. Fawcett to B. W. Fawcett and that described in the

original Guinn deed, other than that described in her deed from Mrs. Smith and that the defendant "is the owner of, and in possession, of all that lot and parcel of land set out and described in the deed from D. R. Fawcett and wife to B. W. Fawcett dated February 14, 1890, and also a strip of land extending from the north boundary line of said last mentioned parcel 18 feet wide immediately west of, and parallel with, the west boundary line of the parcel conveyed to Rebecca Fawcett, as hereinbefore set out, to the north boundary line of the Nancy C. Guinn survey * * * and that the title and possession of defendant in and to all of said land should be forever quieted and confirmed in B. W. Fawcett against all the claims of the plaintiff, and those holding through her." After these findings follows the formal decree, which first decrees a reformation of the deeds under which Fawcett claimed, that title to a parcel of land 106 feet north and south by 90 feet east and west, which is described, is in Mrs. Rhyne, and that her right to possession therein and her title thereto be confirmed. Second, it was decreed as follows: "That B. W. Fawcett be and he is hereby decreed to own in fee simple a strip of land 18 feet in width from east to west lying immediately east of the tract of land herein decreed to be owned by the plaintiff, and his title thereto is forever confirmed and quieted in himself as against the plaintiff and all persons claiming through her. It is further decreed that the cost be divided equally between the defendant and plaintiff. Both parties except, pray, and are granted, appeals to the Supreme Court."

The instant suit had its origin in a complaint filed by B. W. Fawcett in the circuit court alleging that he was the owner of a certain specific parcel of land described as follows: "Commencing at the southeast corner of southwest quarter of northeast quarter section 5, township 11 south, range 29 west, running thence west 90 feet to beginning; thence west 208.5 feet to public road running from Ben Lomond to Brownstown, now highway No. 71; thence north with said road 120 feet; thence east

208.5 feet; thence in a southerly direction to point of beginning." Fawcett alleged his title under the deeds pleaded in the former suit which he again exhibited, and further alleged title by virtue of the decree of the chancery court hereinbefore mentioned which he claimed was quieted and confirmed in the specific tract mentioned in his complaint, and that, notwithstanding this, Mrs. Rhyne and her tenants were in possession of the same under claim of ownership, whereas by the terms of the decree pleaded her rights were barred and the plea had become *res judicata* as to all of her rights.

Mrs. Allie Rhyne and a Mrs. Ethel Fawcett and the tenant in possession were made defendants, but as to Mrs. Rhyne and Mrs. Fawcett a nonsuit was taken, and Mrs. Rhyne thereupon intervened, denying the allegations of the complaint, averring that she was in actual, adverse and open possession of the land, and that she had been for a period of more than seven years before the institution of the suit. She set up title by reason of said possession. She further alleged that her title was derived through certain foreclosure proceedings and deeds based thereon which she specifically pleaded and exhibited with her intervention; that it was the intention in the said proceedings and deeds to convey the parcel of land named in plaintiff's complaint, but that said proceedings and deeds incorrectly described the lands, and that same should be reformed. Intervener further alleged that the decree under which plaintiff claimed was not the decree rendered by the court, and that a part thereof was obtained by fraudulent representation made to it. The intervention concluded with a motion to transfer the cause to equity to the end that the decrees, orders of the court, and deeds under which she claimed be reformed and corrected so as to correctly describe the lands thereby intended to be conveyed, and that the decree of December 14, 1931, pleaded by plaintiff be vacated and set aside; alleged her title by adverse possession and pleaded the statute bar. On the same date of the filing of the intervention Mrs. Rhyne filed her motion in the chancery court to vacate the decree pleaded

by plaintiff on the ground that it was procured by fraud practiced on the court.

Over the objection of the plaintiff, the case was transferred to the chancery court where a reply to the intervention was filed denying its averments. On the day following a motion was made to remand to the circuit court, which motion was overruled and plaintiff excepted. The suit and motion were consolidated, and the case then proceeded on the issues joined, testimony was heard, and the court found that plaintiff had obtained the decree pleaded in his complaint by untrue testimony, and that the parcel of land claimed in the complaint was the property of Mrs. Rhyne, and the true description thereof, which was thereupon incorporated in the finding, and, without otherwise modifying or vacating its former decree, dismissed the appellant's complaint for want of equity, from which decree is this appeal.

It is appellant's contention that the cause should have been remanded to the circuit court; that there was no fraud practiced on the court as would bring the motion to vacate the decree within the terms of the statute providing the manner in which judgments and decrees may be vacated after the lapse of the term; that his plea of *res judicata* should have been sustained because, as he contends, his title to the lands involved was squarely presented in the proceedings which resulted in the decree of December 14, 1931; that the question was there adjudicated and title confirmed in him.

As preliminary to the discussion of the issues involved, we observe that a most painstaking investigation of the pleadings and exhibits has been made, but because the descriptions in the various deeds and pleadings are so vague and indefinite and made with reference to two highways running past the property in controversy forming a part of its boundary, and to certain parcels of land heretofore conveyed to others, we have been unable to understand just how the property involved directly or incidentally is located, and we are constrained to believe that counsel themselves were confused as to the true location of the parcels of land adversely occupied and claimed

by the litigants. The only thing that is clear relating to the location of the property is that the parcel of land described in the complaint of Fawcett in the instant case lies along the extreme southern boundary of the original Guinn tract, and that the pleadings and evidence indicate that the lands actually involved in the first suit lay to the north and were parts of the north or northwest portion of the original Guinn tract.

The first question in the case relates to the power of the court to vacate its decree or modify the same after the expiration of the term in which it was handed down. The only power to vacate a decree after lapse of the term is to be found in the statute or by a bill of review in equity on the ground of newly-discovered evidence or for error of law apparent on the face of the record. In this proceeding there was no claim of mistake of law or of newly-discovered evidence, but the appellee relied on the allegation which in effect charged that the decree was procured by fraud practiced on the court. On this question testimony was taken, much of which we deem it unnecessary to review at length, it being a sufficient reason, if no other existed, that the court did not find that there had been any such fraud practiced. In fact, the evidence, to our mind, is conclusive that everything done by the attorney for appellant in relation to the suggestion made by him as to the drafting and phrasing of the decree was done in open court in the presence of opposing counsel.

It is only in those States which so prescribed by statute that a decree may be set aside after the lapse of the term because of perjured testimony given by the prevailing party at the hearing of the case. Such is not the rule in this jurisdiction. "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."

Parker v. *Sims,* 185 Ark. 1111, at page 1116, 51 S. W. (2d) 517, and cases cited. Indeed, we are constrained to the view that the learned trial judge misinterpreted the testimony of Fawcett and failed to reach a just conclusion as to the true inference arising from it. We have carefully examined his testimony, and that relating to his adversary possession of the parts of the Guinn tract claimed by him was clearly referable to the specific allegations contained in his pleadings and the pleadings of his adversary. In his pleadings Fawcett was not contending for the parcel of land here involved, and, of course, his testimony could not justly be held to refer to it. This indubitably appears when his testimony in the instant case is considered, for he states that during the progress of the original lawsuit and at the time he testified therein he was fully aware that appellee was in actual possession of the subject-matter of this suit, and he then made no claim to it, nor did he do so until after the decree was rendered, and then only on the information of this attorney that the land had been decreed to him. In explaining why he claimed this parcel in the instant case when he did not in the former, he stated that if "she (appellee) tried to take something that doesn't belong to her, I will take something that doesn't belong to me."

The next question involved is the jurisdiction of the chancery court to hear and determine the issues in the instant case and the propriety of the court's order overruling the motion to remand the cause to the circuit court, from which it had been transferred. This action, an ejectment suit, was properly instituted in a court of law. In the intervention filed by the appellee it was alleged, among other things, that she was the owner of the parcel of land acquired by reason of certain decrees and proceedings thereunder which divested title of appellant in the land and vested it in her, and it was the intention of the parties to the mortgage that the identical land involved be included therein, but that there was a mistake and misdescription therein which was brought forward and continued in the descriptions in the decrees

and other proceedings and the deeds based thereon, and she prayed for reformation of these deeds, decrees and other proceedings. This stated an equitable defense and warranted the transfer of the cause to the chancery court and the retention of jurisdiction by the chancellor on motion to remand. *Nichols* v. *Shearon,* 49 Ark. 75, 4 S. W. 167; *Marsh* v. *Erwin,* 155 Ark. 376, 244 S. W. 441; *Langless* v. *McCarthy,* 169 Ark. 953, 277 S. W. 27; *Soderman* v. *Bell,* 102 Ark. 83, 143 S. W. 595; *Martin* v. *Hempstead County Levee Dist.,* 98 Ark. 23, 135 S. W. 453.

It was the principal contention of the appellant that his title to the tract of land described in his complaint was involved in the proceedings resulting in the decree of December 14, 1931, and that that decree was a bar to the defenses interposed by appellee by reason of the rule *res judicata.* That rule has been often announced by this court to the effect that a 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. This brings us to a consideration of the issues raised by the pleadings in the former suit and the true import and effect of the resulting decree.

In determining what were the issues raised by the pleadings, it is the general rule that specific allegations in a pleading must be given precedence over general averments, inasmuch as the latter are to be deemed as explained, limited and controlled by the special allegations. 49 C. J., 157, § 11, note 8; *Haley* v. *Mo. Pac., etc., Co.,* 197 Mo. 15, 93 S. W. 1120; *Seattle Bank* v. *Carter,* 13 Wash. 281, 48 L. R. A. 177; *Whitcomb* v. *Vigeant,* 240 Mass. 359, 19 A. L. R. 1439; *Johnson* v. *Sampson,* 167 Minn. 203, 46 A. L. R. 772; *Wright* v. *State,* 104 Okla. 57, 230 Pac. 268.

It is also the rule that an obscure pleading will be treated in the light in which the parties themselves treated it. *Cunningham* v. *Dellmon,* 151 Ark. 409, 237 S. W. 450.

By reference to the statement of the averments in the pleadings, it will be observed that the appellee was

contending that the particular parcel of land, title to which was desired to be adjudicated, was a small triangular strip on the northern boundary of her property. In the answer there is the specific averment that on the Guinn tract appellant "built a home and established his residence with that of his family thereon, and at all times thereafter until the filing of this action he has occupied the land so conveyed peaceably," except as to certain tracts of land which he and his co-defendant Fawcett had previously conveyed; and the further specific averment that he had "used and occupied openly, adversely and without interruption a strip of land 46 feet wide on the north end of said land and extending from the west boundary line of his grant and west 109 feet to the west line of land conveyed to Rebecca Fawcett, as hereinbefore referred to; also, a parcel of land connected with the strip just referred to on the south 19 feet wide and extending in a southerly direction from the strip just mentioned along and parallel with the west line of the land so conveyed to Rebecca Fawcett a distance of 60 feet, more or less, to the northeast corner of the property conveyed to A. J. Clingan, as hereinbefore referred to, at which point the width is reduced to 14 feet and so continues in a southerly direction to the southwest corner of the said Rebecca Fawcett land." Continuing, he averred that the said strips just described had been in his exclusive possession and used solely and exclusively as a roadway and means of ingress and egress from certain roads and highways into his residence, outhouses and other inclosures, and that he had no other way of ingress and egress therefrom or thereto during all the time of his possession, and that no other person had any right or interest in the same. He prayed for reformation of certain deeds, and that his title and interest in the lands described be quieted and confirmed in him.

Further answering the complaint as amended, he denied that plaintiff had any title to the lands described in her complaint, alleged that it was impossible for him to know the extent of the lands claimed by her, and prayed that the complaint be dismissed, or, if the court

should be of the opinion that plaintiff was entitled to any part of the lands, that the same be definitely ascertained and described in the decree of the court, and that his interest in the remainder be confirmed.

Nowhere in any of the pleadings filed by the appellant was there any specific description of lands claimed by him except in the one we have just quoted, and the general averment under the rule announced must be deemed to relate to, and be controlled by, that special allegation. It is obvious that this is the way the appellant so understood it, for, as has been stated, he expressly disavowed any claim of possession to the lands involved or that his testimony given at the former trial had any reference thereto. The pleadings are obscure, and appellant's understanding strengthens the conclusion that the general averment related only to this special allegation. That being true, the tract of land involved in this suit was not within the issues raised at the former trial. Indeed, it is our opinion that the decree rendered did not, in fact, adjudicate or attempt to adjudicate the subject-matter of this controversy. Decrees must be construed with reference to the issues raised. *Nakdimen* v. *Brazil,* 137 Ark. 188, 208 S. W. 431.

"The doctrine of *res judicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated." Black on Judgments, vol. 2, § 614, p. 936.

"If a particular point was not in issue in the suit—either in the technical sense of an issue framed by the pleadings, or in the sense of being the decisive question in the case and the one actually litigated and determining the result—it is not conclusively established by the judgment therein, for the purposes of a subsequent suit upon a different cause of action, although it may be expressly or tacitly involved in the judgment." Black on Judgments, vol. 2, § 617, p. 940.

On an examination of the decree, it appears that there was a general finding to the effect that the appellant was entitled to have his title quieted and confirmed as to all the lands in the deed from D. R. Fawcett to him except the lands described therein as belonging to the appellee, and it is also true that the particular tract appellant now seeks to recover was not included in the description of appellee's land contained in her pleadings or decree and that she disclaimed all title to any property not included in such description. This disavowal, however, does not aid the appellant, for it is on his own averments of ownership and the evidence adduced to support them that his title must rest. The only specific finding of the court was that title rested in the appellant to an 18-foot strip of land described in that finding. When it comes to the decree proper, there were only two subjects relative to which the decree made an adjudication: (a) that certain deeds be reformed, and (b) that appellant's title to the said 18-foot strip be quieted and confirmed.

If the findings of the court should bear the construction contended for by the appellant, they were wholly irrelevant to the issues and did not enter into and become a part of the final judgment. As there was no judgment confirming title in appellant except to the 18-foot strip described, it constitutes a bar to the title to that strip and that alone.

In *Springer* v. *Bien,* 128 N. Y. at page 102, 27 N. E. 1077, it is said: "Neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action between the same parties, constitute a bar unless followed by judgment based thereon, or into which the verdict or finding entered."

"Where no formal judgment has been entered, the plea of *res judicata* has no foundation; neither the verdict of a jury nor the findings of a court, even though in a prior action upon the precise point involved in a subsequent action and between the same parties constitutes a bar." *Oklahoma City* v. *McMaster,* 196 U. S. 529 (2d syl.).

"A final decree is the order of the court pronounced upon hearing and understanding all the points in issue, and determining all the rights of the parties to the suit, according to equity and good conscience.

"If a decree does not profess on its face to dispose of many of the important matters involved in the cause, and it is manifest that the cause was not in condition to be heard upon those matters, and the decree fails to show affirmative action of the court upon them, the presumption may be indulged that they were not under consideration at the hearing or intended to be embraced in the decree." *Shegogg* v. *Perkins,* 34 Ark. 117 (2d syl.); see also *Seitz* v. *Meriwether,* 114 Ark. 297, 169 S. W. 1175.

We suggest, with deference to the eminent counsel who appeared for the parties litigant and the learned trial judge, that the final proceedings and findings in the instant case were based on a wrong interpretation of the pleadings and a misconstruction of their purpose, and also upon a misapprehension of what was really decided in the decree of December 14, 1931. Those pleadings, as we have seen, did not include the subject-matter of this proceeding, or raise any issues with respect to it; nor did the decree adjudge to the appellant, either specially or generally, title in the lands now in controversy or confirm that title in him. For either of these reasons the plea of *res judicata* invoked has no application; and, since the chancery court acquired jurisdiction for the purpose of reforming appellee's muniments of title, it might, and should, retain jurisdiction for all purposes and finally settle the lawsuit. *Fulcher* v. *Dierks Lbr. Co.,* 164 Ark. 261, 261 S. W. 645; *Held* v. *Mansur,* 181 Ark. 876, 28 S. W. (2d) 704. The court properly heard the testimony relating to the appellee's title acquired by adverse possession which abundantly justified the conclusion reached that the appellant's complaint was without equity.

The decree is therefore affirmed.

JOHNSON, C. J., disqualified and not participating.

WARDLOW *v.* MCGHEE.

4-3092

Opinion delivered October 2, 1933.

Appellant *pro se.*

W. A. Dickson and *Price Dickson,* for appellee.

BUTLER, J. On October 30, 1930, the Benton Chancery Court rendered a decree setting aside a conveyance from Con Primrose and wife, Gertie Primrose, to Fannie Wardlow as made in fraud of creditors, and also as to a subsequent deed made by Fannie Wardlow to a part of the lands conveyed to her to Dee Primrose, except as to one 80-acre tract which the court found was the homestead of the said Con and Gertie Primrose at the time of their conveyance. The allegations of the complaint in that case were that the conveyances were made with the fraudulent intent to defeat J. P. McGhee in the collection of a debt owing him by said Con and Gertie Primrose which had been reduced to judgment. The prayer was that the conveyances be set aside and the land subjected to the payment of his judgment debt. All the parties.

grantor and grantee, in the alleged fraudulent conveyances answered denying the allegations of the complaint and affirming that the conveyances were *bona fide* and made for a valuable consideration. On these issues testimony was adduced on behalf of the plaintiff and defendants with the result announced.

On November 12, 1931, a day of the same term, defendants filed a motion to set aside and modify the decree. The order of sale was suspended pending the hearing of said motion, which was continued from time to time until April 14, 1931, when the motion was overruled. The case came to this court where the appeal was found not to have been taken within the time limited by law, and the same was dismissed.

The present proceeding was begun on June 23, 1932, by the appellant's filing in the Benton Chancery Court a petition by which she sought to reopen the suit and set aside the decree before mentioned. This petition contained, in addition to said purpose, an averment that a certain 40 acres of the land involved in the former decree was her homestead of which she was in possession, and there was a prayer that her homestead right be ascertained and the sale enjoined as to it. To this petition a response was filed denying appellant's right to have the decree set aside or modified and, further responding, appellee denied the averment of appellant as to her homestead right alleging that such right, if any, had been adjudicated in the prior proceedings, and that the decree therein rendered was *res judicata.* At the trial the evidence adduced in the previous suit was introduced and other testimony taken and the court refused to vacate its former decree, but adjudged that the 40 acres mentioned in the petition was in fact the homestead of Fannie Wardlow and in effect enjoined the sale thereof under the former decree. The appellant appealed from that part of the decree refusing to vacate the former decree, and the appellee filed his cross-appeal from that part of the decree finding for Mrs. Wardlow on her plea of homestead.

Without setting out the petition at length, which we deem unnecessary, it may be said that it contained no averment of any of the causes for which a judgment or decree may be vacated or modified set out in the statute. In numerous decisions, beginning with *Brady* v. *Hamlett,* 33 Ark. 105, this court has held that after the expiration of the term a judgment can be set aside or modified only in the way and for the reasons mentioned in the statute; or by bill of review in equity, which is an independent proceeding to reverse or modify a decree rendered at a former term and lies only for an error of law apparent from a comparison of the decree and the pleadings and findings, or for new matter the evidence of which has become known since the date of the decree and could not have been before discovered by the use of reasonable diligence. *Evans* v. *Parrott,* 26 Ark. 600; *Boynton* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 203, 105 S. W. 77. The petition contains none of the allegations of a bill of review.

The cause alleged in the petition is that appellant's motion to vacate filed at the same term at which the decree was rendered was continued from time to time on motion of her adversary and until April 14, 1931, a period of five months and 22 days from the date of the decree, and that she and "her attorneys anticipated and had reason to believe and did believe at all times that in the event said motion to modify was overruled she and her co-defendant would be given the statutory period from the date of the overruling of her motion in which to lodge her appeal in the Supreme Court, * * * and was taken by surprise when confronted by the fact she had only nine days in which to perfect her appeal, and was wholly unable to avail herself of an appeal, etc." This is a plea to a mistake of law which is no ground for modifying or vacating a judgment.

On cross-appeal appellee relies on the plea of *res judicata* and on the rule as stated in *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614, and many other cases: "The judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equit-

able, which were interposed or which could have been interposed in the former suit." Appellee relies especially on the case of *Turner* v. *Vaughan,* 33 Ark. 454, where it was held that, although a conveyance of land set aside for fraud at the suit of creditors does not estop the grantor from claiming a homestead in the premises conveyed, he must assert his claim in that suit or he will be afterward barred. As is pointed out, however, in the case of *Bunch* v. *Keith,* 64 Ark. 654, 44 S. W. 452, the case of *Turner* v. *Vaughan, supra,* arose under the Constitution of 1868, and the decision was based upon a consideration of that Constitution, but that, since the adoption of the Constitution of 1874, and the statutes passed in aid thereof providing how exemptions allowed may be selected, a different rule governs, and now a judgment sustaining a bill to set aside a conveyance of his homestead by a debtor as fraudulent and ordering it sold will not bar him from claiming it as exempt before the sale. This the homestead claimant may now do under the doctrine of *Bunch* v. *Keith,* which has been approved and reaffirmed in *Gray* v. *Bank of Hartford,* 137 Ark. 232, 208 S. W. 302.

In this case the chancellor might have treated the petition as a complaint to enjoin the sale of homestead right of the petitioner. The decree of the court reflects that evidence was heard, but this evidence has not been brought forward in the record, and we must assume it was sufficient to sustain the finding of the court. It follows that the decree will be affirmed, both on appeal and cross-appeal.

HOLMAN *v.* ARMSTRONG.

4-3103

Opinion delivered October 2, 1933.

Beloate & Beloate, for appellant.

H. L. Ponder, for appellee.

BUTLER, J. The appellee, receiver of the Planters' National Bank (Walnut Ridge), insolvent, brought suit on a note signed by Mrs. Fannie Mitchell and appellant to said bank. Appellant answered alleging that she was a surety and was not liable because (1) she signed the note without any consideration passing to her and after its execution by Mrs. Mitchell and its acceptance by the bank, and (2) that before its maturity and in her absence and without her consent time of payment thereof had been extended for a valid consideration and for a fixed period.

The case was submitted to the court, sitting as a jury, upon the pleadings and evidence introduced by the parties. The court found for the plaintiff and rendered judgment accordingly. This appeal followed.

The evidence was to the effect that before the fall of 1930 the bank had secured a judgment against Mrs. Mitchell, which it was proceeding to enforce by having garnishments issued and served on the tenants on Mrs. Mitchell's farms.

There was testimony tending to establish appellant's defense that early in October, 1930, Mrs. Mitchell applied to Judge W. H. Cunningham, the president of the bank, for additional time to pay her debt and for the garnishments to be withdrawn, thus releasing her rents; that Judge Cunningham refused this request. Afterwards, acting upon the advice of one of the board of directors, she applied to Mrs. Lane, the bank's principal stockholder, for relief, making of her the same request

as that made to Judge Cunningham and promising if this was granted that she would pay $1,000 on the judgment debt, and execute her note due one year after date for the balance. Mrs. Lane accepted this proposition and in furtherance of the agreement, on October 30th, Mrs. Mitchell paid the bank $1,000 and executed her note for $1,786, balance of debt, due a year after date. About a week after the execution and delivery of the note, Judge Cunningham informed Mrs. Mitchell that the note was not acceptable without security and suggested that she procure the signature of the appellant who is her daughter. Mrs. Mitchell gave the bank's cashier the appellant's address and the note was sent to her for her signature. The appellant signed the note in Little Rock, and nothing was paid her for this act.

On behalf of the appellee there was evidence which tended to contradict that of appellant and was to the effect that, when Mrs. Mitchell secured the promise of extension, it was with the understanding that the appellant's name was to be secured on the note; that this was desired because she was the owner of the farms, Mrs. Mitchell being the life tenant; that, with this understanding, the signature of appellant was made on the note, and that it was not to become, and did not become, valid until appellant signed the same, nor were the garnishments released until this had been done.

This evidence raised a question of fact which was resolved by the court against the appellant, which found the extension of time for payment and the withdrawal of the garnishments a sufficient consideration to bind the surety.

It is contended that the preponderance of the testimony rested with the appellant. This is a question we are not permitted to determine. *Turner* v. *Coats*, 148 Ark. 654, 227 S. W. 982. The weight of the evidence and credibility of the witnesses were for the sole determination of the court, which, as we have many times said, has all the finality as the verdict of a jury. *Dixon-Rogers Trading Co.* v. *Scroggins*, 136 Ark. 33, 206 S. W. 49; *Dyer* v. *Continental Jewelry Co.*, 178 Ark. 1199, 10

S. W. (2d) 1. It may be conceded that appellant received no direct benefit for signing the note, but this is not essential to her liability, as it is sufficient if the primary debtor received such. The extension of time for payment and the release of her rents were benefits to Mrs. Mitchell, and the court correctly held that such bound the appellant. *Kissire* v. *Plunkett-Jarrell Gro. Co.,* 103 Ark. 473, 145 S. W. 567.

On the second defense, it is sufficient to say that appellant, by a stipulation in the note sued on, expressly consented in advance that time of payment might be extended without notice to her. This was a valid stipulation and her liability is unaltered by granting the extension. *Ward* v. *Nutt,* 120 Ark. 445, 179 S. W. 667.

It may also be observed that the court found there had been, in fact, no extension in that the renewal note, by which the extension was to be effected, had never been accepted by the bank. It is undisputed that a representative of the bank procured by Mrs. Mitchell the execution of a note renewing the note sued on extending the payment one year past the due date, that this renewal note was signed before the maturity of the former obligation, and the interest accrued and that not yet earned was included in, and made up, the sum of the renewal note. A just inference may be drawn, however, from the testimony that the payee bank was not then the owner and holder of the note, but that it was held by some bank in St. Louis, that before the new arrangement could be concluded the payee bank failed, and that afterward the renewal note was returned to, and accepted by, Mrs. Mitchell. We are of the opinion that the trial court was not without some evidence of a substantial nature to support its conclusion in this regard.

On the whole case we find no error, and the judgment is therefore affirmed.

BANKS *v.* STATE.

Crim. 3842

Opinion delivered October 9, 1933.

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

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

JOHNSON, C. J. On February 14, 1933, appellant was indicted by the grand jury of Pulaski County for the crime of murder in the first degree for the killing of Mark Goodson. Thereafter he was duly placed upon trial in the circuit court and was found guilty by a jury, and the court pronounced a sentence of electrocution against him. This appeal is prosecuted to reverse that judgment.

The first alleged error is that the trial court erred, to the prejudice of the appellant, by the admission of incompetent testimony. This alleged error is predicated upon the testimony of Mrs. Ethel Jerome May. To fully comprehend this alleged error, it is necessary to make a concise statement of the facts as given by this witness, which is as follows:

Mrs. May testified that on the third day of February, 1933, she, in company with Mark Goodson, was in the woods about a quarter of a mile off the pavement on Park Hill, in Pulaski County; that they were seated upon a lap robe spread upon the ground; that after they had been seated about five or ten minutes, and at about 5:30

P. M., appellant approached the place where they were seated carrying a double-barreled shotgun. That appellant ordered them to accompany him, and, as they arose, he shot the gun between them and some of the shot hit her in the leg. Appellant then marched them through the woods for about a mile, then ordered Mr. Goodson to remove his clothing. After Mr. Goodson had removed all of his clothing, including his trousers, and had given them to appellant, appellant then told him to hold up his hands, and, while in this position, appellant fired two shots through the body of Mr. Goodson at a distance of about ten feet. Appellant then demanded that witness accompany him, and said that he was not going to hurt her. He took her down the hill about fifty yards and ordered her to lie down upon the ground. When she refused, he attacked her with a small pocket knife and forced her to have sexual intercourse with him. When witness kept screaming, appellant ordered her to hush and then stabbed her about 18 times with a small pocket knife. Appellant then struck her over the head and she lost consciousness.

It is earnestly insisted on behalf of appellant that the trial court erred in permitting the witness, Mrs. May, to testify that appellant forced her to have sexual intercourse with him, because, it is said, appellant was not on trial for the crime of rape. The general rule is that admissions of testimony showing the commission of other crimes having no relation to the crime charged is error, but this general rule has no application to the facts of this case. It is always entirely proper for the State to show, if it can, motive for the commission of the crime, and the evidence of Mrs. May, in reference to appellant forcing her to have sexual intercourse with him was entirely proper for this purpose. We understand the rule to be that the fact that evidence introduced to prove the motive of the crime for which the accused is on trial points him out as guilty of an independent and totally dissimilar offense is not sufficient grounds upon which to reject the testimony. Section 154, Underhill on Criminal Evidence, 3d ed.

In the case of *Marsh* v. *State,* 183 Ark. 1, 34 S. W. (2d) 767, it was insisted that the trial court erred in permitting the State to show that appellant Marsh was operating a still, which was an independent crime, but this court disposed of the contention by saying. "In prosecution for murder, evidence that defendant operated a still was admissible where it tended to show a motive for shooting the deceased."

Moreover, the testimony of Mrs. May was competent for another reason, that is to say, if several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense, which is itself a detail of the whole criminal scheme. Thus, where two or more persons are assaulted at or about the same time and place, it will be permitted to prove all the assaults on the trial of one indictment for any one of them. For the reason that all the assaults are merely parts of one transaction and to prove one necessitates proof of all of them. Section 152, Underhill on Criminal Evidence, 3d ed.

It is insisted on behalf of appellant that the views herein expressed are in conflict with *Williams* v. *State,* 183 Ark. 870, 39 S. W. (2d) 295. The instant case is clearly distinguishable from that. In the Williams case just cited, the State was permitted to show that before appellant came to Little Rock he had been confined in the penitentiary in Oklahoma; that he had come to Little Rock in a stolen car; that after reaching Little Rock he had robbed a drug store and was arrested and confined in jail therefor; that he escaped the jail, and in doing so stole the pistol with which he later killed the officer who attempted to arrest him while robbing a man named Chance. This court said: "There is no connection between these various crimes and the killing of McDermott, and the only and the necessary effect of this testimony was to show the desperate character of appellant as a confirmed criminal."

We adhere to the pronouncement in *Williams* v. *State,* cited *supra.* In the instant case, however, the murder of Goodson and the assault upon Mrs. May were a part of one and the same transaction. Since this is true, the testimony was competent and admissible.

It is next insisted on behalf of appellant that the trial court erred in permitting the prosecuting attorney to argue to the jury that appellant had ravished Mrs. May. Necessarily, this alleged error has been disposed of heretofore. Since it has been determined that the testimony of Mrs. May, in reference to being ravished by appellant, is found to be competent and admissible, it necessarily follows that the prosecuting attorney had a lawful right to argue it to the jury.

Again, it is insisted that the trial court erred in holding Charles Pumphrey a competent juror to serve on this case. This contention arose under the following circumstances: Charles Pumphrey admitted on examination as a prospective juror that he had served as a juror at a murder trial in the same court within 60 days last past. Services as a special juror within two years does not disqualify a juror to serve on the regular panel. This question was decided adversely to appellant's contention in the case of *Hampton* v. *State, ante* p. 869.

Lastly, it is insisted that the court erred in refusing to give to the jury appellant's requested instruction, No. 10. We have explored the transcript to determine the instructions, given and refused, and find that the requested instruction was fully covered by other instructions given in the case. Therefore it was not prejudicial error to refuse this instruction.

Other alleged errors are argued by appellant, but we deem them not of sufficient importance to discuss in this opinion.

No error appearing, the judgment is affirmed.

BEESON *v.* BYARS.

4-3125

Opinion delivered October 9, 1933.

H. L. Veazey, for appellant.

Haynie, Parks & Westfall, for appellee.

SMITH, J. Appellee brought this suit to reform and foreclose a mortgage executed to him by John Beeson on February 21, 1931, to secure a note of even date for $200, which mortgage was recorded on May 30, 1931. It was alleged that the property mortgaged was the east half of northwest quarter of section 19, township 11 south, range 14 west, whereas, by mutual mistake, the property was described as east half of northwest quarter of section 10, township 11 south, range 14 west.

The complaint alleged that the mortgagor died in June, 1931, leaving as his sole and only heir a son named R. L. Beeson, to whom, on or about May 2, 1931, the said John Beeson had executed what purports to be a warranty deed, and had thereby attempted to convey the mortgaged property, by a correct description. It was alleged that this deed was without consideration, and had been executed for the fraudulent purpose of preventing the plaintiff from collecting his debt through foreclosure of the mortgage.

An answer was filed by the mortgagor's son and sole heir, which denied the existence of the debt and the validity of the mortgage, and asserted title under the deed to the defendant from his father.

The answer further alleged that the land described was the homestead of John Beeson, and was not sub-

ject to the claims of creditors, and that the plaintiff therefore had no right to raise the question that the deed to defendant was without consideration.

The testimony established the debt and the mistake in the description in the mortgage so clearly as to preclude any controversy over that fact, and it was established with equal certainty that the deed from the mortgagor to his son was without consideration, and that John Beeson, the grantor in the deed, was insolvent when the deed was made and at the time of his death.

The land in question had been for many years the homestead of John Beeson, but his son had moved away and his wife had died, and for some years John Beeson had lived alone on the land. It is insisted—and correctly so—that John Beeson's homestead right was not lost by the removal of his son from the homestead and the death of Mrs. Beeson. It was held, in the case of *Baldwin* v. *Thomas,* 71 Ark. 206, 72 S. W. 53, that one who has acquired a right of homestead as head of a family will not lose such right by subsequent loss of the family if he retains his residence thereon. See also *Butt* v. *Walker,* 177 Ark. 371, 6 S. W. (2d) 301.

It is therefore insisted that, as the plaintiff had no mortgage of record describing the land in controversy when defendant received his deed from his father, the plaintiff cannot raise the question whether there was any consideration for the deed, for the reason that the land was John Beeson's homestead, and no unsecured creditor could complain of any disposition which John Beeson made of his homestead.

The land ceased to be the homestead of John Beeson on November 19, 1929, at which time he sold and conveyed it to D. C. Cathey. Notes given by Cathey for the purchase money were not paid, and in January, 1931, Cathey reconveyed the land to John Beeson. The testimony establishes the fact very clearly that, when Beeson sold the land to Cathey, he surrendered possession thereof and removed therefrom, and went to the home of D. C. Cathey about 2½ miles away, in fact he had removed from the farm upon the death of his wife and after

living with D. C. and Jack Cathey for something over two years he returned to live with Arthur Clements on the land in suit. Clements testified that he was in possession of the land for two years, the first year as the tenant of D. C. Cathey and the second year as the tenant of John Beeson, Cathey having reconveyed the land to Beeson, as above stated.

Upon these facts the court found that the deed from John Beeson to his son was void, as having been executed in fraud of creditors, and, upon that finding, reformed the mortgage, and decreed its foreclosure.

The mortgage was, of course, good between the parties, and the testimony required its reformation. This being true, the mortgagee had the right to litigate the question whether the land was John Beeson's homestead when the deed was executed to his son, and whether the deed was fraudulent, and we think the testimony shows that the land was not John Beeson's homestead at the time of his death, and that his conveyance thereof to his son was fraudulent and void.

While, as we have said, John Beeson did not lose his right of homestead because he had been left without family, he did lose his homestead right when he sold and surrendered possession thereof. *Wooten* v. *Farmers' & Merchants' Bank,* 158 Ark. 179, 249 S. W. 569; *Gray* v. *Bank of Hartford,* 137 Ark. 232, 208 S. W. 302.

Having abandoned the homestead, that right was not reacquired when Beeson returned to the land to live in the home of his tenant. To reimpress the homestead right upon the land it was essential that Beeson be then a married man or the head of a family. Section 3, article 9, Constitution.

In other words, while Beeson might have retained his homestead right, even after he had ceased to be a married man or the head of a family, yet, when he abandoned his homestead right by the sale thereof and the removal therefrom, he could not thereafter, without being a married man or the head of a family, reacquire that right.

The decree of the court appears therefore to be correct, and it is affirmed.

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY *v.* SIMS.

4-3105

Opinion delivered October 9, 1933.

King, Mahaffey, Wheeler & Bryson, for appellant.

Jones & Jones, for appellee.

HUMPHREYS, J. This suit was brought in the circuit court of Miller County by appellee, the sole beneficiary under an insurance policy No. D-8,509,279 and the sole heir of her mother, Alice Jackson, to whom the policy was issued and delivered by appellant. The policy undertook for payment of premiums to pay the insured $66 on the anniversary of the policy next after the insured became 69 years of age; and, in case of permanent disability prior thereto due to sickness, to pay the insured $6 a week, limiting the number of days to 182 days during any twelve consecutive months. It was alleged in the complaint that the insured became permanently disabled from sickness covered by the policy the latter

part of the year 1931, and remained so until her death on May 3, 1932; that appellant ceased to pay the insured her weekly indemnity on and after December 9, 1931, thereby, on said date, breaching its contract with her. That appellant denied all liability under said policy. The prayer of the complaint was for damages in gross, amounting to $2,678, with a statutory penalty thereon of 12 per cent. and a reasonable attorney's fee.

Appellant filed an answer denying the material allegations of the complaint and alleging that the insured became disabled on account of a venereal disease not covered by the policy.

The cause proceeded to a hearing upon the pleadings and testimony, at the conclusion of which the court submitted the cause to the jury upon one issue of fact, the theory being that all other allegations in the complaint had been established by undisputed testimony. The issue of fact submitted to the jury will be reflected by the instruction given by the court, which is as follows:

"If you find from a preponderance of the evidence in this case that the insured was suffering from a venereal disease, to-wit, syphilis, and that her sickness and subsequent death resulted from syphilis, you will find for the defendant; if you fail so to find, your verdict will be for plaintiff in the amount sued for."

The jury found the issue of fact submitted to them against appellant, and returned a verdict against it for $2,999.36, including the statutory penalty of 12 per cent. A judgment in accordance with the verdict was rendered in favor of appellee, and an attorney's fee of $450 was included, from which is this appeal.

The appellant is bound by the verdict of the jury unless the trial court erred in the admission of testimony excepted to or in refusing to submit some other issue involved about which there was a dispute in the testimony.

Appellant contends that the court erred in admitting in evidence the Carlisle Mortality Tables over its objection and exception. It is urged that there was no issue of the expectancy of Alice Jackson's life in this case

and that the table of expectancy of life was therefore inadmissible. The cause of action accrued to Alice Jackson on the date appellant breached the contract, and at that time she had an expectancy of life. This suit survived to Alice Jackson's only heir, and, by this survivorship, appellee, the heir, acquired all the rights of her mother which existed at the time the action accrued to her mother. This court said in the case of *National Life & Accident Insurance Company* v. *Whitfield,* 186 Ark. 198: "The breach of 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. 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."

This court, in the case of *Arkansas Midland Railroad Co.* v. *Griffith,* 63 Ark. 491, 39 S. W. 550, said that: "Evidence of disease or of ill health or of hazardous employment may impair or destroy probative effect of tables of expectancy of life, but it does not make them inadmissible."

No error was committed in admitting the mortality tables, but reversible error was committed in accepting them by the court as conclusive. At the time of the breach of the contract, Alice Jackson was sick, and her condition would have entered into her expectancy of life. At the time of the breach of the contract, when her right of action accrued, her expectancy of life was necessarily in dispute and to be ascertained from all the evidence and circumstances surrounding her condition of health. This issue of fact being in dispute, it was a question for the jury and not the court to determine.

It is also contended that the statutory penalty has no application to suits for breach of contract. This court

has held otherwise in the case of *Sun Life Insurance Company* v. *Coker, ante* p. 602, and cases cited therein.

On account of the error indicated the judgment is reversed, and the cause remanded for a new trial.

STOKES *v.* HOME LIFE INSURANCE COMPANY.

4-3126

Opinion delivered October 9, 1933.

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

Mann & Mann and *Ingram & Moher*, for appellee.

HUMPHREYS, J. The only question presented by this appeal is whether the Central States Life Insurance Company, assignee of the Home Life Insurance Company, has a right to set off its deposit of $11,000 in the Merchants' & Planters' Bank of Humphrey against the amount of $1,884.46, which it owed the bank on the 27th day of April, 1932, when this suit was instituted by E. B. Stokes as trustee for Cora Belle Watson, and said bank upon a life insurance policy issued by the Home Life Insurance Company on June 1, 1930, to said Stokes as trustee aforesaid upon the life of J. T. Watson. The life insurance policy was for $5,000, and at the time J. T. Watson was indebted to the bank in an amount equal to about one-half the face value thereof. The policy was for the bank's protection to the extent of said indebtedness.

On November 17, 1930, said bank became insolvent, and the Bank Commissioner took possession of its assets and proceeded to liquidate same. Several months after the failure of said bank, the Central States Life Insurance Company acquired the assets of the Home Life Insurance Company and assumed the payment of all its death claims. Among the assets which the Central States Life Insurance Company acquired was the deposit of $11,000 which the Home Life Insurance Company had in said bank on the date the bank became insolvent, for which amount the Central States Life Insurance Company subsequently presented a claim to the Bank Commissioner. Subsequent to the insolvency of the bank and the acquisition of the $11,000 deposit by the Central States Life Insurance Company, to-wit, on June 9, 1931, John T. Watson died, and the insurance companies became liable on the policy to the trustee aforesaid for Mrs. Watson, and said bank according to their respective interests therein. At the time John T. Watson died, he owed the bank $1,884.46. The insurance companies admitted their indebtedness to the trustee for the benefit of Mrs. Watson and paid her, but refused to pay the trustee $1,884.46 for the benefit of said bank or the general depositors thereof, claiming they were entitled to set off the amount due the bank as against the deposit of $11,000.

It will be observed from the facts detailed above that, on the date of the failure of said bank, the insurance companies were not indebted to it in any sum. At that time the Central States Life Insurance Company was not either a debtor or creditor of the bank, and the Home Life Insurance Company was a creditor, but not a debtor of the bank. No liability existed under the insurance policy, and could not exist as long as John T. Watson continued to live. The law of set-off in this State between defunct banks and their creditors applies only to concurrent liabilities on the date of the insolvency of such bank. A contingent liability cannot be set off against an uncontingent liability. The claims to be set off must be mutual, certain and concurrent. *U. S.*

Fidelity & Guaranty Co. v. *Maxwell,* 152 Ark. 64, 237 S. W. 708; *Sloss* v. *Taylor,* 182 Ark. 1031, 34 S. W. (2d) 231; *Taylor* v. *Cox,* 183 Ark. 1117, 40 S. W. (2d) 444.

The trial court allowed the set-off, and in doing so erred. The decree is therefore reversed, and the cause is remanded with directions to deny the set-off, and to allow appellant 12 per cent. penalty on $1,884.46 and an attorney's fee of $200.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY *v.* ANDERSON.

4-3106

Opinion delivered October 9, 1933.

George W. Emerson, for appellant.

Harper E. Harb and *Paul L. Barnard,* for appellee.

KIRBY, J. Appellee brought suit against appellant company on a sick and accident insurance policy to recover $500, penalty and attorney's fee, on a policy issued to her husband, Ed Anderson, on September 22, 1930, alleging that Anderson died on October 3, 1930, from ptomaine poisoning as the result of having accidentally eaten some spoiled food a few days before.

The policy provides in the second paragraph of the first page that Anderson was insured from the date thereof (September 22, 1930) until 12 o'clock noon the first day of November, 1930, and for such further periods, etc.

The insured died October 3, 1930, which was after the date of issuance of the policy and before the date on which the face of the policy recites the next premium would be due.

The answer admitted the issuance of the policy; denied the other material allegations of the complaint, and pleaded special defenses that neither the insured nor the beneficiary had paid any premiums whatever on the policy, that no immediate notice in writing was given to the defendant at its home office in Chicago of the illness of the insured, and that no such notice was given at all as required by the policy; that no proofs of illness or death were made to the company; denied that death by accidental poisoning was covered by the policy or contract of insurance; and alleged that the policy required a strict compliance with its terms so far as giving notice was concerned; denied all liability under the policy.

The policy provides in paragraph C for the payment of $500 for accidental death and in paragraph A insures for bodily injuries effected during the life of this policy solely through external, violent and accidental means. And in paragraph F it classifies injuries as follows: "(1) Injuries, fatal or non-fatal, which produce immediate, total and continuous disability from date of accident, or which make a visible contusion or wound on the exterior of the body. (2) Disability caused partly by

injury and partly by disease shall be classified as disease and paid for as such."

Appellee relies on the fact that the injuries which the insured, Ed Anderson, received produced immediate, total and continuous disability from the date of the accident, and in doing so should not be classed as a disease.

The court instructed the jury, giving over appellant's objection its amended instruction No. 2. The jury returned a verdict against appellant, and judgment was rendered for the amount of the policy, penalty and $150 attorney's fees to be taxed as costs, from which comes this appeal.

Appellant insists that the court erred in the giving and refusal of certain instructions, in the admission of the certificate of the State Health Department as to the cause of death of the insured, and that there was no liability under the policy which it alleged had been wrongfully delivered to the insured without the payment of the first premium.

It is admitted that the policy was delivered to the insured by appellant's agent, although the agent reported that he did not receive the payment of the first premium, and the general agent testified also that such first premium had not been paid, still two witnesses testified that they were present when the policy was delivered, and that they saw the insured pay the money to the agent upon its delivery. The agent delivering the policy testified, as did also the general agent, that policies were sometimes delivered without payment of the first premium by the insured, the agent taking a chance upon the collection of the premium. It is admitted, however, that the policy was delivered to the insured, and such delivery is *prima facie* evidence of the payment of the first premium, and further the insured's mere possession thereof is *prima facie* evidence that the first premium has been paid. 32 C. J., § 355, p. 1204; *Mutual Life Ins. Co.* v. *Parrish,* 66 Ark. 612, 52 S. W. 438. Such *prima facie* case may be overcome, however, but it was not done here by the agent delivering the policy, who testified that the premium was not in fact paid, since two witnesses testified that they saw the insured pay the premium money

when said policy was delivered. Neither does the testimony of the general agent, Mr. Naylor, overcome such *prima facie* case, as he stated that the policy was delivered and the company took a chance on the collection where they were delivered on credit. The delivery of the policy without condition without exacting payment of the premium in cash raised the presumption that a short credit was intended. *American Employers' Liability Ins. Co.* v. *Fordyce,* 62 Ark. 562, 36 S. W. 1051.

The presumption that the first premium was paid upon the policy is an ordinary presumption of fact and can be rebutted. The jury decides such questions of facts in the case, and the instruction No. 2, complained of, properly left this for determination by it, and, the jury having found against appellant on this point, its finding will not be disturbed here.

Appellant next insists that the ptomaine poisoning from eating unsound food does not constitute a death solely by external, violent and accidental means within the meaning of the policy, and cites *Martin* v. *Inter-State Business Men's Acc. Ass'n,* 187 Iowa 869, 174 N. W. 577, as authority on this point, but such case appears to be contrary to the weight of authority. It is stated in 5 Couch Enc. of Insurance Law, § 1141, p. 4003: "There are also numerous cases of death or disability incident to the partaking of food or drink and resulting either from poisoning or from disease. In the case of death or disability resulting from the mechanical action of food or drink, the cases are largely agreed that it was by accident or the result of accidental means. And the authorities agree that death directly from poisoning following the unintentional eating of bad but apparently wholesome food is effected by accident, or is the result of accidental means, unless causes of such a character are expressly excepted." See also 1 C. J., § 78, p. 431, and note 14 thereto, and Vance on Insurance, § 232, p. 566.

It is contended here that under the provisions of the policy there must be a visible wound or contusion on the body in order to recover thereunder for accidental death, but paragraph F provides if the injury causes immediate, total and continuous disability, it is classed

as an accident by the policy, or if there is a wound or contusion, it is classed as an accident and not as a disease, etc. The insured here was shown to have gone to his lunch in a cafe across the street from where he stopped with the car in which he was riding with another man, who saw him eating in the cafe, and that he felt sick shortly and had to be taken home, was vomiting violently and almost continuously, and was continuously disabled from then until his death occurred, which was pronounced by the doctor as from the effects of ptomaine poisoning. This places his death within the provisions of the policy, without regard to whether there was any visible contusion or wound on the exterior of the body. The disjunctive conjunction "or" separates the sentence, and either of the two causes provided would be sufficient to bring the insured within the terms of the policy for accidental death, both not being required. *U. S. Casualty Co.* v. *Griffis,* 186 Ind. 126, 114 N. E. 83, L. R. A. 1917E, 485.

The testimony shows appellee notified the agent who delivered the policy, Collins, and talked with him about the death of the insured and the payment of the policy, and that he told her that Mr. Naylor was the agent of the company that paid the claims and to see him. That she saw Mr. Naylor, and he denied that there was any liability on the part of the company to the insured, saying he had not been a member long enough. This was a denial of liability and a waiver of written proof of loss, and there was no error in instruction No. 5, objected to, telling the jury that, if they found that defendant refused to pay anything on the policy for the reason that the premium had not been paid, then it could find that the company was estopped from objecting that the proofs of loss were not furnished in the proper time. *Inter-Ocean Casualty Co.* v. *Copeland,* 184 Ark. 648, 43 S. W. (2d) 65; *Old American Ins. Co.* v. *Wexman,* 160 Ark. 571, 255 S. W. 6.

Neither was error committed in allowing the introduction in testimony of the copy of the certificate of death of the insured recorded in the State Health Department. Such certificates are required to be made and filed in that office, and the statute provides that copies thereof

duly certified should be received in evidence in any court of the State with like effect as the original thereof. Act 283 of 1921, p. 308; Castle's Supp. 1927, § 4133a. See also *Marsh* v. *Erwin,* 155 Ark. 371, 244 S. W. 441; 22 C. J., § 914, p. 801.

It is finally insisted that the court erred in assessing the 12 per cent. penalty and $150 attorney's fee. The plaintiff moved the court for an order assessing the statutory penalty and a reasonable attorney's fee, and the record recites that the court, being well and sufficiently advised, doth grant said motion and doth fix $150 as a reasonable attorney's fee, same to be taxed as costs. This court has concluded $100 would be a reasonable attorney's fee under the circumstances, and that the judgment should be modified accordingly, reducing the amount to that sum, and, as modified, it will be affirmed.

ATLAS LIFE INSURANCE COMPANY *v.* WELLS.

4-3123

Opinion delivered October 9, 1933.

H. M. Barney, for appellant.

James D. Head, for appellee.

MEHAFFY, J. On July 9, 1921, the appellant, Atlas Life Insurance Company of Tulsa, Oklahoma, issued to the appellee, Billie D. Wells, its policy insuring the life

of appellee for $5,000. The policy contained the following provisions:

"And the company agrees to pay to the insured fifty dollars monthly during the lifetime of the insured, if the insured becomes wholly and permanently disabled, before age 60, and to waive the payment of premiums thereafter becoming due, subject to all the terms and conditions contained in section A hereof:

"Section A. Permanent and Total Disability. After one full 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 and before having attained the age of sixty years become wholly disabled by bodily injuries or disease, not occasioned by military or naval service or participation in aeronautic or submarine expeditions or operations, and will be presumably thereby permanently, continuously and wholly prevented from engaging in any occupation or employment whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days, then,

"1. Waiver of Premium. Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will on each anniversary waive payment of the premium for the ensuing insurance year."

"2. Life Income of Insured. Six months after the anniversary of the policy next succeeding the receipt of such proof, the company will begin to pay to the insured the monthly income stated on the first page of this policy, which income will be continued during the lifetime and continued disability of the insured. Interest on any indebtedness on this policy shall be deducted from each monthly income payment. The premiums so waived and the disability income so paid shall not be deducted from the amount payable at death nor shall they impair the loan or surrender values, if any, under this policy."

The complaint in this suit was filed on August 13, 1932. It was alleged that on February 17, 1932, when the policy was in force and effect, and before appellee reached the age of sixty years, and after one full annual

premium had been paid thereon, and when there was no default in the payment of any subsequent premium due on said policy, appellee was wholly and permanently disabled by bodily injuries described in the complaint, and that by said injuries he was permanently, continuously and wholly prevented from engaging in any occupation whatsoever for remuneration, profit or gain, and such disability has existed more than sixty days; that the injuries are permanent and incurable. It was alleged that due proof of loss was furnished the appellant on July 9, 1932.

Appellant filed a demurrer alleging that the complaint failed to state a cause of action, and that the complaint shows upon its face that no cause of action has accrued, and also that the complaint shows upon its face that suit has been prematurely brought. The demurrer was overruled, and appellant excepted.

The appellant then filed answer denying the material allegations in the complaint, and pleading the provisions of the policy above set out. The appellant also filed a motion to dismiss because said suit had been prematurely brought.

There was a verdict and judgment in favor of appellee for $50 per month from the date of injury, with six per cent. interest, penalty and attorney's fees. A motion for new trial was filed and overruled, and the case is here on appeal.

The evidence as to appellee's total disability being in conflict, it was a question of fact for the jury, and the jury's verdict was against the appellant. There was substantial evidence to support the verdict. The jury's finding of fact on conflicting evidence, if there is any substantial evidence to support the verdict, will not be disturbed by this court.

In numerous cases decided by this court, we have discussed the question of total disability and reviewed the authorities, and we do not deem it necessary to review them here. Among the cases discussing this question and reviewing the authorities are: *Missouri State Life Ins. Co.* v. *Holt,* 186 Ark. 672, 55 S. W. (2d) 788; *Mutual Benefit Health & Acc. Ass'n* v. *Bird,* 185 Ark. 445, 47 S. W.

(2d) 812; *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 518, 54 S. W. (2d) 407; *Guardian Life Ins. Co.* v. *Johnson,* 186 Ark. 1019, 57 S. W. (2d) 555; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 61, 56 S. W. (2d) 433.

Our conclusion is that there was ample evidence to support the finding of the jury as to total disability.

This is not a suit for a breach of contract, but it is a suit based on the contract. It is insisted by the appellant that the complaint shows on its face that it was prematurely brought.

The complaint was filed August 13, 1932, and appellee based his cause of action on the policy, alleging that on February 17, 1932, he received the injuries that rendered him permanently, continuously and wholly disabled. Appellee alleged that on July 9, 1932, he furnished the appellant proof of loss. It will be observed that the proof of loss was furnished on July 9, and the suit was begun August 13, 1932. The policy provides: "Six months after the anniversary of the policy next succeeding the receipt of such proof, the company will begin to pay to the insured the monthly income stated on the first page of this policy, which income will be continued during the lifetime and continued disability of the insured. Interest on any indebtedness on this policy shall be deducted from each monthly income payment. The premiums so waived and the disability income so paid shall not be deducted from the amount payable at death nor shall they impair the loan or surrender values, if any, under this policy."

The promise of the insurance company was to pay, beginning six months after the anniversary of the policy next succeeding the receipt of proof. No cause of action therefore accrued until the six months expired, and this suit was begun less than two months after the proof of loss was made. It was therefore prematurely brought.

"By the weight of authority, it is ground for abatement, that the action was prematurely brought, even

though the right of action has matured before trial; as, in most jurisdictions, where an action is brought before maturity on a note or other debt; where the time for payment of a note or other debt has been extended by agreement, and an action is brought before expiration of the period of the extension; where an action is brought before the happening of an event upon the happening of which the right to commence the action is to accrue; and in many other like cases." 1 C. J., 107, 108.

"Appellee raised in the pleading her objection that the action was prematurely brought; and, if the evidence sustained the plea, the action should have been abated, even though the right of action had matured before the trial." *Jones* v. *Dyer,* 92 Ark. 460, 123 S. W. 757; *Ferguson* v. *Carr,* 85 Ark. 246, 107 S. W. 1177; *Rogers* v. *Wise,* 106 Ark. 310, 153 S. W. 253.

"Where the policy provided that the loss should not be payable until 60 days after satisfactory proofs of loss were received, and the company objected to proofs of loss for specific valid reasons, and the insured furnished supplemental proofs, a suit brought 49 days after the supplemental proofs were furnished was premature." Cooley's Briefs on Insurance, vol. 7, p. 6782; *Marino* v. *Hartford Fire Ins. Co.,* 227 Penn. 220, 75 Atl. 1037.

It is contended by the appellant that the policy had lapsed, and that therefore no cause of action existed. There was no premium due either at the time of the injury or at the time proof of loss was made.

Liability attached when the disability occurred and proof of loss was made. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335.

The rights of the parties had become fixed at a time no premium was due. While the cause of action had not accrued, yet the liability existed, and all premiums that became due after the time fixed for payment under the disability clause in the policy are, by the express terms of the policy, waived, and are not to be deducted in any settlement. Premiums that became due after the liability attached, but before the time fixed in the policy for

a waiver of the premiums, are not waived, and, of course, are to be deducted, if they have not been paid.

Our conclusion is that the only error in the case is that it was prematurely brought, and for that reason it must be reversed and remanded with directions to grant the motion to abate and dismiss the case without prejudice.

SMITH and MCHANEY, JJ., concur.

NEW YORK LIFE INSURANCE COMPANY *v.* FARRELL.

4-3128.

Opinion delivered October 9, 1933.

Louis H. Cooke and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

W. W. Sharp and *Lee & Moore,* for appellee.

MEHAFFY, J. In June, 1919, the New York Life Insurance Company issued to the appellee its policy No. 6,513,376 in the amount of $5,000, and also its policy No.

6,513,377 for the same amount, and each policy provided that, should appellee become totally and permanently disabled before reaching the age of sixty years, it would waive the payment of premiums thereafter falling due, and pay to the appellee one-tenth of the face amount of said policies annually during his lifetime. This suit is brought to recover under the total disability clause of these policies.

It was alleged in the complaint that in September, 1922, appellee became totally and permanently disabled. Suit was for the sum of $3,000 on each policy.

The appellant answered denying the allegations of the complaint, and pleading the following provisions of the policies as a defense: "Whenever the company receives due proof, before default in the payment of premiums, that the insured, before the anniversary of the policy on which the insured's age at nearest birthday is 60 years and subsequent to the delivery hereof, has become wholly disabled by bodily injury or disease, so that he is and will be, presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days, the permanent loss of the sight of both eyes, or the severance of both hands or of both feet, or of one entire hand and one entire foot, to be considered a total and permanent disability without prejudice to other causes of disability, then

"1. Waiver of Premium.—Commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will on each anniversary waive payment of the premium for the ensuing insurance year, and, in any settlement of the policy, the company will not deduct the premiums so waived. The loan and surrender values provided for under sections 3 and 4 shall be calculated on the basis employed in said sections, the same as if the waived premiums had been paid as they became due.

"2. Life Income to Insured.—One year after the anniversary of the policy next succeeding the receipt of such proof, the company will pay the insured a sum

equal to one-tenth of the face of the policy and a like sum on each anniversary thereafter during the life time and continued disability of the insured. Such income payments shall not reduce the sum payable in any settlement of the policy. The policy must be returned to the company for indorsement thereon of each income payment. If there be any indebtedness on the policy, the interest thereon may be deducted from each income payment."

The appellant also stated that appellee did not claim benefits under said policies, and did not make proof of his alleged disability until November, 1931.

The court, on its own motion, for the purpose of trial only, consolidated the two cases, a separate suit having been brought on each policy. After the court's order consolidating the cases, appellant filed petition and bond for removal to the federal court, which petition was overruled, and appellant excepted.

There was a trial by jury and a verdict and judgment in each case for $3,000. 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 petition for removal to the federal court. There were two separate suits, each one for $3,000. The court, without the suggestion of either party, but on its own motion, for the purpose of trial only, consolidated the two cases. That meant nothing more than the taking of evidence in the two cases at the same time. There was no consolidation for any other purpose, and there was a separate verdict, and separate judgment in each case.

This question was settled against the contention of the appellant in the case of *St. L. S. F. R. Co.* v. *Oxford,* 174 Ark. 966, 298 S. W. 207. Appellant calls attention, however, to the case of *Marshall* v. *Holmes,* 141 U. S. 589, 12 S. Ct. 62. That case has no application, because it was a single suit by the plaintiff against the defendant to set aside several judgments, and to restrain parties from executing the judgments. Neither judgment was for a sufficient amount to remove it to the Federal court, but the aggregate was more than $3,000. It was a single suit

charging that each and all the judgments were obtained by false testimony and forged documents, and it was in fact a single suit involving more than $3,000.

Appellant also calls attention to the case of *Yates* v. *Whyel Coal Co.*, 221 Fed. 603. In that case the court said: "The requisite jurisdictional amount is controlled, not by State legislation as defendant would have it appear, but by the federal law, and is determined by the aggregate sum for which judgment is sought, and not by the amount named in each cause of action." The plaintiff in that case had pleaded as a single cause of action the entire loss claimed to have been sustained for the several months covered by the contract. While there were several claims against the company, they were all combined in one suit, and the amount in controversy was, of course, the amount claimed in the suit.

The next case relied on by the appellant is *McDaniel* v. *Traylor*, 196 U. S. 415, 25 S. Ct. 369. This was also a suit in Federal court to set aside, as fraudulently obtained, certain judgments which aggregated $3,000, but no one of the judgments was for that amount. Here there was a single suit, and the amount in controversy exceeded $3,000.

The next and only other case relied on by appellants is *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 24 S. Ct. 784. In that case the court said: "The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights." There is nothing in any of the cases relied on by appellant that would justify or authorize a removal to the Federal court.

It is next contended by the appellant that the court erred in refusing to direct a verdict in its favor. It contends that this request should have been granted on account of appellee's unreasonable delay in notifying the appellant of his claim for the total and permanent disability benefits. Numerous authorities are cited, and it is earnestly contended that the delay made it impossible for appellant to make investigation, and determine whether appellee was totally and permanently disabled. None of these authorities are applicable here because the policy itself expressly provides that commencing with

the anniversary of the policy next succeeding the receipt of such proof the company will waive, etc. Since there can be no recovery except for claims arising after the proof of loss, whenever proof of loss is made, the company can then investigate, and, under the terms of the policy, it becomes immaterial to determine appellee's condition immediately after the injury, if he is in fact disabled when the proof of loss is made.

This court has frequently decided what constitutes total and permanent disability. Among the cases discussing this question are the following: *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 519; *Guardian Life Ins. Co.* v. *Johnson,* 186 Ark. 1019; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Travelers' Pro. Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 61, 56 S. W. (2d) 433.

As to whether the party is totally and permanently disabled is a question of fact for the jury, and the jury decided this issue against the appellant, and there was ample evidence to support their verdict.

It is next contended by appellant that the verdicts rendered by the jury were excessive. We agree with the appellant in this contention.

The court gave instruction No. 2 requested by the appellee, which reads as follows: "If you find from a preponderance of the testimony that the plaintiff became totally and permanently disabled within the meaning of the policy before he reached the age of sixty years, then he would be entitled to recover the sum of $500 per year, and the annual premium paid, on each of the policies, for that period of time which you find he was disabled, not to exceed the sum of $3,000 on each policy."

This instruction was erroneous and should not have been given. The provisions of the policies are set out above, and each one provides that commencing with the anniversary of the policy next succeeding the receipt of such proof, the company will waive payment, etc.

It is perfectly plain from this provision of the policy that it waives premiums only commencing with the anni-

versary of the policy next after proof of loss is made, and it will be observed from the second paragraph above quoted from the policy that one year after the anniversary of the policy next succeeding proof of loss the company will pay. It was therefore improper to instruct the jury that the payments continued throughout the time of appellee's disability. The provisions of the policy providing for payment are plain and unambiguous. The liability attached when the disability occurred and proof of loss was made. The company, however, did not promise to pay from the time the disability occurred, but from the time fixed in the policy itself.

In construing the provisions of a policy similar to the policies involved here, the Supreme Court of the United States said: "Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnished no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings." *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230.

Appellee calls attention to numerous cases where a recovery was permitted from the date of the disability, but these cases were suits for breach of contract. The case at bar, however, is not a suit for breach of contract, but a suit on the policy, and the policy expressly provides when payments shall begin. The court therefore erred in giving the instruction above quoted, and for this error the case must be reversed.

 [redacted]

All the questions of fact had been determined against the appellant, and there is nothing to be done but to determine the amount that appellee is entitled to recover under the contract.

The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment for the amount found to be due according to the terms of the policies as herein construed.

[redacted]

RIVER VALLEY GAS COMPANY *v.* IMPROVEMENT DISTRICTS NOS. 1 AND 2.

4-3121

Opinion delivered October 9, 1933.

[redacted]

Harry Neelly and *Hardin & Barton,* for appellant.

Cochran & Arnett and *Robert J. White,* for appellee.

MCHANEY, J. This is an appeal from judgments in favor of appellees against appellant for $2,400 and $2,150, respectively. Appellees are street improvement districts in the city of Paris, Arkansas. Each had paved certain streets in said city. After the paving was completed in each district a franchise was granted by the city of Paris to appellant's assignor, and appellant through its contractor constructed a gas distributing system in said city under said franchise. In doing so it made a number of cuts in the pavement in the streets

in each district which were repaired and placed back in as good condition as when originally constructed. These were separate suits to recover the penalty provided in § 5736, Crawford & Moses' Digest, which reads as follows: "Before any street is paved, the commissioners of the improvement district may give notice to waterworks companies, gas companies and other public service corporations, of their intention to pave such street, and shall in such notice fix a reasonable time in which such public service corporations shall make excavations, for the purpose of laying down the service pipes and conduits to the property line; and thereafter it shall be unlawful for such public service corporations, or for any individual to make any excavations in said streets, except upon condition of restoring said streets to their condition before such excavation is made, and paying to the commissioners of said district, or, in case of their discharge, to the city or town, twenty-five dollars for each excavation. The said sum of twenty-five dollars shall be paid before the work of excavation is begun, and, if such work of excavation is begun without payment thereof, the commissioners of the district, or, in case of their discharge, the city or town, may recover the sum of fifty dollars of the party undertaking such excavations, together with all costs and a reasonable attorney's fee to be taxed by the court."

We think this statute has no application to the facts in this case. The object of this statute as clearly indicated by its express language is to give opportunity to utility companies operating in any city to lay service pipes and conduits before constructing the pavement. Manifestly a utility company not operating in the city at the time of the construction of the pavement could not be notified of the laying thereof, and could not lay down any service pipes or conduits before the pavement was constructed. The proof in this case shows that the appellant was not even in existence at the time the streets were laid, and the franchise granted its assignor by the city of Paris was subsequent thereto. The statute is penal in its nature, and must be strictly construed.

The penalties imposed by it must be limited to those that were in existence at the time, and who received notice of the construction of the pavement, and, after having received such notice and having been given a reasonable time in which to make the excavations to lay their service pipes and conduits, ignored such notice and neglected and failed to avail themselves of the opportunity thus given to make their improvements before the laying of the pavement.

The court therefore erred in granting a directed verdict in favor of appellees, and in refusing to grant appellant's request for a directed verdict in its favor at the conclusion of the testimony for appellees. The judgment will be reversed, and the cause dismissed.

MUTUAL LIFE INSURANCE COMPANY *v.* WILCOXON.

4-3129

Opinion delivered October 9, 1933.

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

Fred A. Isgrig and *Harry Robinson,* for appellee.

McHANEY, J. This is a suit by appellee as beneficiary of a life insurance policy issued to her husband, Jesse R. Wilcoxon, against appellant, in which it is alleged that the insured disappeared from Corpus Christi, Texas, on June 11, 1931, "under such circumstances as to warrant the conclusion that he is dead." Mr. Wilcoxon formerly resided at Hamburg, Arkansas, and dur-

ing the boom period he accumulated quite a substantial fortune, selling out his interests in Arkansas, and removing from thence to the Rio Grande Valley in Texas, where he made investments in real estate. For a time after removing to Texas he seemed to prosper, but during the slump in values in 1929 and 1930 he became bankrupt. Not only did he lose his money, but there were large deficiency judgments against him. After the loss of his property he engaged in other business in Harlingen, Texas, without much success, and in June, 1931, he obtained employment as a traveling salesman for a milling company in Oklahoma, and, in order to be near the center of his territory, on June 10, 1931, he and appellee removed to Corpus Christi, Texas, and on the next day he disappeared and has not been heard from since that time.

This suit was brought in April, 1932, and the trial occurred in November following, about a year and a half after the date of his disappearance. The case was tried before a jury which resulted in a verdict and judgment against appellant for the amount of the policy.

For a reversal of the judgment against it, appellant first urges that the evidence was insufficient to support the verdict and judgment, and that the court erred in refusing to direct a verdict in its favor. We cannot sustain this assignment. Of course, there is no presumption that Mr. Wilcoxon is dead either under our statute (§ 4111, Crawford & Moses' Digest) or under the common law. Appellee based her action upon proof of death, independent of any presumption. The proof in this case is wholly circumstantial and is somewhat in conflict as to whether he has been seen since his disappearance on June 11, 1931. Briefly stated, the evidence in this regard is as follows: All the witnesses agree that Mr. Wilcoxon was an honest man and a good citizen; that he was highly esteemed by, held the confidence and the good will of, all who knew him; that he had been prosperous in business, accumulating a substantial fortune in cash, all of which had been lost during the depression and consequent slump in values; that he was a married man,

living happily with his wife, the appellee, to whom he was very much attached, as well as his home, his friends and possessions; that he was a person of good habits and fine traits of character; that, after he lost his fortune, his health was impaired, became nervous, low spirited, and of changed appearance; that he had disappeared once or twice before for short periods of time, and upon his return he was ill and went to bed. He was shown to have bought poison from one drug store and capsules from another, his wife finding two capsules apparently filled with poison in his pocket; that the day before his disappearance his two automobiles were taken away from him by his creditors, leaving him nothing in which to make his territory in the new position he had obtained, and that upon the next day he disappeared. Upon his failure to return, his wife notified the police officials at Corpus Christi, who assisted her in a thorough search at that time. Later, she had 800 posters made giving a description of him as well as printing his picture thereon, and these were widely posted and scattered throughout the State of Texas, being sent to each sheriff in the State of Texas as well as immigration officials on the border between Texas and Mexico. She wrote appellant and other insurance companies who had issued policies on the life of her husband notifying them of her husband's disappearance. She furnished appellant and its investigator with all the information she had, giving it the names of his relatives and their post office addresses. She furnished them with a picture and a specimen of his handwriting and informed the company of every rumor she had heard regarding her husband's existence.

Appellant introduced the testimony of three witnesses tending to show that they had seen Mr. Wilcoxon shortly after the date of his disappearance. The court submitted the question to the jury, and by its verdict it has found that Mr. Wilcoxon is dead. We think the circumstances testified to were sufficient to take the case to the jury.

The facts and circumstances in this case are quite similar to those in *Tisdale* v. *Conn. Mutual Life Ins. Co.*, 26 Iowa 170, 96 Am. Dec. 136. In that case the trial court had instructed the jury that the death of the missing person could not be presumed from an absence of less than seven years, except upon evidence of exposure to danger which probably resulted in death. The Supreme Court of Iowa held the instruction erroneous and said: "Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity and objects in life, which easily control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence."

We therefore hold that the evidence in this case was sufficient to take the case to the jury, and to justify it in finding that Mr. Wilcoxon is dead.

It is finally argued that the court erred in refusing to give appellant's requested instructions Nos. 8 and 8-A. Instruction No. 8 follows: "In attempting to determine whether or not the said Jesse R. Wilcoxon committed suicide, you would be authorized to take into consideration all of the proved facts and circumstances which have been testified to in this case. Before you would be justified in finding that he did commit suicide, there must be evidence from which a conclusion would be reasonable and probable, and not merely speculative or conjectural. If you find from a consideration of all the evidence in this case that it is merely speculative or conjectural as to whether the said Jesse Wilcoxon committed suicide, your verdict should be for the defendant." The concluding sentence in that instruction makes it erroneous, as it requires the jury to find for appellant if it finds that Wilcoxon did not commit suicide, whereas appellant would be liable if it found him to be dead either from natural causes or by murder. Instruction No. 8-A, relating to death by murder, is erroneous in the same respect. The two instructions are identical with the exception that death by murder is substituted for death by suicide.

The question for the jury to determine was whether Wilcoxon was dead. If dead, then the manner of his death became immaterial. The fact that evidence was introduced tending to show the probability of suicide did not justify the instruction as asked. The court correctly refused said instructions.

No error appearing, the judgment is affirmed.

FRENCH *v.* BROWNING.

4-3134

Opinion delivered October 16, 1933.

O. T. Ward, for appellant.

Wm. F. Kirsch and *Maurice Cathey,* for appellee.

JOHNSON, C. J., (after stating the facts). But one question is presented on this appeal for determination, namely, was the assignment of the National Cottonseed Products Corporation mortgage by French to Burns fraudulent and void?

The chancery court of Clay County found that his assignment was fraudulent and void, and this judgment should be affirmed, unless the chancellor's findings are contrary to the clear preponderance of the testimony. *Mente & Company, Inc.* v. *Westbrook,* 181 Ark. 96, 24 S. W. (2d) 976.

This court has held that the intent to defraud creditors may be presumed from an act necessarily resulting in such hinderance. *Metcalf* v. *Jelks,* 177 Ark. 1023, 8 S. W. (2d) 462.

Again, this court said in the last case cited that the testimony of a party to an action who is interested in the result will not be regarded as undisputed in determining the legal significance of the evidence.

It would serve no useful purpose to detail the testimony presented to the chancellor. It suffices to give only a short statement thereof. French testified that Burns paid him more than $2,000 in cash as consideration for the assignment. Burns testified to practically the same statement of facts. Other testimony, however, shows that Burns was a renter and had been for a number of years; that he owned no real estate and but little personal property; that at numerous times during the past several years he was forced to borrow very small and insignificant sums of money from the banks in the vicinity; that

he had been a renter on French's farm for a number of years. On the other hand, the testimony shows that French was substantial in his dealings; that he carried very substantial balances in the banks in that vicinity; that he was a man of some means and no necessity appears for his negotiations with Burns. French and Burns were examined and cross-examined time and again in the presence of the court, and the contradictions and inconsistencies which appear from their testimony were entirely sufficient to warrant the trial court in disbelieving their testimony.

After carefully reviewing the transcript of the testimony, we cannot say that the chancellor's findings of fact were contrary to the clear preponderance of the testimony.

Decree affirmed.

NICHOLS *v.* STATE.

Crim. 3854

Opinion delivered October 16, 1933.

Isaac McClellan, for appellant.

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

SMITH, J. This appeal is from the judgment of the Grant Circuit Court sentencing appellant to a term of one year in the penitentiary, upon a conviction for involuntary manslaughter, alleged to have been committed by striking and running over one Grady Porter with an automobile.

One of the errors assigned for the reversal of the judgment is that the testimony is not sufficient to sustain the verdict. This assignment may be disposed of by saying that the testimony shows that appellant drove his car rapidly down a street in the town of Sheridan, striking Porter, who was walking with Albert Roberts along the edge of the street. There does not appear to have been a sidewalk at the place of collision. Roberts testified: "I was about two or three feet from the edge of the street, and he (Porter) was on my left side, about two or three feet further out towards the center of the street." He further testified that he did not know the car was approaching until it struck Porter, as no signal of its approach was given. The car knocked Porter eighteen or twenty feet, and, without diminution of speed, ran over him and killed him. After running over Porter, the car was driven down the street a few hundred yards further, when it ran into a ditch and was wrecked. Appellant testified that he knew nothing about striking Porter or wrecking the car until the morning after, when this information was communicated to him in the jail where he had been confined. The testimony clearly shows that appellant was helplessly drunk. It may be said therefore that the testimony sufficiently sustains the verdict.

It is assigned as error that the grand jury which returned the indictment had not been impaneled as provided by law, and this is the most serious question in the case. It appears that the court convened on February

20th, at which time the grand jury was impaneled, and that the court, after being continuously in session until February 28th, adjourned on that day to May 8th. On February 22d the following order was entered in regard to the grand jury:

"On the 22d day of February, 1933, after serving three days, the grand jury made a report that they had finished their work and desired to be discharged.

" 'And after hearing said report, it is by the court considered, ordered and adjudged, that this report be and the same is accepted, and the grand jury be and is hereby discharged from further duty, subject, however, to the call of the court at any time.' Ordered that court adjourn until tomorrow morning."

During the interval between the regular and the adjourned sessions of the court, to-wit, on April 29, 1933, the killing of Porter occurred in the manner stated above. When the court convened on May 8th pursuant to adjournment, the presiding judge directed the sheriff to summon a special grand jury, and, upon appellant's arraignment, he questioned the authority of the special grand jury to return the indictment. His motion to quash the indictment was overruled.

We think there was no error in this ruling. It is true, of course, as appellant insists, that there cannot be two grand juries, each having power to investigate violations of the law and to return indictments therefor. But upon the finding that the regular grand jury "had finished their work and desired to be discharged," it was ordered that "the grand jury be and is hereby discharged from further duty, subject, however, to the call of the court at any time." No such call was made, and the court, interpreting its own order, treated it as a final discharge of the grand jury. The regular grand jury having been discharged, the special grand jury was summoned and impaneled pursuant to express statutory authority. Section 3004, Crawford & Moses' Digest.

Objection was made to the introduction of an ordinance of the town of Sheridan fixing a maximum speed limit of fifteen miles per hour while driving upon the

streets thereof; but we think no error was committed in permitting this ordinance to be read in evidence.

The ordinance was not conclusive that appellant was doing a lawful act in an improper manner, but it was evidence of that fact. In the case of *Bain* v. *Fort Smith Light & Traction Co.*, 116 Ark. 125, 172 S. W. 843, we considered the effect of testimony showing the infliction of an injury by one who, at the time of the injury, was violating a city ordinance, and, after reviewing many cases there cited, we said that the rule supported by the weight of authority and the better reason was that proof of the violation of an ordinance may be shown as tending to establish the allegation that the injury was occasioned by negligence. So here, the existence of the ordinance and the proof of its violation were facts to be considered in determining whether appellant was engaged "in the prosecution of a lawful act done without due caution and circumspection." Section 2356, Crawford & Moses' Digest.

What we have said disposes of the objections made to instructions numbered 7 and 8, which present this view of the law and were given over appellant's objections.

Appellant asked instructions numbered 1 and 4, which the court refused to give. These instructions are as follows:

"No. 1. You are instructed that if you find from the evidence in this case, beyond a reasonable doubt, that the defendant was so intoxicated at the time he struck the deceased with an automobile that he did not know he had hit a man, and at the time was on the right side of the road, then he would not be guilty of negligence or carelessness in the operation of the car, unless you further find beyond a reasonable doubt that he did it wilfully and without due regard for the lives of others, and you will so find."

"No. 4. You are instructed that drunkenness is no excuse for crime, yet if a person is so intoxicated to lose his faculties, both in body and mind, and not comprehend what he was doing, then he would in that case have no wilful intent to commit crime, and, if you believe beyond a reasonable doubt from all the evidence, that the defend-

ant was so drunk that he did not know or have control of himself and that the accident which resulted in the death of Grady Porter was unavoidable, then you will find the defendant not guilty."

It will be observed that these instructions, if given, would have required a finding that appellant had acted wilfully, whereas this is not required to constitute the offense of involuntary manslaughter. It was said, in the case of *Bennett* v. *State,* 161 Ark. 501, 257 S. W. 372, that: "Involuntary manslaughter is, as its name implies, an involuntary killing done without any intent to kill, but in the commission of some unlawful act, or in the improper performance of some lawful act. *Tharp* v. *State,* 99 Ark. 188, 137 S. W. 1097; *Trotter* v. *State,* 148 Ark. 466, 231 S. W. 177. See also *White* v. *State,* 164 Ark. 517, 262 S. W. 338.

No error appearing, the judgment must be affirmed, and it is so ordered.

STATE EX REL. LEE *v.* MCMILLIN.

4-3135

Opinion delivered October 16, 1933.

A. D. Whitehead, for appellant.

John C. Sheffield, for appellee.

SMITH, J. Appellant filed a petition in the Phillips Chancery Court for a writ of habeas corpus to recover the possession and custody of his minor child, Betty Joe Lee. The petitioner alleged that a similar proceeding had been had in the chancery court of Davidson County, Tennessee, wherein the custody of the child had been awarded to him, but that its custodian, the child's aunt, Mrs. Maybelle McMillin, had disobeyed the court's order

and had brought the child into this State. Duly authenticated copies of the proceedings of the Davidson County, Tennessee, Chancery Court were exhibited with the petition. Pending the hearing of this petition Mrs. McMillin, the respondent, executed the following bond:

"BOND

"We acknowledge ourselves indebted to J. C. Barlow, sheriff of Phillips County, Arkansas, in the sum of $500, conditioned as follows, to-wit:

"Whereas, Hon. A. L. Hutchins, chancellor, has directed that the minor, Betty Joe Lee, be presented before the chancellor at Forrest City, Arkansas, at 10:00 A. M., June 4, 1931. Now, if the said Maybelle McMillin shall present the said Betty Joe before the chancellor at the time and place aforesaid, for the further orders of the said court, then this obligation shall be null and void, otherwise to remain in full force and effect.

"Witness our hands this the 3d day of June, 1931.

(Signed) "Maybelle McMillin,
(Signed) "Pat Keeshan,
(Signed) "W. T. Greer."

The Phillips Chancery Court entered an interlocutory decree on June 4, 1931, which directed that the custody of the child be delivered to petitioner, its father, on condition that he execute a bond in the sum of $300, conditioned that he present the child at the courthouse in Helena at 9 A. M. Monday, July 27, 1931, for final orders in the case. This bond was never executed and the child was never delivered to him.

A decree was entered July 27, 1931, which contained the following recitals: Petitioner's wife, the mother of the child, died September 9, 1929, at which time petitioner turned the child over to its aunt, his wife's sister, with the understanding that she would return the child to him when he was prepared to take care of it. The petitioner made monthly contributions to the support of the child, and on October 16, 1930, married again, and petitioner and this wife, who are found to be proper persons to have possession of the child, desire its custody.

It was decreed that the custody of the child be awarded to its father, conditioned that the respondent be permitted to visit the child at such times as are most convenient to her. The clerk of the court was ordered to issue a writ of possession commanding the sheriff to deliver the child to its father. This order was not obeyed, and a motion was filed in the name of the State, on the relation of Lee, for judgment on the bond set out above.

Upon this motion a decree was entered on November 23, 1931, which contains the following recitals:

"It appearing to the satisfaction of the court that the said respondent and her cognizors aforesaid have heretofore, to-wit: On the 4th day of June, A. D. 1931, made default in carrying out the terms of said bond and the orders of the court on the 4th day of June, 1931, wherein the court ordered the respondent, Mrs. Maybelle McMillin, to retain said child in her possession until noon, June 5, 1931, with instructions to have said child examined by two reputable physicians, namely, Dr. W. C. Russworm and Dr. W. H. Orr, to determine whether or not said child, Betty Joe Lee, was in fit physical condition to make the change to Akron, Ohio, with her father, the relator, William E. Lee, and in case said physicians found said child to be in physical condition to make said journey, then the court commanded the respondent to deliver said child to the relator on or before noon of June 5, 1931. The court further finds that on the afternoon of June 4th, or the morning of June 5th, the respondent disappeared beyond the borders of this State with said child in disobedience and contrary to the orders of this court. The court, being well and sufficiently advised as to the law and facts in this case, doth find that the respondent and her bondsmen have made default in carrying out the orders of the court and the terms of said bond, and said bond is by the court forfeited."

Upon this finding it was ordered that "the State of Arkansas do have and recover of and from the said Mrs. Maybelle McMillin, W. T. Greer and Pat Keeshan the sum of $500, the penalty of said cognizance, and that a writ of *scire facias* issue requiring the said Mrs. Maybelle

McMillin, W. T. Greer, and Pat Keeshan to appear at the bar of this court on January 21, 1932, at 9 o'clock A. M., and show cause, if any they can or have, why a final judgment should not be entered against them."

Process issued as ordered upon this decree, and the respondents filed a special demurrer and a response. On February 15, 1933, the court rendered a final decree, from which is this appeal. The decree recites that: "This cause is submitted to the court on the writ of *scire facias* issued out of this court on the 28th day of November, 1931, the demurrer to the *scire facias* herein, the special demurrer to the said *scire facias,* and the response to the *scire facias* served on respondents on November 28, 1931, together with argument of counsel, and the court, being well and sufficiently advised in the premises, finds that the complaint of the plaintiffs should be dismissed."

It was decreed that "the *scire facias* issued out of this court on the 28th day of November, 1931, is hereby quashed and that the decree forfeiting the said bond, dated November 23, 1931, is set aside and held for naught, and that the court is without equity to enforce said decree and the terms of said bond."

The recital that the court is *without equity* to enforce said decree is obviously a clerical misprision, the correct reading being, no doubt, that the court was without authority or jurisdiction to enforce the terms of the bond.

The respondents insist that this decree should be affirmed for the reason that the question for decision is a mixed one of law and fact, and that, as the record contains only the pleadings without any testimony, it must be conclusively presumed that testimony was offered which supported the action of the court.

We do not concur in this view for two reasons: (a) That the cause was in fact heard upon the pleadings only, which are in the record before us, together with the argument of counsel; and (b) however heard, the decree was based upon the finding that the court was without authority or jurisdiction to enforce the bond;

and we do not concur in this statement of the law. In our opinion, the chancery court had the jurisdiction to determine whether there was liability upon the bond which should be enforced.

The practice is not unusual in habeas corpus cases involving the custody of children to require the custodian to execute a bond conditioned that the child be held subject to the orders and disposition of the court, the execution of the bond being made the condition upon which the custody of the child may be retained. *Willis* v. *Bell,* 86 Ark. 473, 111 S. W. 808; *Andrews* v. *Andrews,* 117 Ark. 90, 173 S. W. 850.

Having the jurisdiction to require the execution of such a bond, the court necessarily had the jurisdiction to enforce it in case of a breach thereof.

The decree of the court below will therefore be reversed, and the cause will be remanded, with directions to determine whether final judgment should be rendered against the principal in the bond and the sureties therein.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HANCOCK.

4-3108

Opinion delivered October 16, 1933.

[redacted]

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

Thomas P. Holt and *D. H. Howell,* for appellee.

HUMPHREYS, J. These cases were consolidated for the purpose of trial with the result that appellee Hancock recovered judgment for $250 against appellant and appellees Buchanans recovered $500 for the Buchanan estate, from which is this appeal.

The testimony in the cases was sufficient to warrant the jury in finding that appellant knew that Archie Hancock, who was injured, and his companion, Willis Buchanan, who was killed in a train wreck near Van Buren, were in a box car on the train without permission; and in finding that the train crew or some of them knew that a hot box developed on one of the trucks of a car near the one the boys were riding in, and that the crew knew that it was very dangerous to operate a train with a hot box, and contrary to the rules of appellant to do so.

Instancing the sufficiency of the testimony to warrant the jury in so finding, reference is made to that part of the record which reflects that a brakeman discovered the boys in the car and talked to them concerning the movement of the train and when it would arrive in Van Buren; and to that part of the record which reflects that signals were given by a number of persons that the train had a hot box and the signal back from one of the train crew, and the stop signal which was given by the depot agent at Alma. This testimony warranted a submission of the cause to the jury under the doctrine of discovered peril. That doctrine is to the effect that a duty under the law rests upon the railroad company to use ordinary care not to injure even a trespasser when his peril is discovered or known.

All the instructions given to the jury correctly defined this doctrine except No. 10 given at the request of appellee. This instruction imposed the duty upon appellant to use ordinary care to prevent the injury if its agent "should have known of said burning hot box."

This was a misstatement of the law of discovered peril and constituted reversible error.

On account of the error indicated, the judgments are reversed, and the causes are remanded for a new trial.

McHaney and Butler, JJ., agree that the case should be reversed, but are of the opinion it should be dismissed, as the discovered peril doctrine has no application to the facts in this case.

Lumpkin *v.* Askins.

4-3090

Opinion delivered October 16, 1933.

[redacted]

Edwin W. Pickthorne and *Will G. Akers,* for appellant.

Walter L. Pope, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the chancellor erred in decreeing a restoration of the will and also in confirming the title of Mrs. Williams to the property given her by the testator during his lifetime. Appellant also contends that the chancellor erred in not granting a new trial because of newly-discovered evidence.

The statute provides the procedure for the restoration of lost or destroyed wills and vests the jurisdiction in the chancery court. Section 10,545, Crawford & Moses' Digest; *Bradway* v. *Thompson,* 139 Ark. 542, 214 S. W. 27; *Rose* v. *Hunnicutt,* 166 Ark. 134, 265 S. W. 651.

The chancellor, it is true, in making his findings expressed a doubt as to whether the proof justified the finding that the will relied upon by the plaintiff was in existence at the date of the death of Mr. Askins, but there is no presumption that the will was destroyed by the testator with the intention of revoking it, the proof not showing that he retained the custody of the will or had access thereto, notwithstanding it could not be found after his death. There was no proof to justify a finding

that the testator had possession of the will after he executed it and left it with his attorney, although it was shown that he could have gotten it by asking for it. The testimony showed that the will had been duly executed, and, if not in existence at the death of the testator, that it had been fraudulently destroyed in his lifetime, and its provisions were clearly established and proved by two witnesses as well as that it was properly executed and attested by the witnesses as required by law.

If such presumption could arise from the testimony of the intentional revocation of the will by the testator, it was overcome in this case by the proof that the will was placed in the desk of the partner of the member of the law firm who drew it, to which the testator had no access, and, by his testimony, that it was never called for by the testator or delivered to him.

A careful examination of the whole record discloses that the findings of the chancellor are not contrary to the weight of the evidence, but supported by it in his decision on both matters.

The testator could make a valid parol gift of the property to Mrs. Williams, and the evidence amply justifies the finding that he did so and delivered possession of the property to her at the time, which she has ever since retained, although it is true that he promised to and indicated later that he had conveyed the title thereto by will. Mrs. Williams stated, however, that on the last day of his life when he realized his condition that he handed her the key to his trunk, stating that all the papers in which she was interested would be found therein and directed her to get them. She failed to get access to the trunk and the papers because appellants, the Lumpkins, in whose house the trunk was, would not permit her to do so; and the fact that she thought that Askins had not only conveyed the property to her, the home where she lived, but his other property as well, which he had already indicated would be done, does not lessen the effect of the testimony showing the delivery of the property to her under the express intention to give it to her. *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; *Causey* v. *Wolfe,* 135 Ark. 9, 204 S. W. 977; *Akins* v. *Heiden,* 177 Ark.

392, 7 S. W. (2d) 15; *Speck* v. *Dodson,* 178 Ark. 549, 11 S. W. (2d) 456; *St. Louis, I. M. & S. Ry. Co.* v. *Hall,* 71 Ark. 302, 74 S. W. 293; *Berg* v. *Moreau,* 199 Mo. 416, 97 S. W. 901, 9 L. R. A. (N. S.) 157.

No error was committed because of the refusal to grant a new trial on account of newly-discovered evidence. No proper diligence was shown in procuring the alleged newly-discovered evidence when the necessity therefor fully appeared from the denials in the response to the motion showing the appellants were fully informed, before the beginning of the trial as well as during the introduction of the testimony, of what the issues were and the necessity for such testimony. The testimony proposed by the new witnesses was altogether cumulative in its nature, and there was no abuse of discretion on the part of the chancellor in refusing to grant the new trial. On the whole case we find no error in the record, and the decree is affirmed.

DONALD *v.* HEIGEL LUMBER COMPANY.

4-3138

Opinion delivered October 16, 1933.

Edw. Gordon, Reynolds & Reynolds and *E. A. Mitchell,* for appellant.

George F. Hartje, for appellees.

KIRBY, J. Appellees, partners operating a retail lumber business in the city of Conway, Faulkner County, Arkansas, have been engaged in business there for a number of years. They erected a filling station on some

property they owned in the town of Plumerville, Arkansas, about the year 1930, and leased it to an oil company on a rental basis of one cent per gallon of gasoline sold at said station with a guarantee from said company that the rental would not be less than $10 per month. The oil company subleased said station to Charles Sams, who continued to operate same.

This station was situated upon highway No. 64, as same then ran through the town of Plumerville. About 1931 said highway No. 64 was changed from its old location so as to run through the town of Plumerville, and Sams wanted to move the station over on the highway No. 64 as re-located. Tubby Mitchell, who was the oil company's local representative in Conway County, and Charles Sams, the sublessee, arranged with J. J. Heigel of the appellee company to move the station over on the new highway, and place same upon property purchased by them and deeded to appellees. Heigel consented to the station being moved over to the new location, "provided same would be done without any cost to the appellees." Instead of moving the station or building, appellants Mitchell and Sams had the old station torn down and erected an entirely new and different station upon appellees' property on the highway as re-located near Plumerville. Lumber and materials were purchased by Tubby Mitchell and charged to him. In fact, one of appellants, E. E. Mitchell, is the father of Tubby Mitchell, who was never the agent of the appellee; and he and Sams were not the contractors. The appellees never at any time agreed to pay for moving the filling station, nor consented that any part of the rental should be used to pay for same. The change was made entirely for the lessee's and sublessee's benefit and not for the benefit of appellees, and was agreed to be done without any cost to them.

The premises upon which the filling station was first erected was leased to the oil company for a period of five years at a rental of one cent per gallon for each gallon of gasoline sold at the station with a guarantee of not less than $10 per month, and the title of the property was in appellees. The title to the land upon which the filling station was later moved was vested in appellees in fee

simple. Appellees consented to the moving of the filling station only for the benefit of the lessee and the sublessee, conditioned that the removal thereof could only be made at the expense of appellants and without any cost to appellees.

A lessor does not subject the fee of the property upon which the improvement is made to a mechanics' lien merely by consenting that the lessee can make improvements thereon. This was definitely settled in the case of *Hawkins* v. *Faubel,* 182 Ark. 304, 31 S. W. (2d) 401, where this court said:

"We now decide the question reserved in the case of *Whitcomb* v. *Gans, supra,* and we hold that the lessor does not make his property subject to a lien merely by consenting for the lessee to make improvements. This view accords with reasons upon which the decisions were based in the following cases: *Langston* v. *Matthews & Lawton,* 117 Ark. 628, 173 S. W. 397; *Daly* v. *Arkadelphia Milling Co.,* 126 Ark. 305, 189 S. W. 1035; *Davis* v. *Osceola Lbr. Co.,* 168 Ark. 584, 270 S. W. 960; *Fine* v. *Dyke Bros. Lbr. Co.,* 175 Ark. 572, 300 S. W. 375, 58 A. L. R. 907; *Morrilton Lbr. Co.* v. *Groom,* 176 Ark. 520, 3 S. W. (2d) 293. This view also accords with the general rule where there is no statute making the owner liable who merely consents that the improvements shall be made."

It is not contended that appellants at any time ever had any conversation or agreement with appellees relative to making the change of location of the station to the new highway, but rely upon the fact that the appellees consented to the removal of the filling station from its old location on their property to other property owned by them on the new highway on condition that appellees would not have to bear any costs of the moving. Neither Tubby Mitchell nor Sams was the agent of appellees, and appellant Donald testified that he received the job as the lowest bidder upon his bid to Mr. Sams. That the contract was put up for a bid, and he was the lowest bidder, and Mr. Mitchell O. K.'d it, and we went to work, and he said he would pay it; said he had no dealings with Mr. Heigel about the matter. Upon the completion of the building, Donald, the contractor, demanded payment

therefor from Mitchell, who said that the reason he did not pay him was that he didn't have the money.

Mitchell admitted that he and Sams were responsible for the entire amount due on the contract with Donald. Upon cross-examination he stated that Heigel told him he would permit them to move the building only on condition that they would have the deed for the new site made to the lumber company, and the building removed without expense to them. Sams never at any time discussed the removal of the building from the old site to the new with Mr. Heigel. The agreement to move the building was made by Mitchell and Heigel.

There was no agency or authority on the part of Mitchell or Sams to represent the appellees in any contract for removal of the building to the new location, and the contractor's or materialman's lien would not be effective against the fee of the land under the circumstances, a contract not being made with appellees or their agents, and the owners granted the permission to make the removal of the station to the new location only upon condition that it was to be done without expense to them.

No error was committed therefore in the decree of the chancellor, which is affirmed.

McHaney, J. I dissent on the ground that appellants should be decreed a lien on the building only, to share ratably with appellees for the amount of its material that entered into the building.

Singer Sewing Machine Company *v.* Cole.

4-3124

Opinion delivered October 16, 1933.

Appellant *pro se.*

Donham & Fulk, for appellee.

MEHAFFY, J. This is an action in replevin, begun in the Little Rock Municipal Court, for the recovery of an electric sewing machine.

The appellant sold the sewing machine to appellee for $210, taking an old machine of appellee's for $30, and $10 in money, the balance of the $210 to be paid at the rate of $5 per month. Title of the machine was to remain in appellant, until the full consideration had been paid. Appellee made two payments, and refused to make additional payments, and also refused to surrender the machine.

Appellee filed answer alleging that the execution of the contract was induced by fraudulent representations of appellant's agent in making the sale. She alleged that the appellant's agent represented to her that the appellant was offering to a few selected women, the opportunity to enroll in a class of advanced sewing, designing and drafting, which was to be taught in Little Rock by a representative of appellant; that the price of the course was $150, and that no one could enter the class unless they purchased one of appellant's machines; that relying on these statements, believing them to be true, she

entered into the contract for the purchase of the sewing machine; that she thereafter went to the office of appellant in Little Rock to secure the instructions, and learned that the school was not as represented by appellant's agent, and was nothing more than an elementary class in dressmaking and sewing. She further stated that appellant breached the contract by its failure to carry out the terms; that the contract was induced by fraud, and she was entitled to have it canceled, and entitled to the return of her old machine. She prayed for a dismissal of the complaint, and for possession of her old machine.

The appellee, at the time she purchased the machine, signed an instrument promising to pay the purchase price at the rate of $5 per month. The instrument also retained title in the appellant until paid for in full. There was also added, after the signature of appellee, the following: "Also school free to daughter, Francis. Hem. Attch. free after completion of course." Also on the margin was the following: "This note specifies all the conditions of this sale, and no other will be recognized." The attorneys for the parties in municipal court, signed the following stipulation:

"Expressly reserving and saving to each of the parties hereto all right to except to and interpose objections to the competency, relevancy, legality and legal effect of the facts stated, it is agreed by and between the Singer Sewing Machine Company, by its attorney, Jno. S. Gatewood, and Mrs. Eula Mae Cole, by her attorneys, Owens & Ehrman, that the following facts would be proved if testimony were offered upon hearing of the above-styled cause:

"That on the 3rd day of June, 1932, the defendant, Mrs. Eula Mae Cole, was solicited by one Marvin O. Dawson, the then agent of the plaintiff, Singer Sewing Machine Company, who represented that he was the representative of the educational department of the Singer Sewing Machine Company, and that the company was offering to a few select women of Little Rock and North Little Rock the opportunity of enrolling in a class of advanced sewing, designing and drafting to be taught by an expert who would be brought from New York by

the Singer Sewing Machine Company; that the class or course of instruction had never been before taught in Little Rock; that the usual price charged for the course was $150; that upon completion of the course the defendant, Eula Mae Cole, would be so trained as would enable her to support her family in case her husband lost employment; that the large firms in New York were looking for women with the training this company was offering, and that he could place fifty women in responsible positions as designers of women's clothes; that no women, however, could enroll or take the course of instruction unless she purchased one of the Singer Sewing machines; that the purchaser of a machine would receive the course free.

"That, by being induced by and relying upon the promises and representations of the plaintiff, by its said agent, the defendant purchased a machine for the price and consideration of $210, of which $10 was paid in cash and $30 was credited upon the remainder as represented by an old machine of defendant's, and at the same time executed and delivered to the plaintiff a sales agreement contract, reciting said consideration and said credits and providing that the balance of $170 would be payable at the rate of $5 per month, and that title to said machine should remain in the plaintiff, Sewing Machine Company, until the full consideration was paid; that the contract attached to the complaint is the contract signed and executed by the defendant; that sometime after the purchase and delivery of said machine the defendant went to plaintiff's office at 924 Main Street, Little Rock, and applied for the course of instruction, but found that the school of instruction conducted there was not as represented to her by the plaintiff's said agent, and that no course of designing and drafting was being offered by plaintiff, but only a course in less advanced sewing was being offered; that upon learning this fact the defendant demanded that plaintiff give the course as represented to her would be given by plaintiff's said agent; that plaintiff had been and was then offering a course of instruction in sewing at its place of business in Little Rock, but at no time did it offer to give such instruction

as was represented by its agent; that defendant paid the installment due in July and August and then refused to make further payments; that there was no defects, flaw or misrepresentation as to the kind or quality of the machine purchased, and no objection thereto has been found that same was not as was represented, or that same was not worth the price asked for it."

There was a judgment in favor of appellant in the municipal court, and an appeal prosecuted by appellee, and in the circuit court judgment was rendered in favor of appellee. The appellee offered testimony tending to prove the allegations of her answer. Judgment was entered for the appellee, motion for new trial filed and overruled, and the case is here on appeal.

It is first contended that the court erred in permitting appellee to introduce testimony varying from and inconsistent with the statement of facts agreed to in the stipulation above set out. Attention is called to *Webster* v. *Goldsby,* 130 Ark. 141, 197 S. W. 286. In that case the court quoted with approval the following statement from 1 R. C. L. 778: "Where parties to a case agree to submit the same for decision upon an agreed statement of facts, and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statements of fact thus agreed to, so far as the trial in which the stipulation is made is concerned; and where the agreement is not expressly limited to use in the trial in which it is made, it is admissible in evidence as an admission in any other trial or litigation between the same parties, where the same issues are involved, but it is not absolutely binding and conclusive upon the parties in other litigation."

The court also said in the above case that it was error to permit the jury to consider the stipulation, along with all other evidence in the case, in determining what the agreement between the parties was. The evidence offered in that case, however, tended to contradict the recitals of the stipulation, and the court held that it was improper to admit evidence contradicting the recitals of such stipulation. The stipulation in the instant case does not purport to contain all the facts, but the parties

simply agree that the facts set out in the stipulation would be proved if testimony were offered upon the hearing. We therefore think that the statement in the stipulation that the following facts would be proved is equivalent to an agreement that the following facts are true, and we think the parties are bound by the agreement. It does not, however, prevent either party from introducing other evidence which does not contradict the stipulation.

The authorities quoted from, and especially R. C. L., are discussing what is called an agreed case, and that means that all the facts are contained in the agreement. It is stated in 1 R. C. L. 777: "The agreed case should contain a clear statement of the facts agreed upon, without ambiguity or material omission. All the facts upon which the controversy depends, necessary to give ground for a conclusion of law, should be stated, otherwise the court cannot pronounce judgment, and the proceedings will be dismissed. It ought affirmatively to appear that the case is submitted to the court for an opinion of the law."

It is also stated in the same volume, page 778, that where the parties to a case agree to submit the same for decision upon an agreed statement of facts, and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statement of facts thus agreed to.

In this case we think the parties are bound by the statements in the stipulation, and cannot introduce evidence to contradict it, but we do not think that it purports to contain all the facts, and it does not therefore prevent either party from introducing other evidence which does not contradict the stipulation.

It appears from the record that oral evidence was taken in the municipal court. When the case came on for trial in the municipal court, the record shows that all parties announced ready, witnesses were sworn and testified, and judgment was entered in favor of the appellant. What the evidence was in the municipal court, is not shown by the record.

When evidence was offered in the circuit court, the appellant objected, first, because the parties had agreed as to the facts on which the case would be tried, and that they were bound by this stipulation, and, second, appellant objected to the introduction of oral testimony to vary or contradict the plain, unambiguous terms of the written contract. His objection was overruled, exceptions saved, and the oral testimony was admitted.

The answer alleges that fraudulent representations were made, which induced appellee to sign the note. Parol evidence is admissible to show that a written sales contract was procured by false representations relied upon by the buyer, and upon which the buyer was entitled to rely. The testimony offered in this case tending to show that false representations were made and relied on by the appellee was competent. *Shaver* v. *Clark County Bank,* 182 Ark. 198, 31 S. W. (2d) 132; *New Home Sewing Machine Co.* v. *Westmoreland,* 183 Ark. 769, 38 S. W. (2d) 314.

We think the court was correct in holding that the writing failed to express all the essential terms of the agreement. Notation on the stipulation with reference to the daughter is incomplete and ambiguous.

In a suit in replevin, the plaintiff must show both title to the property and right to possession. Any evidence on the part of the defendant that tends to show either that plaintiff has no title, or that he is not entitled to possession is competent, and, under our statute, the appellee was entitled to show by way of set-off or counterclaim any facts that showed fraud in the execution of contract, and was entitled to show that she had been damaged by a breach of the contract.

The appellee alleged fraudulent representations inducing the making of the contract, but she did not ask for damages because of the breach of the contract; she simply prayed in her answer for a dismissal of the complaint and for possession of her old machine; she did not ask for possession of the new machine. We think, therefore, that the court erred in entering judgment in her favor for the new machine, because the contract provided expressly that appellant retain title, and, if she

had failed to carry out her part of the contract, it was entitled to possession. Her defense was a breach of the contract and false representations, and she had a right under this pleading, not only to show a breach of the contract, but to show whether she was damaged thereby, and the extent of her damages, if any.

She testifies that the price for the instructions which were to be given at the school was $150. The evidence, however, does not show the extent of her damages by reason of breach of the contract.

The judgment is therefore reversed, and the cause remanded for a new trial, with permission for appellee to offer evidence showing whether she was damaged, and, if so, how much.

DIXIE BAUXITE COMPANY *v.* WEBB.

4-3146

Opinion delivered October 16, 1933.

[redacted]

John Sherrill, for appellant.

W. R. Donham, for appellee.

MEHAFFY, J. This suit was begun by appellee to recover damages for personal injuries alleged to have been caused by the negligence of the appellant.

On March 17, 1932, while in the employ of the appellant, the appellee, between eleven and twelve o'clock at night, was injured while replacing a belt on the pulleys. He alleged that the belt was old, badly worn, and fastened together with metal belt lacing at the ends; that the belt had been patched in several places by the use of metal belt lacing; that appellee was directed to replace the belt, by an employee who had authority to direct the belt to be replaced, and while he was trying to replace it, the belt suddenly caught on the pulleys, and the thongs of the belt lacing caught appellee's glove, causing his hand to be caught between the belt and the lower pulley; his hand was drawn around the pulley, and his body was thrown upon the framework of the line-shaft; that he sustained injuries to his left chest, the second to the seventh ribs, inclusive, were broken, the second rib being broken in two places; in healing the ribs overlapped and decreased the size and shape of the left chest; the injuries to the chest wall displaced his heart to the right; the muscles to the left chest have become atrophied; the left knee and bones of the left leg below the knee were injured; the upper end of both bones were fractured, and his nervous system was severely shocked; his left shoulder was injured, and his left arm somewhat paralyzed; he has difficulty in breathing, and is very nervous.

The appellant answered denying all the material allegations of the complaint, and pleading contributory negligence on the part of the appellee. Appellant also alleged in its answer that it had made a settlement with the appellee, paying him $289.40, and that appellee executed a release, and appellant pleaded the settlement and release as a defense of appellee's cause of action.

There was a trial by jury, and a verdict and judgment for $15,000. The case is here on appeal.

The appellant contends that the testimony does not show any negligence on its part, and for that reason the court should have directed a verdict in its favor. The appellant is a corporation, and at the time of the injury to appellee was engaged in mining bauxite at Sweet Home, Arkansas. The appellee had been working for the appellant since August 29, 1931, and the injury occurred March 17, 1932. He had, however, been at work as fireman, calciner, and drierman since sometime in February.

Appellee testified that a man named Poole, another employee of appellant, told appellee that the belt was off, and to put it on. This belt operated on a pulley near the floor, and another pulley six or eight feet above the lower one. Appellee testified that Poole had charge of this. He went to work on that day about 11 o'clock P. M., and was injured at about 11:30, about thirty minutes after he had gone to work. He testified that he put the belt on the bottom pulley, and straightened up to adjust the belt, and as he did this, something caught the belt and jerked it on, and jerked his left hand into the pulley; that his hand was caught by one of the steel belt laces.

He testified that his hand was caught by one of the steel belt laces, a steel lacing that you drive through the belt. On each side of the lacing there are hooks and thongs, or teeth. It was an old six-inch belt, and had several patches in it. In patching a belt, there has to be a piece cut out and another piece put in, and they use these steel belt laces to hold the ends together.

Appellee testified that there were four men working at the time, but none of them were where they could see appellee at the time he was injured. He further testified that the belt was frazzled on both sides, had three or four patches in it, and he did not know how many seams were in the belt. When asked how he knew that caught his hand, he said: "That is the only thing that could catch it." He did not see it at the time, and there was bound to have been something sticking up to catch his hand.

Appellee testified at great length as to how the injury occurred, but the above testimony tends to show that the belt was old, frazzled, and that the teeth, or thongs, of the belt lacing caught his hand and caused the injury.

While none of the appellant's witnesses saw the injury, they testified in substance that the belt was in good condition and had only one patch in it, although they testified that it was an old belt. Appellant's witnesses also testified that appellee had been using belt dressing, and that this may have caught his hand.

Appellee testified, however, that he had not used belt dressing, and that the thongs of the belt lacing caught his hand.

As to how the injury occurred, and whether the condition of the belt was the cause of the injury, were questions of fact properly submitted to the jury. The testimony was conflicting, and it was the province of the jury to determine which was true.

Witness for the appellee, Vinas C. Hale, testified that he worked for the appellant some months before the injury to appellee, quitting there sometime in December; that the belt was pretty well worn when he worked there; that the thongs, or teeth, of the lacing stuck out; that he observed the condition of the teeth or thongs, and that at that time they were sticking up.

This court has many times held that it is the province of the jury to reconcile conflicts which exist in the testimony, and if there is sufficient evidence to submit a question to the jury, its finding is conclusive, although we might believe that its finding was against the preponderance of the evidence. *Gibson Oil Co.* v. *Bush,* 175 Ark. 944, 1 S. W. (2d) 88; *International Harvester Co. of America* v. *Hawkins,* 180 Ark. 1056, 24 S. W. (2d) 340; *Chapman & Dewey Lbr. Co.* v. *Bryan,* 183 Ark. 119, 35 S. W. (2d) 80.

The appellant, however, contends that many witnesses testified that the condition of the belt was good. That is true, and it is also true that witnesses other than the appellee testified that the belt had been used a long

while, and had been patched several times. There was therefore substantial evidence to support the jury's verdict on this question.

It was not the duty of the appellee to inspect the belt, pulleys, or machinery, but he had a right to assume that the master had performed its duty, not only to exercise care in furnishing safe appliances with which to work, but to exercise ordinary care to keep them in safe condition.

Appellant contends that it was the duty of appellee to repair minor defects. No one, however, testified that it was his duty to inspect. Several witnesses testified that he was in charge, although this is contradicted by appellee's evidence, but if he were in charge of the other three men, the master owed him the duty to exercise care to furnish him with safe appliances with which to work, the same as if he had not been in charge. He testified that he was not in charge, but whether he was or not, there is no evidence tending to show that it was his duty to inspect the belt. The appellant had a millwright whose duty it was to look after machinery and appliances and inspect them, and, if appellant's evidence is correct that appellee was to repair minor defects, that, of course, meant defects that were called to his attention, because no one contends that it was his duty to inspect.

"Where there is any substantial 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 precaution to guard against the defects or danger, is generally a question for the jury." 45 C. J. 1325.

"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 ques-

tion for the jury." *Burden* v. *Hughes,* 186 Ark. 707, 55 S. W. (2d) 502.

It is next contended by the appellant that the release was valid and binding. The evidence, in this case as to the extent of appellee's injuries, is in conflict, but there is no dispute that appellee was severely injured. Witnesses for both parties testified that both bones in his left leg were broken, extending up into his knee; that six ribs were broken, some of them overlapped, and that there was some deformity in the chest, and the heart was pushed over to the right one-half inch or one inch; and that there was also an injury to his left arm.

While appellee was at the hospital, a representative of the insurance company secured a statement, which was introduced in evidence, purporting to have been signed by appellee, and witnessed by the insurance agent and another. The undisputed evidence, however, shows that appellee did not sign the statement, but that the agent signed appellee's name to the statement, and then signed as a witness.

Appellee testified that before he left the hospital, a short time before the release was signed, he had a talk with the company physician, about the extent of his injuries, and that the physician told him that he would be all right and able to work; that his injuries did not amount to anything, and that he would be able to go back to work, and be as good as he ever was. He believed what the physician told him, relied on it, and, because of this, signed the release. He would not have signed it if he had not believed what the physician told him. This release was signed at his home shortly after he had been removed from the hospital to his home.

As we have already said, there is no dispute about both bones of his left leg being broken, extending up into the knee; there is no dispute about the condition of his chest; there is no dispute about six ribs being broken, and some of them overlapped; and it is practically undisputed that his left arm is permanently injured.

It is true that two doctors testifying for the appellant said that they thought the condition of his chest was

caused by rickets; which is a disease of childhood. It is said that it usually occurs from nine months to two years, and these physicians thought that that was the cause of the condition of his chest.

The physicians introduced by appellee, however, testified positively that in their opinion the condition of the chest was caused by a crushing injury; that the injury that crushed his chest and broke his ribs moved his heart to the right. They testified that his arm was getting worse, and would continue to get worse, and that he would never be able to work again.

The release was signed when he did not know the extent of his injuries, and thought that he would soon be well. The appellant paid him in settlement, when it took the release, the sum of $289.40, that is, what they paid him and his doctor's bill and hospital bill amounted to this sum. This court has many times held that a release executed by an injured party, relying upon the opinion of the physician of the party responsible for the injury, that the injury was slight and temporary and not permanent, is not binding upon the party making the release. *Sun Oil Co.* v. *Hedge,* 173 Ark. 729, 293 S. W. 9; *St. Louis I. M. & S. R. Co.* v. *Hambright,* 87 Ark. 617, 113 S. W. 803; *St. Louis I. M. & S. R. Co.* v. *Reilly,* 110 Ark. 182, 161 S. W. 1052; *St. Louis I. M. & S. R. Co.* v. *Morgan,* 115 Ark. 529, 171 S. W. 1187.

In the last case, this court said: "There is also testimony sufficient to warrant a finding that the physician or surgeon who treated the plaintiff at the hospital represented to him that he was not permanently injured, and that the settlement was induced by that statement. Under the doctrine of the case of *St. Louis I. M. & S. R. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803, that constituted grounds for avoiding the release, whether the statements were made by the physician falsely or under mistake of fact." *Griffin* v. *St. Louis I. M. & S. R. Co.,* 121 Ark. 433, 181 S. W. 278; *Chicago, R. I. & P. Ry. Co.* v. *Smith,* 128 Ark. 233, 193 S. W. 791; *Kiech Mfg. Co.* v. *James,* 164 Ark. 137, 261 S. W. 24; *Phoenix Utilities Co.* v. *Smith,* 185 Ark. 587, 42 S. W. (2d) 238.

It is next contended by the appellant that the court erred in permitting witness Hale to testify that the belt was pretty well worn when he worked there, and that the thongs or teeth of the lacing stuck out when he was working there, and that he had observed that their condition at that time was that they were sticking up. The only objection made to Hale's testimony was sustained by the court. This witness had testified about the condition of the belt when he worked there, and the last time he worked there was in the latter part of December; but the evidence shows that it was the same belt that he testified about that was in use when appellee was injured, and that it had been in use for more than two years.

It is next contended by the appellant that the court erred in permitting appellee's counsel to examine witness Floyd Brown with reference to the changes made in the plant subsequent to the injury, and to ask if same were not made at the instance of the insurance company. The appellant, however, did not object to that question, but the witness was asked: "I mean the Fire Insurance Company," and he answered: "No, sir, all I know of, we raised it for ventilation." Certainly there could be no error in this. The witness testified that he made it for the purpose of ventilation, and not at the instance of the insurance company.

It is next contended that the court erred in excluding the testimony of Sam Diemer. The witness testified that he did not ask appellee anything about whether he was satisfied, but that he said something to his wife about it, and that both Mr. and Mrs. Webb were satisfied with the settlement. The court said that he did not think this evidence was competent, and the attorney for the appellant said: "Save our exceptions."

In the first place, the record does not show any objection to the ruling of the court, and in the next place it is wholly immaterial whether Mrs. Webb was satisfied or not; what she said would not be competent evidence. Moreover, it was not a question as to whether she was satisfied or not, but the question was whether the release was signed by appellee because of the statement made by

appellant's physician as above set out, and relied on by appellee. There was no error in the court's excluding this testimony.

The appellant then contends that the court erred in permitting exhibition of the insurance policy and testimony regarding the same, before the jury. In the first place, there was no objection by the appellant to this evidence. There was a suggestion on the part of the attorney for the appellant that the testimony that he had stood an examination for life insurance was improper, and the court sustained this suggestion of appellant. There is no evidence in the record tending to show that the policy was exhibited to the jury. The record shows that the policy was exhibited to the witness, and the witness was asked if it did not show March 4, 1932, and he answered that it did, and there was no objection made to either the question or answer. The record does not show that the policy was exhibited to the jury, and it does not show that any objection was made to exhibiting it to the witness; in fact, the only objection made by the appellant at the time was sustained by the court.

Appellant, in its brief, says that counsel for appellee unfolded an insurance policy, which was waved before the jury, and presented to the witness, and features of the policy testified about pointed out, etc. There is no evidence in the record that the policy was waved before the jury, and no objection made to exhibiting it to the witness.

It is next contended by the appellant that the court erred in permitting Dr. Hyatt to testify that he examined appellee for insurance on March 4, 1932, and to exhibit the policy and state the date of examination. Dr. Hyatt testified that he examined witness shortly before the injury on March 4th. This evidence was introduced in rebuttal of that offered by appellant, tending to show that appellee was in poor health prior to the injury, and the only objection made by appellant was that this evidence was not in rebuttal. All the other evidence of Dr. Hyatt was admitted without objection.

Appellant contends that the court erred in refusing to instruct a verdict for appellant at the time appellee rested his case. We have already shown that there was ample evidence to submit the case to the jury, and there was no merit in this contention.

The appellant argues that the court erred in not granting a new trial on newly-discovered evidence. The affidavits submitted with the motion for new trial on the ground of newly-discovered evidence were all with reference to appellee's injuries, except the affidavit of Robert Ruffin, and this affidavit shows that in the trial he was called as a witness by appellant, but never called to the stand, although he was around the courthouse all during the trial, and this witness testified that he was offered $50 by some one to testify to certain facts. The other evidence was merely cumulative.

All of the evidence contained in the affidavits was known, or by the exercise of any diligence could have been known, to the appellant at the time of the trial. *Miller* v. *Johnson,* 184 Ark. 1070, 45 S. W. (2d) 41; *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. There was no error in overruling the motion for new trial.

It is next contended that the instructions given at the request of the appellee were erroneous. Attention is called specially to instruction No. 4. That instruction reads as follows: "You are instructed that it was the duty of the defendant company to exercise reasonable care to furnish plaintiff a reasonably safe belt for use by him in work being performed for defendant, and it was the further duty of the defendant to exercise the same degree of care in maintaining said belt in a reasonably safe condition, unless you find that it was plaintiff's duty to look after the safety of the belt and to keep it in a reasonably safe condition, and to make necessary repairs."

The objection to this instruction is that the preponderance of the evidence shows that it was the duty of the appellee, himself, to keep and maintain said belt in a reasonably safe condition, and, if same became un-

safe, it was appellee's duty to repair it. We think instruction No. 4 correctly stated the law, and that there is no merit in the objection. The objection to No. 5 was similar to the objection to No. 4. Objections were also made to Nos. 6, 7 and 8. We do not set them out, but have carefully examined them, and do not think there was any error in giving said instructions.

Appellant next objected to the court's refusal to give its instruction No. 1, in which the jury were instructed to return a verdict for the appellant. We have already stated that the evidence was sufficient to submit the cause to the jury. We do not deem it necessary to set out the instructions, but we have carefully examined them, and have reached the conclusion that the court did not commit any error in giving or refusing to give instructions; that the instructions given correctly submitted every issue to the jury.

It is finally contended that the verdict is excessive. The verdict was for $15,000.

Dr. W. F. Smith, the surgeon in charge of the Missouri Pacific Hospital at Little Rock, Arkansas, testified that he had examined appellee with reference to his injuries, and had examined the X-rays made by Dr. Law. The pictures showed a fracture of the upper end of both of the bones of the leg, which extended into the joint, resulting in thickening of the membrane; they also showed the fracture of six ribs, the second to seventh inclusive; that the heart was slightly displaced; a depression of the left side of the chest following the injury; that there was considerable flattening of the left side, caused in his opinion by the fracture of the ribs; there was overlapping of sixth and second ribs. This would cause conversity of the ribs, which prevents lung expansion; it would make him more liable to disease of respiratory tract, such as tuberculosis. In his opinion the appellee cannot perform manual labor, and will never be able to labor again, like he did.

Dr. Parmley testified that he specialized in traumatic surgery; that he examined appellee, and the X-rays, and he testified to substantially the same as Dr. Smith.

He also said that on the arm, the forearm, shoulder and left chest there was marked atrophy, at the time there was only slight palsy or jerking; subsequent examination showed it was very bad, and very plain to see that paralysis was increasing. He attributed this to the injury, and it seems to be progressive. From June until the trial, it seems to have increased from a slight tremor to a very marked tremor or palsy; the deflection of the left leg was limited to 30 degrees; that the efficiency of his lung has been reduced to approximately 30 or 35 per cent. In his opinion the appellee will never be able to perform manual labor again.

Dr. Law also testified substantially the same as Dr. Smith and Dr. Parmley. All of them agree that the conditions were caused by the injury. In addition to that, the evidence shows that he has difficulty in breathing; and his injuries are permanent. These injuries must have caused great pain and suffering. We think the evidence is ample to justify the amount of the verdict.

Finding no errors, the judgment is affirmed.

PARRENTS *v.* BANK OF RECTOR.

4-3131

Opinion delivered October 16, 1933.

C. T. Bloodworth, for appellant.
O. T. Ward, for appellee.

McHaney, J. On November 18, 1924, a decree of divorce was entered in Clay Chancery Court wherein Charles Hesket was plaintiff and appellant, M. C. Hesket, was defendant on the ground that appellant had deserted her husband for the statutory period. Prior to the divorce decree, the parties had entered into a property settlement contract which the court incorporated in this decree as follows:

"It is further ordered, adjudged and decreed that the settlement between the parties as to the rights of property heretofore agreed upon be and the same is by the court approved. Said agreement as to the property herein is in words and figures as follows, to-wit: 'This agreement of arbitration between Charles Hesket and M. C. Hesket, his wife, is a division of personal property. M. C. Hesket agrees to take one-third of Charles Hesket's personal property for her dower in said property which has been divided by mutual consent of both parties and one-third of notes and seasons book of jacks for the year 1923.'

" 'And further agree to take $50 a year for M. C. Hesket's dower on the following tract of land described as follows: Section 22, township 20, range 6, acres 40; southeast northwest; north five-eighths northeast southwest, section 22, township 20, range 6 east; southwest 25 acres; north five-eighths northwest southeast, section 22, township 20, range 6, 25 acres.

" 'M. C. Hesket is to receive $50 a year on this 90 acres described in this writing, commencing in the year 1924, and so on the succeeding years during her lifetime and further agree to hold no dower in the following tract of land described as follows: Northeast northeast, section 28, township 20, range 6, acres 40. Charles Hesket claims the right to have this recorded by notary public and also M. C. Hesket the same right.' "

Thereafter on December 23, 1924, appellant mortgaged the 90 acres above-described, describing it more accurately and correctly in the mortgage, to the Bank of Rector to secure an indebtedness to it. Hesket died without satisfying his indebtedness to the bank, and it brought

a suit against his heirs to foreclose said mortgage. In April, 1932, appellant intervened in said foreclosure suit admitting the execution of the note and mortgage as alleged in the foreclosure suit and setting up the divorce proceedings and the contract incorporated in the above decree, and praying that the land be sold subject to her rights of $50 per year during her life. The trial court denied the relief prayed, dismissed her intervention for want of equity, and she has appealed.

The trial court correctly so held. Conceding without deciding that the description of the ninety acres of land set out in the contract between her and her husband was sufficiently definite, we are of the opinion that the divorce decree was insufficient to establish any lien on the land for the $50 a year he had agreed to pay her for her dower interest therein. The divorce cut off the right of dower, and she has to depend upon her contract. While this contract was signed by the parties, it was not acknowledged or placed of record, nor was it subject to record. The divorce decree incorporating it therein failed to render any judgment against Charles Hesket for said sum or to declare a lien upon the land therefor. Under this situation, there was nothing in the record of the chain of title to bring home notice to appellee that appellant had or claimed any interest therein. Appellee was therefore an innocent purchaser, and its title was superior to any claim or equity of appellant therein.

Affirmed.

HARRIS *v.* MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION.

4-3145

Opinion delivered October 16, 1933.

H. B. Means, for appellant.

Malcolm W. Gannaway, for appellee.

McHaney, J. March 24, 1932, appellant's husband, Gust Harris, applied to appellee for a policy of sick and accident insurance in the sum of $2,000 and paid the quarterly premium in advance to July 1, 1932, by giving his note to the soliciting agent for $22 which the agent discounted at a bank. He gave said Harris a receipt for said note which, among others, contained this clause: "Should the company decline to issue the insurance policy, I hereby agree to return the above sum to said applicant." The application for insurance contained this question: "Do you agree that this application shall not be binding upon the association (appellee) until accepted by the association, nor until policy is accepted by the insured while in good health and free from injury?" The answer was: "Yes." Thereafter, on April 2, and before any policy was issued by appellee, and, of course, before delivery to Harris, he was accidentally killed. Appellant, his widow and beneficiary, brought this action to recover $2,000 on the theory that appellee's agent told Harris he was insured from the date of the application. One witness testified he was in Harris' place of business shortly before April 1, and that the insurance agent told Harris when he signed the note he was insured for so much—his insurance was in effect from that time. On this state of facts, the court instructed the jury to return a verdict for appellee, holding that there was no contract of insurance in force in appellee association at the time of Harris' death.

We agree with the trial court. No attempt was made to show that the soliciting agent had any power or authority to bind his company on an oral contract of insurance. Indeed the contrary appears from the application, and the receipt issued by the agent. In the application Harris agreed that the application should not bind appellee until accepted by it, and until policy is accepted by him in good health and free from injury. The receipt for the premium again notified him that no policy might

be issued, in which case premium was to be returned. This was done. Under similar provisions, we have many times held there was no contract, and that the agent was without power to effect a contract of oral insurance. *Jenkins* v. *International Life Ins. Co.,* 149 Ark. 257, 232 S. W. 3; *Pyramid Life Ins. Co.* v. *Belmont,* 177 Ark. 564, 7 S. W. (2d) 32; *Interstate Business Men's Acc. Ass'n* v. *Nichols,* 143 Ark. 369, 220 S. W. 477; *American Ins. Co.* v. *School Dist. 23,* 182 Ark. 158, 30 S. W. (2d) 217.

Affirmed.

BUSINESS MEN'S ASSURANCE COMPANY *v.* SELVIDGE.

4-3132

Opinion delivered October 16, 1933.

Solon T. Gilmore and *J. Loyd Shouse,* for appellant.

V. D. Willis and *Shinn & Henley,* for appellee.

BUTLER, J. On the 23d day of July, 1932, the appellee made an application to appellant company for an accident and sickness insurance policy. S. T. Phifer was designated in said application as "company salesman," and the issuance of the policy was recommended

by him. The indorsements on the application show that the application was accepted by the appellant, and its policy of insurance issued on the 26th day of July, 1932.

The appellee brought suit on the policy to recover for the loss of one eye, the injury to which he alleged was sustained on the 12th day of August, 1932. The appellant, in its answer, denied that plaintiff suffered the injury on the date alleged and averred that, if such injury was sustained, it occurred prior to the issuance of the policy; and for further defense it averred that plaintiff failed to comply with the terms of the policy as to the giving of notice.

The trial resulted in a verdict and judgment for the plaintiff in the sum of $750 for the loss of his eye, whereupon the court rendered judgment in his favor against the appellant for that amount, together with the sum of $150, attorney's fee, and a 12 per cent. penalty. The appellant company has appealed, and for grounds of reversal contends that the evidence was not sufficient to support the verdict in that it failed to establish the fact that the injury occurred on the date alleged, but insists that it shows the injury to have happened on a date prior to the issuance of the policy; and that the evidence establishes that notice of the happening of the accident was not given within the time provided in the policy, and no evidence was offered tending to show that it was not reasonably possible for the insured to give the notice within the time stated in the policy, or that the notice was given thereafter as soon as was reasonably possible.

On the first contention, it may be said that the evidence introduced by the appellant strongly tends to sustain his theory, but the appellee in round terms testified that the injury which caused the loss of his eye occurred on the date alleged. The jury was the sole judge of the credibility of the witness, and it has resolved the disputed question of fact in favor of the appellee. It was the duty of the trial judge, if in his opinion the verdict was not sustained by a preponderance of the evidence, to have set the verdict aside on motion and to have granted a new trial. By his failure to do this he has added the weight of his judgment regarding the sufficiency of the evidence

to that of the jury. Notwithstanding what we may think, on the question of where the preponderance lies, we are not permitted to exercise our judgment in that particular, but must be bound by that of the jury and the trial court.

The pertinent parts of the contract of insurance relating to the next defense interposed in the trial court and pressed on our attention, are as follows:

"4. Written notice of injury or of sickness on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury, or within ten days after the commencement of disability from such sickness.

"5. Such notice given by or in behalf of the insured or beneficiary, as the case may be, to the company at Kansas City, Missouri, or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

"7. Affirmative proof of loss must be furnished to the company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the company is liable and in case of claim for any loss, within ninety days after the date of such loss.

"8. The company shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

"5. * * * Strict compliance on the part of the insured and the beneficiary with all the provisions of this policy is a condition precedent to recovery hereunder."

It is admitted by the appellee that the written notice of his injury provided for in the policy was not given within the twenty days and not until the 12th day

of November, 1932, following the occurrence. He contends, however, that circumstances existed which rendered it reasonably impossible for him to give the notice within the twenty-day period, and that he gave the same as soon thereafter as was reasonably possible; that there was evidence which warranted this contention, and that the same was properly submitted to the jury for its determination. To excuse his failure to give notice within the twenty-day period, appellee testified that on the 19th day of August, 1932, about seven days after his alleged injury, his wife became suddenly insane; that he was caring for her at their home until the 29th day of August, following, when he carried her to the insane asylum and immediately returned home, that during the first part of September, he was at home looking after its affairs and caring for his two children, and the latter part of the month he was at work in his shop doing first one thing and then another; that within fifteen days after the date of his injury, he told the agent who had written his application of it, and the agent promised to write the company.

The evidence fails to show what appellee was doing during the month of October or what were the circumstances surrounding him during that month, nor is it shown what were his circumstances in November prior to the 12th day on which day, he, for the first time, gave written notice to the appellant company of the injury to, and the loss of his eye.

It is well settled that stipulations as to the giving of notice in policies of this character are reasonable and valid, and that where a written notice is required an oral notice is not sufficient. Also that these provisions are for the purpose of giving opportunity for an early investigation of claimant's injury.

If we construe the stipulation in the policy relative to the giving of notice most liberally in favor of the insured, if any effect is given to it at all, it must bar a recovery, since we are unable to discover any testimony tending to show that the failure to give the notice within the twenty-day period or within a reasonable time there-

after, resulted from anything except the negligence of the insured; and certainly there is nothing to indicate that there was any circumstance which would have prevented him from giving the notice in September. It is clear that appellee's failure to give the notice was due solely to his own neglect, and not from any circumstance which would reasonably have prevented him from doing so; and it prevented the insurer from making investigation until the wound was thoroughly healed, when, if the notice had been properly given, it might have determined from an inspection of the wound itself whether it had been received at as late a date as claimed. Appellee testified that he had told the agent about his injury fifteen days after it occurred; the agent testified it was about a month and a half; but, whenever the agent was told, it is not shown that he ever communicated his information to the appellant company. The inference is clear from the testimony that Phifer, the agent, was clothed with no general authority, but was a mere soliciting agent, and therefore verbal notice to him was not sufficient. *Ark. Mut. Fire Ins. Co.* v. *Clark,* 84 Ark. 224-7, 105 S. W. 257.

Courts are reluctant to deprive the insured of the benefit of an honest claim by any narrow or technical construction which prescribes the requisites by which an accrued right is to be made available. But in this case there is a total lack of evidence tending to show that the insured has placed himself within the terms of the policy as most liberally construed in his favor, and for that reason the judgment of the trial court must be reversed, and the cause dismissed. It is so ordered.

HUMPHREYS, J., dissents.

BOLLINGER *v.* WATSON.

4-3285

Opinion delivered October 16, 1933.

Evans & Evans, for appellant.

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

BUTLER, J. The General Assembly of 1921 passed act No. 606, the first section of which provides: "That all persons, firms or corporations who shall sell gasoline, kerosene, or other products to be used by the purchaser thereof in the propelling of motor vehicles, using combustible type engines over the highways of the State, shall collect from such purchaser in addition to the usual charge therefor, the sum of one cent per gallon for each gallon so sold." This section has been retained in all subsequent legislation except as to the amount to be levied on motor fuel, and at the regular session of the Legislature of 1923, act No. 501 was passed, retaining the above section except as to difference in the amount per gallon levied with the following additional paragraph: "Provided, however, that whenever there are adjoining cities or incorporated towns, which are separated by a State line, the tax on lubricating oils and gaso-

line, sold by any dealer in such adjoining city, on the Arkansas side of the State line to the owner or owners of a motor vehicle or vehicles for immediate use therein, shall be at the rate as provided by law in such adjoining State, not to exceed the rate herein provided for in this act."

In that act it was also provided that if the above proviso should be held to be unconstitutional, it was the intention of the Legislature that the act be upheld with the proviso eliminated. These provisions passed through the Legislatures of 1927 and 1929, and finally appear in act No. 63 of the Acts of 1931 as paragraphs "C" and "D" of § 1 thereof, which, together with paragraphs "E" and "F" are challenged by the present appeal as violative of Amendment No. 14, Arkansas Constitution, of the Fifth Amendment to the Constitution of the United States and of § 8, article 2 of the Constitution of Arkansas, and also, as prohibited by the Fourteenth Amendment to the Federal Constitution and § 18, art. 2 of our Constitution.

The paragraphs challenged read as follows:

"(c) There is hereby levied a privilege tax of six cents on each gallon of motor vehicle fuel sold in the State or purchased for sale in the State for the purpose of propelling any motor vehicle on the public roads or highways in the State.

"(d) Where there are adjoining cities or incorporated towns which are separated by a State line, the tax on motor vehicle fuel sold by any dealer in such adjoining city on the Arkansas side of the State line to the owner or owners of a motor vehicle or vehicles for immediate use therein shall be at the rate as is provided by law in such adjoining State, such rate not to exceed the rate in this act provided. Provided, however, where the State line is the center of the main channel of the Mississippi River this provision does not apply."

The Fifth Amendment to the United States Constitution and § 8, article 2 of the Arkansas Constitution are practically identical, both providing that no one shall be deprived of life, liberty or property without due proc-

ess of law. Section 18, art. 2 of our Constitution, provides that "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." The Fourteenth Amendment to the Federal Constitution may be said to be the antithesis of this, providing that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The section quoted from the act of 1921 was attacked as in violation of the above constitutional provisions. In the case of *Standard Oil Company of La.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, it was held that the act did not violate any of the constitutional provisions, *supra.* In the case at bar, in addition to the attack on the constitutional grounds stated, it is contended that the act is a local and special one, and therefore comes within the inhibition of Amendment No. 14 to the Constitution of Arkansas, which prohibits the Legislature from passing any local or special laws. It is argued that the rule promulgated by the Highway Commission under authority of act No. 63 and putting into effect paragraph (d), *supra,* excepts from the general provisions of the act as stated in paragraph (c), the towns of Texarkana, Fort Smith, Blue Eye, Mammoth Spring, and St. Francis; that, as the tax in the State of Oklahoma is four cents per gallon, the citizens in the city of Fort Smith are required to pay only four cents per gallon on motor fuel; as the rate in Missouri is two cents per gallon, the citizens of Blue Eye, Mammoth Spring and St. Francis are required to pay only two cents; and as the rate in Texas is three cents per gallon, the citizens of Texarkana are required to pay only three cents; that the effect of the provision of paragraph (d) renders the act local or special.

To support this contention the appellant cites and relies on the cases of *Webb* v. *Adams,* 180 Ark. 713, 23

S. W. (2d) 217; *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. (2d) 991; *Street Imp. Dist.* v. *Hadfield,* 184 Ark. 598, 43 S. W. (2d) 62; *Leonard* v. *Luxora-Little River Road Maintenance, ante* p. 599. In the first mentioned case the act under consideration provided for optional county unit or a consolidated school system operating equally and uniformly throughout the State, but with a proviso that "the provisions of this act shall in no way apply to, or affect, Gosnell Special School District in Mississippi County, Arkansas; provided, also, that the provisions of this bill shall not apply to Faulkner and Sharp counties."

The act in question in the case of *Simpson* v. *Matthews, supra,* provided for the formation of improvement districts for the purpose of constructing dams and reservoirs and for the condemnation of lands within the areas affected, and further, that the act should apply only to counties which now or hereafter may have a population of 75,000 inhabitants according to the last federal census.

In *Street Imp. Dist.* v. *Hadfield, supra,* the act under consideration provided that the collector and county treasurer of each county which then had, or which should thereafter contain, 125,000 or more inhabitants, should pay to the city treasurer of each city fifty per cent. of all road taxes and delinquent road taxes collected by them, respectively, on property within the limits of such city; and that improvement districts not wholly within the city limits and those whose bonds were issued prior to February 4, 1927, should not come within the provisions of the act.

In *Leonard* v. *Luxora-Little River Road Maintenance, supra,* the act attacked on constitutional grounds provided for the division of certain revenues among all the counties of the State on a certain stated basis, but contained a proviso that the general provisions of the act should not apply in counties having more than one judicial district and a population of not less than $65,000, and that in those counties the funds should be divided

between the judicial districts on another and different basis.

In holding all of these acts local and special and within the prohibition of the 14th Amendment, a principle applicable to all and before announced in the case of *LeMaire* v. *Henderson,* 174 Ark. 936, 298 S. W. 327, is recognized and stated. This principle recognizes the power of the Legislature to enact a valid law which will not be deemed to be a local or special one because it does not operate alike throughout the State, when it does apply to the whole State in its material and important features; that is to say, that a reasonable classification may be made with respect to the localities or classes of citizens upon which the law may operate, and that it is not the form, but the operation and effect, which determines its constitutionality.

In discussing the effect of the constitutional prohibition against the passage of local or special acts in the case of *Simpson* v. *Matthews, supra,* the court said: "We do not think that it was intended to do away with the classification of counties, cities and towns according to population or the topography of the country where such classification rests upon substantial differences in situation and needs. The amendment was intended to prevent arbitrary classification based on no reasonable relation between the subject-matter of the limitation and classification made. In determining whether a law was general or local, the Legislature might still make the classification where it was appropriate and germane to the subject, and was based upon substantial differences which make one situation different from another. The classification of counties and municipalities is legitimate when population or other basis of classification bears a reasonable relation to the subject of the legislation, and the judgment of the Legislature in the matter should control unless the classification is arbitrary or is manifestly made for the purpose of evading the Constitution." Applying this principle, the court, in the case of *Webb* v. *Adams, supra,* held that the statute made no attempt at classification, and that the exemption of two counties from its

application did not constitute any reasonable basis for classification for school purposes.

In *Simpson* v. *Matthews, supra,* the court held that the construction of dams and reservoirs was a subject not germane to a classification by population and took judicial knowledge that only one county in the State could come within the provisions of the act, or that any other county would likely do so within any reasonable future time, and that the classification construed with reference to the purposes of the act was a mere subterfuge to escape the provisions of the amendment and to thereby exclude all counties except one from its operation.

In *Street Imp. Dist.* v. *Hadfield, supra,* it was found that the subject-matter of the act did not relate to counties at all, and the effect of limiting its benefits to cities of the first class in counties having a population of 125,000 or more was to localize the legislation, for the classification was not founded on a real or apparent difference in the situation or condition of other cities of a like class, and judicial knowledge was taken that under the provisions of the act it could relate to only one county and could not relate to any other within any reasonable time in the future.

The act involved in the case of *Leonard* v. *Luxora-Little River Road Maintenance, supra,* was found by the court to be a subterfuge to evade the provisions of the amendment; that it could apply to but one county in the State, and that in the nature of things it could likely never apply to any other; that the classification by which this county received a distribution from the highway fund on a different basis from that of others was an arbitrary and unreasonable classification.

Having in mind the principles stated in the cases reviewed and recognizing the cardinal canon of construction that a statute will be upheld unless clearly within constitutional inhibition and where that question is doubtful the doubt must be resolved in favor of the constitutionality of the act, we have no difficulty in upholding the act in question when the end sought to be attained by the Legislature is considered. The purpose of the legislation, as stated in the Brodie case, was to impose

a tax for the use of the highway to be measured by the extent of the amount of motor fuel consumed in motor-driven vehicles, and the object was to obtain revenue for the building and maintenance of the highway system. All persons who used the roads are benefited by the results made possible from the revenues collected by the gasoline tax, and the more revenue obtained, the greater the benefit. The legislation had in mind that the rate of taxation on motor fuel was much lower in some of the bordering states than in this, made possible because of their greater wealth and population. It took into consideration the well-known human trait of getting as much for as little as possible, and therefore recognized that the inhabitants of the border towns and cities would drive across the State line and purchase fuel in the adjoining State, thereby depriving this State of all revenue from the operation of cars. To meet that situation by virtue of paragraph "D," those border towns were placed in a separate classification, and, while under the operation of the general act, it did not operate upon them in the same degree as upon citizens residing elsewhere. This classification was not arbitrary, but made necessary by the situation and bore a reasonable relation to the purpose and object sought to be accomplished by the act.

We are of the opinion that there is no ground for the contention that the act violates the due process clause of the Federal and State Constitutions, or that it comes within the inhibition of the 14th Amendment to the Federal Constitution or § 18, art. 2, of the State Constitution, above set out. It is not to be doubted that the right to acquire and possess property is one of the privileges and immunities of a citizen which the State may not infringe or abridge, or so legislate as to make the same unequal. These, however, are subject to such restraints and classifications as government may justly prescribe for the general good of the whole. It is not to be presumed that the State has any favors to bestow, or that it designs to inflict any arbitrary deprivation of any right. Discriminations between certain persons or classes is obnoxious to the genius of our government, and it is always to be presumed that no discrimination or abridg-

ment of any fundamental right is contemplated or designed by a Legislature, and a law should not be held unconstitutional because of discrimination or because of some arbitrary deprivation of a right unless there is no rational doubt that it improperly discriminates or arbitrarily destroys some right.

As is said in *Magoun* v. *Ill. Trust & Savings Bank,* 170 U. S. 283, 18 S. Ct. 394: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens. * * * There is therefore, no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." As has been aptly said: "Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a Legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts." In the application of these principles many laws have been approved as not in violation of the constitutional provisions under discussion. Notably, among them, is that approved in the case of *Cumming* v. *Board of Education,* 175 U. S. 528, 20 S. Ct. 197, upholding a law of the State of Georgia which provided for the support of certain schools for white children out of the tax raised for public school purposes, and which ignored the negro schools when it had before maintained out of such funds a school of like class for negro children. This

act was passed for economic reasons, and, in affirming the holding of the State court, the Supreme Court of the United States held that under the circumstances disclosed it could not be said that there was a discrimination between citizens because of their class on account of race.

There are many cases illustrating the wide latitude to be given Legislatures in enacting legislation and upholding their acts where there is some discrimination on the ground that it frequently is impossible to impose the same burden upon every species of property without regard to its nature, condition or class. Among these cases are *Clark* v. *Kansas City,* 176 U. S. 114, 20 S. Ct. 284; *Gundling* v. *Chicago,* 177 U. S. 183, 20 S. Ct. 633; *Petit* v. *Minn.,* 177 U. S. 164, 20 S. Ct. 666; *Williams* v. *Fears,* 179 U. S. 270, 21 S. Ct. 128; *American S. R. Co.* v. *La.,* 179 U. S. 89, 21 S. Ct. 43.

It is no discrimination where the burdens of legislation rest unequally, where the subjects are of different classes, provided the classification rests on substantial difference, and, where the statute is founded upon a reasonable basis, it is sufficient if it operates uniformly upon the class to which it applies. *Willis* v. *Ft. Smith,* 121 Ark. 606, 182 S. W. 275.

The legislation here involved affects equally all of those residing in the border towns according to the tax prescribed by the State upon which they border. These constitute one class, and the act operates uniformly in all other sections of the State, and this constitutes another and different class.

It is argued that the act deprives the appellants of substantial property rights; that they had established their places of business without the limits of the border towns and within adjacent territory, and the practical working of the law prevented them from selling motor fuel as they must sell it with a six-cent. per gallon tax while the motorists, by driving a few miles more, could purchase it at a lower rate. The answer to this is that they could do this without the provisions of paragraph "D" for they would only have to drive across the State line into the adjoining State, and therefore there would

be no practical difference in their condition with or without the law.

It is our opinion that the decree of the court below upholding the validity of the act is correct, and it is therefore affirmed.

[redacted]

OZARK HARDWARE COMPANY *v.* COVINGTON.

4-3151

Opinion delivered October 23, 1933.

[redacted]

W. L. Franklin, for appellant.

JOHNSON, C. J. Seeking judgment on an account for $36.05, appellant instituted this suit in a justice of the peace court of Madison County against appellee, wherein it recovered judgment for said sum. Appellee prosecuted an appeal to the circuit court wherein she was successful in defeating a recovery. Appellant prosecutes this appeal to reverse this adverse judgment.

Rule IX of the Supreme Court provides, in part:

"In all civil cases, the appellant shall file with the clerk of this court, when his case is subject to call for submission, an abstract or abridgment of the transcript setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of all questions presented to this court for decision. The abstract shall contain full references to the pages of the transcript."

Rule XII is to the following effect:

"When no abstract and brief have been filed by the appellant, in accordance with Rules IX and X, when the case is called for trial, the appellee may have the writ of error or appeal dismissed, or the judgment affirmed as of course."

Appellant has made no effort to file an abstract of the pleadings and testimony introduced upon the trial of this case in the circuit court. The rules of the Supreme Court are promulgated for the purpose of expediting the business before the court. At least some effort should be made by counsel to comply with the rules of the court. In the instant case Rule IX was completely ignored by counsel for appellant, for which reason, under Rule XII, this case must be affirmed.

The judgment of the trial court is in all things affirmed.

WATSON *v.* DODGE.

4-3175.

Opinion delivered October 23, 1933

Hal L. Norwood, Attorney General, *Roy D. Campbell* and *Walter L. Pope,* for petitioner.

Lee Miles, for respondent.

JOHNSON, C. J., (after stating the facts). On the threshold of this controversy we are met with the contention that the suit pending in the Pulaski County Chancery Court is one, in effect, against the State, and cannot be maintained.

On behalf of respondent, it is insisted, first, that the suit is not one against the State, and, secondly, that, if so, it may be maintained, the State having expressly consented thereto by legislative enactment.

Adverting to the first contention, is this a suit against the State? In *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, this court held that a suit against the penitentiary board to restrain a breach of contract was, in effect, a suit against the State and could not be maintained.

Again, in the case of *Jobe* v. *Urquhart,* 98 Ark. 525, 136 S. W. 663, this court held that a suit against the penitentiary board to reform a contract made in behalf of the State was, in effect, a suit against the State and could not be maintained.

Again, in the case of *Allen Engineering Company* v. *Kays,* 106 Ark. 174, 152 S. W. 992, this court held that a replevin suit against the board of trustees of a State school could not be maintained, because, in effect, it was a suit against the State.

From the authority cited, it is perfectly evident that any suit, whether in law or equity, which has the purpose and effect, directly or indirectly, of coercing the State is one against the State. Our holding in this regard is in full accord with the views of the Supreme Court of the United States. In *Haygood* v. *Southern,* 117 U. S. 52, 6 S. Ct. 608, that court held:

"Though not nominally a party to the record, it (the State) is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit."

The rule announced in the Haygood case, just cited, was approved by the Supreme Court of the United States in the later case of *Murray* v. *Wilson Distilling Company,* 213 U. S. 151, 29 S. Ct. 458.

Based upon reason and authority, we have no hesitancy in holding that the suit pending in the Pulaski Chancery Court against Fred Watson, Revenue Commissioner, is one, in effect, against the State as certainly and effectively as if the State were named and designated as the defendant.

This brings us to the question, can the State be sued in her own courts? Section 20 of art. 5 of the Constitution of 1874 provides: "The State of Arkansas shall never be made defendant in any of her courts."

This provision of the Constitution was before this court in the Pitcock, Jobe and Allen Engineering cases, cited *supra,* and in each of these cases it was specifically held that the State could not be sued in her courts.

In addition to the authorities just cited, this court held in *Caldwell* v. *Donaghey,* 108 Ark. 60, 156 S. W. 839, that the State could not be sued in her courts for specific performance of a contract made in her behalf.

In the more recent case of *Linwood & Auburn Levee District* v. *State,* 121 Ark. 489, 181 S. W. 892, this court held that the State could not be made a party defendant in her courts in a condemnation proceeding to condemn lands belonging to the State.

Without going into further details, it may be said that up to the case of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41, there had been a uniform holding of

this court that the State could not be made a party defendant in her courts, and therefore could not be sued in the State courts. It would be presumptuous for us to elucidate upon the wisdom of this rule. It suffices to say that the Eleventh Amendment to the Constitution of the United States was promulgated in furtherance of this wholesome protection. The effect is that the State courts will not entertain jurisdiction of such suits because of State constitutional prohibition, and the federal courts will not entertain such jurisdiction, because of the prohibition found in the Eleventh Amendment, thereby protecting the sovereignty of the State from assaults of all individuals and corporations.

The motives impelling the adoption of the Eleventh Amendment to the Federal Constitution were aptly stated by Chief Justice MARSHALL in *Cohen* v. *Virginia,* 6 Wheat. 264, as follows:

"It is a part of our history that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general, and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures."

The same court, in *Hans* v. *Louisiana,* 134 U. S. 1, 10 S. Ct. 504, said: "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its policy and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the Legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself."

The same motives which impelled the adoption of amendment No. 11 to the Federal Constitution actuated the prohibition contained in § 20 of art. 5 of the Constitution of 1874. It will be observed that, under the Constitution of 1868, no such prohibition is found. Section 45 of art. 5 of the Constitution of 1868 reads as follows:

"The General Assembly shall direct by law in what manner and in what courts suits may be brought by and against the State."

It is evident that the Legislature, under the Constitution of 1868, had full power and authority to grant permission to individuals and corporations to institute and prosecute suits in the State courts against the State.

In comparing the language used in the respective drafts of the Constitutions, as aforesaid, it is perfectly evident that it was the purpose of the framers of the Constitution of 1874 to withdraw all power and authority theretofore existing in the Legislature to grant permission for the State to be sued by individuals or corporations in her courts.

It is next contended on behalf of respondents that the State, through its legislative branch, has given to individuals and corporations permission and authority to institute and maintain suits against herself in her courts. Our attention has been directed to the recent cases of *Grable* v. *Blackwood,* 180 Ark. 311, 22 S. W. (2d) 41; *Arkansas State Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879; *Arkansas State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71; and *Campbell* v. *State Highway Commission,* 183 Ark. 780, 38 S. W. (2d) 753.

The exemption of the State from suits at the instance of individuals and corporations, as declared in *Linwood Levee District* v. *State,* and other cases, *supra,* has not been departed from in any subsequent case.

The first case cited by respondents as sustaining the contrary view is that of *Grable* v. *Blackwood, supra.* But such is not its effect. That case deals with the validity of a donation to road improvement districts by the State, and the validity of the appropriation act making the donation effective. We there said that the plaintiffs

"in the case at bar did not have any kind of a claim against the State."

The first case that deals specifically with the nature of the suits which had been authorized against the State Highway Commission, in connection with the State's road-building program, was that of *Arkansas Highway Commission* v. *Dodge,* 181 Ark. 539, 26 S. W. (2d) 879. Conflicting views were entertained by the members of the court, but it plainly appears that only two judges were of the opinion that the State had given, or could give, its consent to being sued in connection with its highway program. It was the view of the other five members of the court that such consent had not been and could not be given. It was expressly stated that: "In the proceedings there provided for a judgment might be rendered fixing a liability against the highway commission, but a judgment so rendered would not be a judgment against the State as such, and could not be enforced by the seizure or sale of the property of the State, as a judgment could be enforced against a private litigant. Satisfaction can be had only out of the fund specifically appropriated for the purpose in regard to which the Highway Commission was authorized to contract."

There was also quoted from the Supreme Court of the United States in the case of *Hopkins* v. *Clemson College,* 221 U. S. 636, 31 S. Ct. 654, the following statement of the law: "No suit therefore can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights."

The effect of this Dodge case was and is that, the State having made appropriations of money to promote its road-building program, and having created an agency to supervise the expenditure of any money thus appropriated, provision was made for the juridical decision of contentions arising out of contracts made by the Highway Commission in the expenditure of the appropriations.

This opinion in this Dodge case was arrived at through the anomalous situation that a majority of the

court did not reach the decision rendered through the same views. The decision was a composite one, which is always unfortunate, but, in some instances, unavoidable, where conflicting views of the deciding judges cannot be reconciled. But the majority made it clear that the State itself could not be sued, and that such consent had not been given, and could not be given, by the General Assembly.

This conflict in the opinion of the members of the court was explained in the case of *Arkansas State Highway Commission* v. *Dodge,* 186 Ark. 640, 55 S. W. (2d) 71, and need not be further discussed. We there said: "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 had consented thereto."

The cases of *Bull* v. *Ziegler,* 186 Ark. 477, 54 S. W. (2d) 283; *Baer* v. *State Highway Commission,* 185 Ark. 590, 48 S. W. (2d) 842; and *Arkansas State Highway Commission* v. *Keaton, ante* p. 306, are to the same effect.

The case of *Campbell* v. *Arkansas State Highway Commission,* 183 Ark. 780, 38 S. W. (2d) 753, is cited as conferring authority to sue the State. But such is not its effect. The facts in that case were that the Highway Commission, in constructing a bridge across the White River in Jackson County, had damaged Campbell's property adjacent thereto. The Highway Commission brought no suit to condemn the property, but was sued by Campbell, the property owner, for the damage caused by building the bridge. We construed this damage as a taking

of the property to the extent of the damage, and we held that, while the State could take or damage property in the construction of its road system, pursuant to the right of eminent domain, this right could be exercised only upon compensation made to the property owner.

We treated the bridge as a part of the State's highway system and the damage to the plaintiff's property resulting from its construction as a part of the construction cost, which might be paid out of money borrowed and appropriated by the State for that purpose. The rule announced in the first Dodge case (181 Ark. 539, 26 S. W. (2d) 879), under which contractors were allowed to sue the Commission to enforce their express contracts, was held applicable to the implied contract to pay damages resulting from building the bridge and thereby damaging the plaintiff's private property. In other words, the damage to the plaintiff's property in the Campbell case, *supra,* was a construction cost, for which the owner had the right to sue the Highway Commission. It was there pointed out that § 22 of the bill of rights provides that private property shall not be taken, appropriated or damaged for public use without just compensation therefor, and it was held, in effect, as we have just said, that damaging the property was a taking of it for a public use to the extent of the damage.

The same section of the bill of rights protected the owners of the bridge here in litigation. The State was without power to condemn and take possession of the bridge without compensating the owners therefor, and the judgment of condemnation could not have been enforced until the compensation to which it adjudged the owner to be entitled had been paid. In the condemnation proceedings the owners made no demand for cash paid down, but expressly consented and agreed to accept the solemn pledge of the State to assume and pay the outstanding bonds as they matured. It is not to be doubted that the sovereign State will ultimately discharge the obligation. Conditions not at all peculiar to this State, and of which all persons have knowledge, render the discharge of the obligation impossible in the time and manner contemplated when the property was condemned. But,

even so, the State acquired, and now has, title to the property, and the former owners have the obligation of the State to pay, and we must therefore hold, notwithstanding the equities of the case, that these former owners have no right to have a receiver appointed to take possession of property owned by the State.

Respondents expressly and irrevocably consented to the vesting of the title to the bridge and approaches thereto in the State of Arkansas. And, in lieu of cash, through their representatives, the trustee in the mortgage, irrevocably accepted the solemn pledge of the State to pay the bonds held by respondents as they matured.

For the reasons aforesaid, a peremptory writ of prohibition is granted against the Pulaski County Chancery Court prohibiting further proceedings in the case of *Bennie S. Mayo et al.* v. *Fred Watson, Revenue Commissioner et al.*

REEVES FURNITURE COMPANY *v.* WOLDERT.

4-3167

Opinion delivered October 23, 1933.

Shaver & Shaver and *King, Mahaffey, Wheeler & Bryson,* for appellant.

James D. Head, for appellee.

SMITH, J. Appellee leased a three-story brick building in the city of Texarkana, Arkansas, to appellant for a period of three years beginning April 30, 1931, at a rental of $5,000 per year, payable in monthly installments of $416.66 each. Appellant, a corporation, dealt in furniture, and occupied and used the building in connection

with that business until April 9, 1932, when a fire occurred which damaged the building to such an extent that extensive and expensive repairs were required to restore the building.

On April 16, 1932, appellee wrote appellant advising that steps were being taken for the immediate repair of the building, and revoking a temporary reduction in rents which had been previously allowed. No reply was received to this letter, and the repairs were made expeditiously and at a total cost of about $10,000. A substantial part of this cost appears to have been incurred in better adapting the building for use as a furniture store, and a representative of appellant appears to have made suggestions in this behalf which were complied with.

On May 19, 1932, the lessor wrote the following letter to the lessee:

"I am pleased to inform you that my building at Third and Olive (Vine) streets, Texarkana, Arkansas, held by you under lease until April 30, 1934, will be ready for your use on May 26, 1932, repairs to the damage resulting from the fire of April 9, 1932, unless some unforeseen delay develops, will be fully completed prior to that date.

"In view of the fact that you have a credit of $75 on my books, representing that portion of unearned rent paid in advance for the period immediately following the fire, you may reduce your remittance by this amount, for the month beginning on May 26, 1932, making your check for $341.66, instead of $416.66.

"I am instructing Mr. Thad A. Bryant, Jr., who has been in charge of repairs, to deliver his key to you prior to May 26, 1932, to insure your exclusive access to the building."

On May 23, 1932, the lessee replied as follows:

"By reason of the recent fire which destroyed or partially destroyed the building, which is described in the lease contract between you and the Reeves Furniture Company, of date the 29th of April, 1930, such building was rendered wholly unfit for occupancy by the Reeves Furniture Company, the lessee in said lease contract above referred to.

"You are therefore advised that under paragraph No. 8 of the said lease, that the lease, on account of said fire and its consequential results, as above outlined, was terminated and ceased to be further binding on either you or the Reeves Furniture Company.

"The said lease contract having been terminated by reason of such fire, the Reeves Furniture Company are no longer bound by its terms, and it is not the intention of the Reeves Furniture Company to re-occupy the building after the same has been rebuilt by you."

Paragraph No. 8 of the lease, to which reference was made, reads as follows:

"Eighth: That the lessee shall, in case of fire, give immediate notice to the lessor, who shall thereupon cause the damage to be repaired forthwith; but if the premises be by the lessor deemed so damaged as to be unfit for occupancy, or if the lessor shall decide not to rebuild, the lease herein granted shall cease, and the rent be paid up to the fire."

The keys were tendered on the 24th or 25th of May, 1932, and, the tender being declined, suit was filed on August 22, 1932, for damages for breach of the contract. An answer was filed on September 21, 1932, denying that appellant was bound under the contract to occupy the building after the fire. This answer was amended on May 23, 1933, the day before the trial, setting up the defense of a surrender of the premises and an acceptance thereof by appellee.

Upon receipt of the lessee's letter dated May 23, 1932, appellee advertised the property for rent, and found a tenant, who was placed in possession about a month before the trial from which this appeal comes. No communication passed between the parties subsequent to appellant's letter of May 23d.

Testimony was heard as to the rental value of the property, and the court submitted no other question to the jury. All the instructions requested by appellant were refused, and the only instruction given reads as follows: "You are instructed that, under the evidence, plaintiff is entitled to recover the difference, if any you find from a preponderance of the evidence, between the

rent reserved in the lease for the remainder of the term after June 1, 1932, and the reasonable rental value of said building on May 26, 1932."

There was a verdict in favor of appellee for $4,000, and from the judgment thereon is this appeal.

The instruction set out above directs a verdict for the lessor on the merit of the case, and was objected to on that account. We think, however, that it was properly given. It appears, from paragraph No. 8 of the lease contract, set out above, that the exclusive right to continue the lease in effect in case of fire rested with the lessor, and we perceive no reason why effect should not be given to this provision, as was done by the trial court.

Seasonable notice of the exercise of this right was given, and the repairs were made pursuant to the notice, and, when practically complete, an offer was made to deliver to appellant exclusive possession of the property. This offer was unequivocally declined, and the lessor then had the right, as stated in *Grayson* v. *Mixon,* 176 Ark. 1128, 5 S. W. (2d) 312, to "treat the lease agreement as at an end and sue for damages for breach of the contract, in which case he could bring his action immediately on the breach and recover the difference between the amount of rent reserved and the reasonable rental value for the remainder of the term, if the rental value be less than the amount reserved in the lease, * * *."

The instruction given conforms to the law thus declared, and, as the undisputed testimony shows a complete repudiation of a contract which the lessee was under the legal duty to perform, it was properly given. The judgment must therefore be affirmed, and it is so ordered.

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

4-3155

Opinion delivered October 23, 1933.

W. H. Bengel and *Moore, Daggett & Burke,* for appellant.

SMITH, J. Appellees borrowed $10,000 from the Federal Land Bank of St. Louis on May 16, 1918, and as security therefor gave a first mortgage on 280 acres of land in Phillips County. The sum borrowed was payable in installments according to the plan adopted by the Federal Land Banks.

Default having been made in the payments due May, 1930, and in November of the same year, suit was instituted on April 7, 1932, to foreclose the mortgage. No answer having been filed, a decree by default was rendered for $10,062.90, which provided that, if this debt were not paid on or before November 1, 1932, the mortgaged property should be sold by a commissioner named for that purpose. Failing payment, the land was advertised and sold on December 10, 1932, at which sale the mortgagee bank became the purchaser for the sum of $5,500. On December 12, 1932, the commissioner made report of the sale to the court, which was approved and confirmed. A commissioner's deed was executed and acknowledged in open court and was filed for and placed of record.

Thereafter, on January 12, 1933, appellees petitioned the court to set aside the decree of foreclosure and to cancel the commissioner's deed, and as grounds therefor alleged the following facts: Petitioners had paid $7,475 on the loan, yet the decree is for a sum in excess of the original loan. There were no bidders present at the sale except the representative of the bank, whose bid of only $2,000 left a deficiency judgment for $8,475. The land is worth an amount greatly in excess of the balance due under the mortgage, and "your petitioner is informed that there is now pending in Congress a bill designed to aid such cases as this. Your petitioner would further respectfully call attention to the joint resolution passed

by the Arkansas Legislature, urging chancellors to hold up foreclosures on farms for a period of two years, also other bills for the relief of farm lands." This petition was unverified, and no testimony was taken in support of its allegations. It may be said, however, that the commissioner's report and the court records show that the sum bid for the land was not $2,000, as alleged, but was, in fact, $5,500.

The court entered an order vacating and setting aside the sale and canceling the commissioner's deed on the same day the petition was filed asking that relief. This order required the petitioner to deposit $40, to cover the cost of readvertising the property, and the deposit of this money with the clerk of the court was made on February 18, 1933.

It was ordered that a receiver be appointed "for the purpose of renting the lands for the crop season of 1933, and said receiver is further directed, in the renting of said lands, to give preference to G. H. Vineyard and his tenants." This appeal is from that order and decree.

The question here presented has been frequently and recently decided by this court, one of the most recent cases being that of *Federal Land Bank of St. Louis* v. *Floyd, ante* p. 616, 61 S. W. (2d) 449. We there said: "Therefore, it seems that this court is committed to the doctrine that a purchaser at a commissioner's sale takes a vested interest by reason of the purchase, and confirmation follows as a matter of right, unless it be found that fraud entered into the transaction or else the price bid and offered was so grossly inadequate as to shock one's sense of justice."

There is no allegation, nor was there proof, of any fraud or unfairness in the sale, which the court approved and confirmed; nor was the price so grossly inadequate as to shock one's sense of justice.

The order approving the sale should not therefore have been set aside, and the commissioner's deed should not have been canceled. The decree so ordering is therefore reversed, and the cause will be remanded, with directions to enter a decree in accordance with this opinion.

WASSON *v.* HUNTER.

4-3172

Opinion delivered October 23, 1933.

Miles, Armstrong & Young, for appellant.

D. W. Bryan, for appellee.

HUMPHREYS, J. This cause comes to us on appeal and cross-appeal from the southern district of the Franklin County Chancery Court and involves the confirmation of the sale of the balance of the assets of the Bank of Branch to Fred Armstrong for $400 and the allowance of $50 a month for 25½ months to Lee G. Sims, special deputy bank commissioner, for liquidating the assets of the defunct bank.

Appellant contends that the trial court erred in refusing to allow the deputy bank commissioner $75 a month for liquidating the assets of the bank, and appellee contends that the trial court erred in approving and confirming the sale of the balance of the assets to Fred Armstrong for $400.

The deputy commissioner administered the affairs of the bank under contract with the Bank Commissioner for $75 a month.

The trial court was not bound by the contract for $75 per month agreed upon between the Bank Commissioner and deputy to liquidate the assets of the defunct bank, but, on the contrary, had authority to fix a fair compensation based upon the testimony adduced in the case. We so held in the cases of *Taylor* v. *Moose,* 185 Ark. 856, 49 S. W. (2d) 1043; *Krumpen* v. *Taylor,* 183 Ark. 1046, 40 S. W. (2d) 775; and *Jeffries* v. *Wasson, ante* p. 519. The record reflects that the deputy commissioner was acting as special deputy by appointment in liquidating the American Bank Trust Company of Paris at a monthly salary of $300 and the Bank of Ratliff at a monthly salary of $100 and an additional $2,500 he received from the latter institution as a bonus at the time he was appointed liquidating agent for the bank in question. In liquidating these three banks, which were located only a few miles apart, salaries were paid to assistants out of the assets of the defunct banks, and that he was not prevented on account of the liquidation from carrying on his regular employment by the People's Loan & Investment Company of Ft. Smith, from which he received a salary of $450 per month. The Bank of Branch was a small institution. It owned only $24,000 in notes to be collected and less than $10,000 was collected out of them covering a period of 22½ months. The chancery court was generous enough in allowing appellant Sims $50 a month for 25½ months for liquidating the bank at Branch, and it was fair compensation for the work actually done by him.

The trial court was also correct in approving and confirming the sale of the balance of the assets to Fred Armstrong. All the notes sold, except two small ones, were barred by the statute of limitations, and none of them were collectible at law. One of the depositors testified that he would have bid $600 for the notes, and now (at the time of the trial) he would not give $500 for them. He did not say what he would give for them, making no offer whatever. He failed to attend and bid at the sale, which he had an opportunity to do. The real estate included in the assets and sold was of problematical value only, and no offer was made by appellees for it. The trial

court found that, should he set the sale aside, the property would not bring enough over the $400 bid to benefit the depositors in the least, and, after reading the testimony, we concur in this view. No fraud was shown in conducting the sale, and every one interested had an opportunity to be present and bid.

No error appearing, the decree is affirmed on the direct and cross-appeals.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* TOLER.

4-3267

Opinion delivered October 23, 1933.

[redacted]

Owens & Ehrman and *John M. Lofton, Jr.,* for appellant.

Melbourne M. Martin, for appellee.

KIRBY, J., (after stating the facts). The writ of prohibition is the appropriate remedy where the inferior court has no jurisdiction over the person of the petitioner and can acquire none. *Caldwell* v. *Dodge,* 179 Ark. 235, 15 S. W. (2d) 391. It is a discretionary writ. *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. (2d) 421; *Galloway* v. *LeCroy,* 169 Ark. 838, 277 S. W. 35. It is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that will be done by such usurpation. *Macon* v. *LeCroy,* 174 Ark. 228, 295 S. W. 31; *Dist. No. 20, United Iron Workers* v. *Bourland,* 169 Ark. 796, 277 S. W. 546; *Metzger* v. *Mann,* 183 Ark. 41, 34 S. W. (2d) 1069.

It is also true that no application for relief need be made to the lower court when such application would be futile, although, as a general rule, a writ of prohibition will not be issued to a lower court unless the attention of the court, whose proceedings it is sought to arrest, has been called to the alleged lack of jurisdiction, the

foundation of the rule being the respect and consideration due to the lower court and the expediency of preventing unnecessary litigation. *Monette Road Improvement Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59; *Detroit Fidelity Ins. Co.* v. *Priddy,* 185 Ark. 9, 45 S. W. (2d) 44.

Petitioner herein did file a motion, however, to dismiss the suit as beyond the jurisdiction of the court, alleging the plaintiff did not live in the county, etc. An affidavit was filed with the complaint stating that the plaintiff was a resident of Saline County; and, upon the motion being overruled, no objections appear to have been made or exceptions saved, the record entries showing: "Cause by consent set for trial September 8."

Petitioner insists that it had no other adequate remedy to protect its rights than by prohibition, since, had it filed an answer and proceeded to trial of the cause on its merits, it would have waived its right to apply for a writ of prohibition, and especially if it had appealed to this court upon an adverse judgment, it having been held frequently that an appeal in such cases is tantamount to an entry of appearance leaving the cause to stand for trial with the appearance of defendant entered at the next term after the decision of this court on appeal. *Order Railway Conductors* v. *Bandy,* 177 Ark. 694, 8 S. W. (2d) 448.

Petitioner had the right, of course, to appear for trial in Saline County, and, whether or not the complaint alleged facts that bring it within the provision of the statute, § 6150, Crawford & Moses' Digest, ("Venue is no part of a cause of action, and it is not usual, nor does it seem necessary, to aver the fact showing it." *Inter-Ocean Casualty Co.* v. *Copeland,* 184 Ark. 655, 43 S. W. (2d) 225), it could have waived its right to object by taking any substantial step in the defense of the cause, such as filing an answer, etc.; and certainly it could enter its appearance by coming into court and agreeing to the setting down of the cause for trial on a certain day as was done here.

The court did not err in overruling the motion to quash, and the writ of prohibition is denied.

WALLDREN *v.* WALLDREN.

4-3171

Opinion delivered October 23, 1933.

Martin, Wootton & Martin, for appellant.

Appellee, *pro se.*

MEHAFFY, J. The appellee, Gage B. Walldren, was in business in Chicago, and on March 1, 1926, he and the appellant were married in Chicago. On August 4, 1932, appellee went to Hot Springs, Arkansas, and established his residence, and on October 4, 1932, he filed an action for divorce in the Garland Chancery Court, alleging a residence in Garland County for more than sixty days. A warning order was issued, and C. D. Harmon, an attorney, was appointed to notify appellant of said action.

On November 1, 1932, appellant, by her attorney, C. D. Harmon, filed answer and cross-complaint, in which she denied the material allegations of the complaint, and alleged that there were property rights to be adjudicated and that appellee was the owner of an interest in warehouses in Chicago, having a value of at least $75,000, and a yearly income for the years 1931 and 1932 and prior

thereto, exceeding the sum of $6,400. She alleged that the appellee wilfully abandoned and left her on March 15, 1931, without reasonable cause, and that since that time he had utterly failed to adequately maintain and provide for her. She prayed that appellee's complaint be dismissed; that she be awarded a reasonable sum for her maintenance and support, and for a continuing and permanent alimony.

Evidence was taken, and a decree was rendered by the chancery court on January 25, 1933, granting divorce to appellee, and awarding judgment in favor of appellant in the sum of $300 as attorney's fees, and the sum of $50 as expense money, and $80 per month alimony during their joint lives, unless the appellant shall sooner remarry, in which event payment of alimony shall cease. This appeal is prosecuted to reverse the decree of the chancery court, granting a divorce to appellee.

The evidence introduced on the part of the appellant showed that he was born in Chicago, and lived there continuously until he went to Hot Springs, August 4, 1932. He was interested in business in Chicago, one of the stockholders in a corporation, and that he has no business elsewhere, and no income except from his business in Chicago; that his income from this business the previous year was $6,400.

Mrs. Joseph Sullivan testified for the appellee that she is 37 years old, a sister of appellee, and has known the parties during their married life; visited them several times at their several addresses in Chicago; that during their married life she had opportunity to observe both of them; that her brother was a good husband, and was kind and affectionate, and did everything to make his wife's life pleasant; he was a good provider and a dutiful husband; she observed appellant's conduct towards her husband on numerous occasions, and, regardless of what her brother did, his wife was unappreciative of kindnesses bestowed upon her; continually nagged, fussed, and treated him indifferently in the presence of her friends without cause; on one occasion of their anniversary appellee mailed her an anniversary card with $50, which did not meet with her approval, and she

carried on a general war lasting several days, by heaping continuous insults upon him. One instance, the witness and her husband were invited to appellee's home for dinner, and witness and her husband were late, and upon arrival at appellee's home appellant was in a considerable temper and throughout the meal, in the presence of guests, continually nagged her husband about their lateness, made insulting remarks, to the embarrassment of appellee and their guests, causing the party to be concluded at an early hour. Appellant continuously and openly insulted appellee, and was guilty of rudeness, contempt, and continuously nagged at him, making his life intolerable; appellee did all he could to provide for appellant, of which she was unappreciative.

Edward E. Walldren, who is 75 years old and the father of the appellee, has known the appellant about eight years in Chicago; during the time his son and wife lived together, his son did everything in his power to make her happy. Appellant was rude, openly insulting, and nagged the appellee, and did other things to make his life miserable, and heaped so many indignities upon him that it was impossible to detail them unless asked to give a lengthy testimony; is convinced that his son's wife had determined to make him unhappy and miserable, and kept him upset and did other things to interfere with his business, without cause. June, 1930, at witness' home in Long Lake, Illinois, his son and wife were invited to dinner with others, and without provocation appellant excepted to the arrival of certain other guests and insisted that appellee leave with her before dinner. After much embarrassment and provocation, they remained for dinner, during which time she sat with her back to the guests she objected to, and refused to enter into any conversation except to make sarcastic and impudent remarks to her husband. Her attitude toward appellee was at all times one of contempt and ridicule.

Gage B. Walldren, the appellee, testified that he was formerly engaged in the storage business in Chicago; had been a resident of Hot Springs since August 4, 1932; married March 1, 1926, in Chicago, and he and appellant lived there together as husband and wife until March 15,

1931; shortly after their marriage appellant began a course of rudeness and contempt, continuously nagged and fussed, with the result that he could never please her; that he bestowed luxuries upon her in keeping with his financial condition, and she continuously demanded and expected more; openly insulted him in the presence of friends which humiliated him, and made his life miserable and intolerable; kept him upset to where he could not devote the time and thought his business demanded; he did things that any man would do to make a woman happy, but it seemed that she was not satisfied.

Thomas Mays testified in substance that appellee came to his place in Hot Springs, Arkansas, on August 4, 1932, and had resided there since.

Edward E. Walldren was recalled. He testified that he was president of the Walldren Storage Warehouse, a closed corporation since November 15, 1929; that the stock book record was in possession of appellee, who was the secretary and treasurer of the company; the stockholders are witness, appellee, and James McGrath, an employee of the corporation; testified about one instance where he said the conduct of appellant broke up a party. She seemed to take delight in doing everything she could to make her husband's life unhappy. He knew they were not getting along well; learned this from his son. The Walldren Storage Warehouse is a corporation capitalized at $100,000, and a mortgage on it for $65,000; it is a five-story, fireproof brick building. The stock book would show the interest of his son in the company, but he refuses to produce the book, as it is in the possession of his son; his son is now in employ of the company, drawing a salary, but has not been in the office for the last three months; the company maintains a record of the salaries, but he refuses to produce it. Witness testified at some length, but generally that appellant nagged at appellee, and insulted him, and in one instance witness was accused of carrying away wine glasses from the home of the mother of appellant, but did not know who accused him.

Several witnesses testified in behalf of appellant, each of them contradicting the evidence given on the part of the appellee.

The evidence shows they separated on March 15, 1931, and on March 24, 1931, appellee wrote to appellant the following letter:

"March 24, 1931.

"Dear Elsie: I have not changed my mind, therefore I am using this means to inform you what I intend to do. As long as you reside at Maplewood Avenue you will receive $200 per month. In the event you want to put your furniture in storage and move, I will send you $150 per month. You will not have to work. The reason for the difference in the money is not to force you to live at your present address, but I realize it cost more on account of the rent. If you decide to move or store your furniture, I will pay this expense. My advice would be to get a small apartment for yourself or go to the Lake for a month or two. I do not blame you in any way for my actions. You are not to blame.

"If you decide to store your furniture, I will send a packer and barrels to the house and get the dishes ready before you move, you can advise me.

"Sincerely,

"Gage B. Walldren.

"(over)

"I am inclosing two checks, each for $100, that are postdated, they will be OK after the 27th, Friday. Gage."

Appellant testified that she received several other letters from appellee after he left, and he did not, at any time, state that he left because he was nagged, but he stated to her that she was not to blame for anything that she was doing; that he could not get a divorce because he had no grounds; after receiving the letters she talked to appellee on the 'phone; the last time he talked to her about letting him have a divorce was in September or October, 1932, at which time he was supposed to be in Hot Springs. From September, 1932, she continuously received letters from him with inclosures of money, in envelopes postmarked August 5, 12, 19, 26, September 9, 16, 23, 30, October 7, 21 and 28th, all addressed in her husband's handwriting, and posted and dated in Chicago.

The cause of divorce is alleged in appellee's complaint as follows: "That, during the time they lived together as such husband and wife, the defendant pursued a course of rudeness, contempt and other disregard for the plaintiff; that she constantly nagged and fussed, without any cause whatever, all of which conduct was continuous and rendered the condition of the plaintiff miserable, unbearable and intolerable."

It will be observed that no facts are alleged constituting the rudeness, contempt and other disregard for appellee. In other words, it is a mere conclusion of law based on the statute, without any attempt to set out what the facts are, or when they occurred, other than stating that it was at the time when they lived together.

"The indignities of which she complained should have been specifically set out, that it might have been seen whether they were such as to render her condition intolerable as alleged, or a sufficient cause for the divorce she sought." *Brown* v. *Brown,* 38 Ark. 324.

An allegation such as the one in appellee's complaint would be sufficient to support a decree where no motion to make more specific was filed, if the evidence had been as to specific facts or specific acts of appellant, instead of mere conclusions.

Where one brings suit for divorce alleging indignities and misconduct, as the appellee did in this case, the defendant, of course, would be entitled to know what the plaintiff claimed were the facts constituting the indignities, and, if a motion was made to make more specific, the court would require the plaintiff to set out the facts. The evidence, however, in this case amounted to nothing more than the conclusions of the witnesses, with the exception of one or two instances.

The statute provides that one may be entitled to a divorce where the other party shall offer such indignities to the person of the other as shall render his or her condition intolerable, but the court decides the question of whether the acts complained of are such indignities as to render one's condition intolerable. It is not the province of the witness to say that one party mistreated the other, and offered such indignities as to render his condition

intolerable, but the witness must state facts, and the court determines whether the facts testified to are such as to justify a decree on the grounds that the facts shown were such as to render the condition of the party intolerable.

In the case of *Bell* v. *Bell,* 105 Ark. 195, 150 S. W. 1031, this court said: "The witnesses upon the part of the plaintiff testified in general terms that about a year prior to the institution of this suit the defendant seemed to lose her love and affection for the plaintiff; that she was rude and contemptuous towards him, and that during the winter prior to the bringing of this suit the plaintiff was sick, and the defendant did not wait on him, and finally, in May, 1911, that she left him. But none of these witnesses testified to any specific act of rudeness on the part of the wife, or to any specific contemptuous language spoken by her to him. This entire testimony consists of generalities, constituting at most mere opinions or beliefs of the witnesses. It is for the court to determine whether or not the alleged offending spouse had been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses." The case of *Bell* v. *Bell, supra,* was followed in the case of *Dunn* v. *Dunn,* 114 Ark. 516, 170 S. W. 234; *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1; and *Cain* v. *Cain,* 145 Ark. 224, 224 S. W. 481.

"On the other hand, testimony which amounts to no more than mere inferences or conclusions of the witnesses should be rejected." Jones on Evidence, (2) vol. 3, page 1968.

The evidence of appellee as to the misconduct of appellant is also contradicted by letters written by himself after the separation. We think, therefore, that the evidence is wholly insufficient to justify a decree in favor of appellee.

In order to get a decree on the grounds alleged, he must prove specific acts and conduct of the appellant, and not mere conclusions of witnesses.

The decree is therefore reversed, and the cause remanded.

W. L. DOUGLAS SHOE COMPANY *v.* ROLLWAGE.

4-3162

Opinion delivered October 23, 1933.

Knott & Spencer, for appellant.

Mann & Mann, for appellee.

MCHANEY, J. Appellant sued appellee, a member of the bar in Forrest City, Arkansas, to recover judgment against him for $763.63, the amount of a claim sent him for collection against B. M. Yoffie, doing business in Forrest City under the name of Yoffie Department Store, alleging negligence in the handling of said claim which resulted in the loss thereof to appellant. The undisputed evidence in this case shows that Yoffie was indebted to appellant in the amount above stated; that on December 15, 1930, his department store, including his stock of merchandise, was totally destroyed by fire; that he carried $4,500 of insurance on the stock which was adjusted after the fire for $3,600: that he owed outstanding bills for merchandise in the sum of about $4,000; that after the fire a number of creditors sued him, causing writs of garnishment to be served on the insurance companies carrying the loss, all of which were paid in full,

leaving $175 of the insurance money unexpended in the payment of debts; that appellee was a member or subscriber to the American Lawyers' Quarterly and was its exclusive representative in Forrest City; that under date of December 23, 1930, appellant's claim was forwarded to appellee for collection by C. S. Dudley & Company, of Dallas, Texas. The letter of transmittal to appellee quotes a telegram from appellant advising that the insurance money owing Yoffie be attached. This letter in part reads as follows: "We are attaching an itemized statement of the account with affidavit. Of course, if you can get the insurance assigned to you, it will be preferable to garnishment, but, if you are unable to do so, proceed to collect for our client, drawing on us for the necessary court costs, you will also have your local bonding company make bond for garnishment proceedings and send us the bill. This party wanted to return some to our client, and they agreed to accept certain shoes. We inclose copy of our letter under date of December 18th, which sets out the facts. We are of the opinion that they did not ship the shoes before the fire, but, in the event the shoes were shipped, you will reduce the amount of the garnishment in accordance with the amount of the shoes returned.

"Please acknowledge the papers promptly, and you will do us a great favor to give this matter your personal attention."

To this letter appellee replied under date of December 29, 1930, as follows: "Replying to your letter of the 23d inst,. will say this debtor has given me assurance of his intention to pay this claim immediately upon receiving check covering his insurance; this debtor bears a good reputation; the circuit court alone has jurisdiction in this case; its next session will be in March, 1931, wherefore, no judgment can be obtained and garnishment levied at present; adjustment has not as yet been made, but adjusters are expected daily.

"I shall keep in close touch with debtor with a view of making this collection as stated."

Under date of January 15, 1931, C. S. Dudley & Company wrote appellee in reply to his letter as follows:

"Your report of December 29th was received, and we believe that garnishment suit should be instituted against the insurance companies or debtor forced to give you an order on the insurance companies. We feel that debtor should be perfectly agreeable to giving you an order on the insurance company for payment of this account, and, if he is not disposed to do so, it may be that we will save ourselves considerable criticism from our client by proceeding with garnishment.

"Practically every time that we have granted the courtesy and privilege of handling insurance direct with creditors, it was regretted in the final outcome, because creditors did not get what they anticipated. If you will advise what papers you need in connection with the further handling of this matter, we will be pleased to call on clients for same. Even though judgment cannot be obtained until the March term of court, if we go ahead with action and garnishment proceedings, we will be pretty sure of getting the money then. Awaiting your further advice, we are,"

To this letter appellee again replied under date of January 22, 1931, advising that the fire insurance had not yet been adjusted, but that the adjuster was expected daily, and that judgment could not be obtained until the March term of the circuit court and that garnishment could not be issued until after judgment. In this letter he asked for a check for $10 to cover court costs, to be used if necessary. Dudley & Company replied to this letter under date of February 3, 1931, as follows: "We have your letter of January 22d, in regard to the above matter. We do not understand what you mean that no garnishment can be run against the insurance until after judgment is obtained. When did that become a law? If your laws are the same as they are in Texas, my good friend, you can run a garnishment at the time of filing suit. All you have to do is to place bond at the time of issuing garnishment for twice the amount of judgment and proceed in the matter. In the meantime, we are handing you herewith complete statement, invoices, affidavit and client's cost deposit check No. 220275 in the sum of $15, to be used as advanced court costs. Please give us

your acknowledgment in regard to the above matter; perhaps we don't understand your letter, and get us straight about running that garnishment suit, please; we are worried about that."

Appellee replied under date of February 16th, acknowledging receipt of the check for $15 and advising that no adjustment had been made of the loss, and that "no garnishment can be executed until adjustment has been made; however, an adjuster is expected daily, and I have the assurance of Mr. Max Yoffie, the proprietor, that he will give a check to me covering the amount of this claim immediately upon the adjustment being made. I shall keep in touch with him with a view of making this collection as stated. This debtor carried an insurance on his stock and fixtures of $4,500 and loss was total. I shall advise you immediately upon any change in present conditions."

Appellee did not file any suit or cause any garnishment to issue, and admits that he relied completely and absolutely on Yoffie's statement that he would pay this account when the insurance was paid; that he did not know when the insurance was paid, but afterwards Yoffie told him he could not pay appellant's account because he got nothing. It appears that there was some question about the legitimacy of the fire, and that the insurance companies held up settlement pending investigation of the origin of the fire, and that appellee thought a suit would have aggravated this situation. Two lawyers testified that they thought appellee used fair judgment in the course pursued.

At the conclusion of the testimony, the court instructed the jury, at the request of appellant, as follows: "Where a claim is placed with attorney for collection with instructions to attach certain property, and the attorney fails to bring suit or attach the property as directed, and in consequence of his delay a loss ensues, the attorney is liable, though he acted under an honest belief that delay would best serve the client's interest, or that a suit would be unavailing." Thereupon the court instructed the jury on its own motion that the burden was on appellant to show by the preponderance of the evi-

dence that appellee failed to use such care that an attorney should use in the collection of such claim, and that, if they found that he did not use such care, it would be their duty to find for appellant in the amount sued for. But, if they found that appellee "used such care as he should use in such cases, it would be your duty to find for the defendant." The court gave another instruction which in effect combined both of the above instructions. The jury found for appellee, upon which judgment was entered, and this appeal is from that judgment.

The above instructions were in conflict. The undisputed facts show that appellant, through its agent, instructed appellee to institute suit and cause garnishment to be issued for which he was sent $15 to cover the costs, $5 more than he had requested, and instructed him to have a surety company make a bond drawing on the agent for the cost thereof. Appellee had no discretion in the matter. His instructions were positive and direct. The fact that he labored under a misapprehension of the law relating to garnishment before judgment did not excuse him, as a mere glance at the statute would have been sufficient to convince him of his error. In the early case of *Pennington's Ex'rs* v. *Yell,* 11 Ark. 212, the duty of an attorney to his client is laid down in the following language: "Reasonable diligence and skill constitute the measure of an attorney's engagement with his client. He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with and skilled in the same kind of business." See also *Hampel-Lawson Merc. Co.* v. *Poe,* 169 Ark. 840, 277 S. W. 29.

This case related to the duty of an attorney to continue in his client's behalf after judgment to use diligence in securing a satisfaction thereof. The rule as to the duty of an attorney to follow the instructions given him regarding the handling of his client's claim is stated in 6 C. J., p. 704, as follows: "An attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matters of detail connected with

the conduct of the suit, and he is liable for all losses resulting from his failure to follow such instructions with reasonable promptness and care. Thus, if an attorney is instructed by his client to bring suit upon a note placed in his hands, it is not discretionary with him to bring suit or not to bring it, but he will be liable for any loss due to his neglect, although he acted in good faith and did what he honestly supposed to be for the interest of his client. Conversely, where an attorney is instructed to pursue a particular course of action, and he does so, he cannot be held liable for negligence in not pursuing another course which might have proved more beneficial to his client." Here the undisputed evidence shows that appellee failed to follow the positive instructions given him by appellant's agents in failing to bring suit and sue out writ of garnishment before judgment. The fact that he talked with Yoffie, who promised to pay this claim on receipt of the insurance money and that he trusted implicitly in Yoffie, is no defense. By failure to follow the client's instructions, appellee became liable for whatever loss appellant sustained, and this, as we view the evidence, is the only question for the determination of the jury. If appellee had pursued the course directed by his client promptly upon receipt of the claim, he undoubtedly would have received something from the insurance companies in satisfaction of his client's debt, but just how much is a question for the jury. It is shown that others who garnished the insurance companies collected their debts in full, and that Yoffie still had $175 remaining of insurance funds. The judgment will be reversed, and the cause remanded for a new trial.

SIMMS OIL COMPANY *v.* SEAGO.

4-3149

Opinion delivered October 23, 1933.

McKay & McKay, for appellant.

McNalley & Sellers and *Jones & Jones,* for appellee.

BUTLER, J. This appeal is from a verdict and judgment in favor of the appellee for the sum of $10,000 for personal injuries sustained by him while in the employ of the appellant company. The sole ground on which the contention of the appellant for reversal is based is that the appellee, on account of the nature of the work in which he was engaged and the character of injury received, assumed as a matter of law the risk at the time and place that the injury occurred.

On the 13th day of June, 1929, the date the appellee received the injury, he was in the employ of the appellant company as a pumper. The oil wells were operated by means of a pumping unit, the motive power being furnished by a gasoline engine. There were eight wells under the care of the appellee, whose duty it was to visit each one during the time he was on duty and to keep the machinery in operation, and for this purpose could start and stop the machinery, keep it oiled, keep the bolts tight and the floor around the machinery clean. At Murphy well No. 4, the one at which the accident occurred, the appellee had noticed that for several days the oil had been escaping from some part of the machinery and flowing out on the platform around the unit. He called this to the attention of his superiors from day to day but repair was not made until the forenoon of the 23d. Passing this well

at some time of the day, he discovered that the oil had ceased to flow over the platform, that the machinery had been repaired, and that the platform was covered with a layer of sand which had been placed there to absorb the oil that was on the platform. In the regular course of inspection on that afternoon he reached Murphy well No. 4, bringing with him his tools to remove the sand he had before discovered upon it. He laid these tools down nearby, and, going around the unit for the purpose of inspection, he discovered that it was in good operation, needed no oil, and the only defect he observed was a loose bolt on the platform, but he had no wrench with him to tighten the same. He stepped upon the platform in order to pass over to get his tools, and stepped upon a bolt hidden under the sand which turned and slipped, causing him to fall under a part of the machinery, resulting in his injury.

It was in evidence that this bolt had been thrown upon the platform and covered with sand by an employee of the company, one of a gang of four employees who were called roustabouts, who were sent from place to place to do such particular work as they might be directed to do without having any regular job or character of work to perform. This employee testified that he had been told by his superior about 11 o'clock to go to Murphy well No. 4 and clean up the rig; that it was his duty, if he found anything in a broken condition needing only a minor repair, to make such. When he reached the well, he found that a bolt was broken in a part of the machinery called the pitman. He removed this broken bolt and replaced it with a new one, throwing the broken bolt upon the platform. This was covered with oil, and he scattered sand over it to absorb the oil. No one had given him any particular directions to do this, but that was a part of his duty, and he was supposed to do it. It was his intention to scrape the floor before he left. He first began under the derrick and cleaned that, and it would have taken him about five minutes to finish the job by scraping the floor around the pumping unit when the whistle blew for dinner, and he quit, intending to return after dinner and complete the job. After dinner, however, he was sent to another job and did not return.

The appellant insists that, since it was one of appellee's duties to clean the floor around the pumping unit for his own protection as well as others whose duties might require their presence on the floor, he must be held to have assumed the risk of his injury, as he was there for the purpose of performing the duty that he had contracted to do; that therefore, for any risk or injury resulting, the master would not be liable, under the rule announced in the case of *Moline Timber Co.* v. *McClure,* 166 Ark. 364, 266 S. W. 301, and numerous cases following. In the case of *Timber Co.* v. *McClure, supra,* this court said: "Learned counsel for defendant invoke the rule, established by decisions of this court and by other authorities, that, where the conditions under which a servant is put to work are constantly changing so as to increase or diminish his safety, it is the servant's duty to make the working place safe and that no duty in that regard rests upon the master. That rule is well established by decisions of this court. *Grayson-McLeod Lbr. Co.* v. *Carter,* 76 Ark. 69, 88 S. W. 597; *Murch Bros. Const. Co.* v. *Hays,* 88 Ark. 292, 114 S. W. 697; *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140, 124 S. W. 1048; *Fordyce Lbr. Co.* v. *Lynn,* 108 Ark. 377, 158 S. W. 501; *Sheldon Handle Co.* v. *Williams,* 122 Ark. 552, 184 S. W. 43. That doctrine is an exception to the general rule that the master owes his servant the duty to exercise ordinary care to make the working place and appliances with which to work reasonably safe. Of course, where the duty is delegated to the servant himself to make his own working place and appliances safe, or to determine the sufficiency of the appliances, there is no duty on the part of the master, and the servant assumes the risk of any danger arising from the use of the working place and the appliances and material."

We are of the opinion that the facts of this case do not bring it within the rule of the case just cited. The dangers ordinarily incident to the use of the platform would be occasioned by the oil that might get upon it causing it to be slippery, and the purpose of cleaning it would be to obviate this danger. There is evidence that this duty was only one of several he had to perform,

and that there were other employees whose duty it was also on occasion to clean up around the wells. The rule is so well settled as to make the citation of authorities unnecessary, that the servant assumes only those risks which are ordinarily incident to his employment, and he does not ordinarily assume risks created by the negligent acts of the master, acting through a fellow-servant. There is testimony that a fellow-servant, acting within the line of his duty, negligently left the broken bolt upon the platform and covered it with sand so as not to make it discoverable by the appellee from an ordinary inspection, and thus created a risk which would not ordinarily exist, and which would not usually be incident to the nature of the employment in which the appellee was engaged.

This is not a case where it can be said as a matter of law that the risk was assumed by the servant, and, as the instructions are not copied into the record, but are conceded to be correct, we must assume that the jury, upon proper declarations of law, passed on this question.

It is argued that appellee's present plight was not caused by the injury resulting from the fall when he stepped on the bolt, but that it is the result of a disease originating from some other and independent cause, and a suggestion is made that it might have been from a different injury than that complained of. The testimony of appellant's witnesses, especially the physicians, supports appellant's contention; these testified that there was a diseased condition of a part of the backbone, which caused his disability, but that this was not occasioned by any antecedent injury but by the attack of some kind of germ on that part of his organism. However, there was other testimony that, before the date of the alleged injury, appellee was a healthy man, able to and did work regularly, and that after that he was unable to work for several days, complained of great pain and was treated by several physicians. He went back to work, but there is evidence he was never able to work with the same degree of efficiency as before, and complained of pain during this time, and when he strained his back he never was able to go back to work again. The injury claimed to have been received and appellee's previous physical condition was

related to physicians who were familiar with his then condition, and these testified that in their opinion the injury detailed to them was the cause of his present disability. This raised a question of fact, upon which the jury's verdict is conclusive.

It is insisted, however, that in any view of the evidence, the damage awarded by the jury is excessive. We have seen that his present condition, in view of the verdict of the jury, must be attributed to the injury arising on June 23d. Regarding that condition, there is but little dispute. He suffers much pain and will continue to do so. He has been rendered totally unfit to perform any work requiring physical exertion, and this condition is permanent. Just before the injury he was a healthy, industrious man, thirty-nine years old, a common laborer, working seven days in the week at a daily wage of $5.50. In view of his age, loss of earning power and pain endured and reasonably to be expected in the future, we are unable to say that the verdict of the jury assessing the damage was the result of passion or prejudice, but rather that it had substantial evidence to support it.

Let the judgment be affirmed.

JACKSON *v.* ELDER.

4-3180

Opinion delivered October 30, 1933.

C. T. Cotham and *John H. Freeman,* for appellant.

Houston Emory, C. H. Herndon and *Harold Watkins,* for appellee.

JOHNSON, C. J., (after stating the facts). Appellant insists that the Montgomery County Chancery Court had jurisdiction of the parties and subject-matter set forth in his complaint, and cites as authority therefor, first, *Big Gum Drainage District* v. *Crews,* 158 Ark. 566, 250 S. W. 865. In this case the drainage district instituted suit against Crews, as collector of Mississippi County, in which it was alleged that Crews, as collector of Mississippi County, had collected certain drainage taxes upon property situated in the district and had failed to account for the same in his settlement with the treasurer of the county, and had failed to account to the district therefor. This court held that the chancery court of Mississippi County had jurisdiction of the subject-matter and parties. This case is no authority for the position here assumed by appellant. The collector in the Crews case had collected the funds from the property owner and had either failed or refused to account to the district or to the treasurer of Mississippi County therefor, and this court held, in effect, that the district was entitled to judgment against Crews for the sum withheld. We fail to see any similarity between the case at bar and the Crews case. It is insisted that the case of *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579, is decisive of this case. This was a taxpayer's suit against a collector to require an accounting, and is in no respect similar to the suit here discussed. We are also cited to the case of *German National Bank* v. *Moore,* 116 Ark. 490, 173 S. W. 401. This was a suit by a depositor in the bank upon a lost certificate of deposit.

Just how this case is thought to be in point is not pointed out in briefs. Our conclusion is that it is no authority for the position here taken.

It will be noted from the allegations of the complaint that this suit was instituted on February 18, 1933, and charged generally that the county court of Montgomery County through mistake wrongfully, erroneously and illegally transferred a credit from plaintiff's account to that of another. These allegations do not constitute a charge of fraud. On the other hand, they come squarely within the purview of § 10,165 of Crawford & Moses' Digest as amended by act 339 of 1927, which said amendatory act reads as follows:

"When any error shall be discovered in the settlement of any county officer made with the county court, it shall be the duty of the court, at any time within one year from the date of such settlement, to reconsider and adjust the same."

Had appellant filed his claim in the county court of Montgomery County on February 18, 1933, instead of in the chancery court, he could and would have received adequate relief under his July, 1932, settlement. If relief had been denied him in the county court, an appeal could have been perfected to the circuit court.

This court had many times held that the county court has original exclusive jurisdiction to audit, settle and direct the payment of all demands against the county. *Chicot County* v. *Crews,* 47 Ark. 80, 14 S. W. 469; *Shaver* v. *Lawrence County,* 44 Ark. 224.

It suffices to say that appellant had a plain, adequate and complete remedy under § 10,165 of Crawford & Moses' Digest, as amended by act 339 of 1927, which afforded him an exclusive remedy for all the things complained about in his complaint.

For the reasons aforesaid, the decree is affirmed.

FIDELITY & GUARANTY FIRE CORPORATION *v.* GOFORTH.

4-3169.

Opinion delivered October 30, 1933.

[redacted]

Cravens, Cravens & Friedman, for appellant.

Williams & Williams, for appellee.

HUMPHREYS, J. Appellees brought suit against appellant in the circuit court of Benton County to recover $1,200 on a fire insurance policy for the loss by fire of their household goods and furnishings which were covered by the policy and for the statutory penalty, attorney's fee and costs.

Appellant filed an answer denying liability under the policy on the ground that appellees burned said property.

The cause was submitted to the jury upon the pleadings, testimony and instructions of the court, which resulted in a judgment against appellant for $1,524, including penalty and attorney's fee, from which is this appeal.

Testimony was introduced by appellant tending to show that the fire was of incendiary origin, and that at the time of the fire the appellees were not residing in their home, but with Mrs. Goforth's father-in-law, who lived about a mile from their home. It also introduced the testimony of Ed Buckmaster to the effect that, between eight and nine o'clock on the night of the fire he met a man coming from appellee's home, who spoke to him, then struck at him, and then ran away; that he chased the man for forty or fifty yards; that the man was about the same size of appellee, W. P. Goforth; that he had known W. P. Goforth all of his life. At this juncture, appellant's attorney asked the witness to state, in his judgment, who the person was he encountered. Over the

objection and exception of appellant, the court excluded the question and answer on the ground that the witness had theretofore stated he did not know who the person was. Appellant's attorney then stated that, if the witness were permitted to answer, he would state that, in his judgment, the person he saw was appellee, W. P. Goforth, and offered to make such proof by the witness. Appellees objected to the offer, which the court sustained over the objection of appellant.

In view of the fact that the witness had known W. P. Goforth all of his life, was close to him and chased him forty or fifty yards, it was competent for him to give his opinion as to whether it was Goforth. The weight to be attached to his opinion was for the jury. The court committed reversible error in excluding the evidence.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

FIRST NATIONAL BANK OF FT. SMITH *v.* HUDSON.

4-3278

Opinion delivered October 30, 1933.

[redacted]

S. W. Woods and *Daily & Woods,* for appellant.

KIRBY, J., (after stating the facts). Under a proper construction of § 2 of said act 24 of 1933, its provisions only require that warrants "properly drawn after the passage of the act shall be presented to the treasurer of the proper county within 30 days after it was drawn by the board of directors, etc."

Section 4 of the act reads as follows: "School warrants legally drawn prior to the passage of this act shall be registered and paid in the order of their issuance—date of warrant shall determine the order of issuance—before warrants drawn after the passage of this act are paid, provided, that, if outstanding warrants are not presented for registration within thirty days from the passage of this act, they shall not be given priority over other warrants."

Between the dates of March 25, 1931, and February 9, 1933, there was no provision of the statute requiring the registration of school warrants. Said § 4 above quoted requires school warrants legally drawn prior to the passage of the act to be registered and paid in the order of their issuance before warrants drawn after the passage of the act, and if such warrants are not presented for registration under the act, they shall not be given priority over other warrants, and that warrants drawn after the passage of the act are required to be presented within 30 days after their issuance, and other warrants outstanding may also be presented within 30 days from the passage of the act and be given priority the same as warrants issued subsequent to the act and registered in accordance with its provisions.

It is obvious that the act does not contemplate requiring the re-registration of any warrants already registered under a valid law; and that such warrants as are issued after the passage of the act are given priority in accordance with the date of their issuance or registration, and that unregistered warrants drawn prior to its passage and presented within 30 days from its passage for registration are also given priority in accordance with its provisions. In other words, it is clear from a proper construction of the statute that its terms were only appli-

cable to unregistered warrants, evidently warrants issued during the time no registration was required, and warrants issued after the passage of the law.

The chancellor erred in holding otherwise, and, in overruling the demurrer, and the decree is reversed, and the cause remanded with directions to sustain the demurrer and grant the relief prayed.

[redacted]

ALLISON *v.* MARTINDALE.

4-3081

Opinion delivered October 30, 1933.

[redacted]

P. T. Staggs and *O. A. Graves,* for appellant.

MEHAFFY, J. On August 13, 1925, the probate court of Hempstead County, Arkansas, appointed G. H. Martindale as guardian of George W. Killion, an insane person.

A short time prior to May 5, 1930, George W. Killion died in the State Hospital. On June 16, 1930, appellant, W. G. Allison, was appointed administrator of the estate of George W. Killion, deceased, by the probate court of Hempstead County.

After appellee's appointment as guardian, he took charge of his insane ward's property, and filed the following inventory:

Cash	$6,655.50
Ford coupe	500.00
Judgment	600.00
Real estate—Home in Hope, Arkansas	1,200.00
Total	$8,955.50

The guardian filed several settlements, and on May 5, 1930, filed his fifth and final settlement, which was as follows:

"In the Hempstead County Probate Court.

"Now comes Dr. G. H. Martindale, as the guardian of the person and estate of George W. Killion, and represents to the court that the said George W. Killion has died. And on this the 5th day of May, 1930, the said guardian files his final settlement for said guardianship, charging himself as follows:

"Amount charged to the guardian as of date of January 7, 1930 ..... $4,443.64

"And said guardian takes credit for the following expenditures for and on behalf of the estate of George W. Killion:

"Attorney's fee	$ 50.00
"Guardian's commission	684.25
"Recording mortgage	2.00
"Auto license	2.50
"Probate court costs	10.50
"Balance charged to guardian	3,694.39

"The guardian further represents to the court that of said sum $274 has been invested in a loan to E. A.

Allen, secured by a real property mortgage. $300 has been invested in a loan to Mr. and Mrs. J. W. Fowler, represented by a promissory note. $300 has been invested in a loan to R. H. Martindale, represented by a promissory note secured by a lien on a Buick automobile. $600 has been invested in a loan to T. C. Jobe, represented by a promissory note and secured by a real property mortgage on certain lots in the city of Hope, Arkansas, and $2,220.37 in cash.

"The above final settlement is respectfully submitted to the probate court for confirmation or rejection in due course of law. And I, G. H. Martindale, as the guardian aforesaid, do solemnly swear that the above account is true and correct to the best of my knowledge and belief.

"Signed this the 5th day of May, 1930.

"G. H. Martindale."

This settlement was approved by the court on May 13, 1930.

The appellant, the administrator, filed exceptions to the guardian's report, and the guardian filed demurrer to the exceptions. An appeal to the circuit court by the administrator was taken. In the circuit court, evidence was taken, and on June 3, 1932, the court took the case under advisement, and on October 18, 1932, rendered an opinion, holding that the guardian should be charged with $458.85 interest collected and unreported in the guardian's settlement, and that he should also be charged with the sum of $26 collected on the E. A. Allen note, and the sum of $50 collected on the Fowler note; and further found that the guardian's final settlement was correct in all other respects, and judgment was entered accordingly.

The court made certain findings of fact and declarations of law, and refused to find the facts and declare the law as requested by appellant. After the judgment of the court, the appellant filed motion for a new trial, which was overruled, and this appeal is prosecuted to reverse said judgment.

Several witnesses testified, and the settlements made by the guardian were introduced in evidence. We deem it unnecessary to set out the evidence of the witnesses or

the documents introduced. There is practically no conflict in the evidence.

The appellee, in his final settlement, took credit for recording a mortgage, $2, when the evidence shows that there was no mortgage recorded; appellee should be charged with this item. He also takes credit in said settlement for $2.50 for automobile license. This item was erroneous and should be charged to him. He also credited himself with $274, a loan to E. A. Allen, and $300 to R. H. Martindale and $300 to Mr. and Mrs. J. W. Fowler. He was not entitled to credit for either of these notes, and the trial court should have so held. These loans were made without any order of court, and without any security.

Section 5059 of Crawford & Moses' Digest provides that the guardian, under the direction of the court, may lend money of his ward; and § 5061 of Crawford & Moses' Digest provides that the guardian shall loan the money of his ward at the highest rate of interest prevailing that can be obtained on unincumbered real estate security, and then not more than to the extent of half the value thereof.

It appears that the loans above mentioned were made without any direction of the court, and without taking security as required by the law. The guardian therefore should not have been credited with these amounts, which aggregated $874.

Section 5065 of Crawford & Moses' Digest makes it the duty of the court to require the guardian to make report at every annual settlement of the disposition made by him of the money belonging to the ward, and, if it appear that such money is loaned out, then the report must show the person to whom it was loaned, the description of the real estate security, and where situated, and its value, and this report must be sworn to by the guardian and filed in the court.

"It is not the policy of the law to permit a guardian to loan the money of his ward without security. There is a mandatory statute to the contrary. By § 5059, Crawford & Moses' Digest, it is provided that: 'Such guardian shall, under the direction of the court, loan the same to

such person as will give good security therefor, and such money shall be loaned on such time as the court shall direct.' " *McCown* v. *Edwards,* 185 Ark. 620, 48 S. W. (2d) 558; *Lee* v. *Beauchamp,* 175 Ark. 216, 300 S. W. 401.

The court allowed the guardian $684.25 as commissions, holding that that amount was reasonable. It may be a reasonable compensation, but in fixing compensation the court should take into consideration all the settlements and the amounts received by the guardian in the first, second, third and fourth settlements to determine whether he would be entitled to any additional compensation, and, if so, the amount of such compensation.

In the guardian's first settlement, he takes credit for $203.20 for storage and difference in price of cars. He not only had no authority from the court to trade cars or pay the difference, but certainly the ward in the insane asylum would not need a car, and this $203.20 which the appellee received should have been charged to him in said settlement; also $40 extras on car should have been charged to him; so also should $17.50 for state and city licenses. He also took credit for $50 for amount paid service station for tires and tubes, and also $12 amount paid garage in Little Rock. In another settlement before the 5th he took credit for $15 for automobile license and $53.64 for repairs on car; $24.32 for tires and battery. In his fourth settlement he takes credit for license on car, $15, and city license, $5; repairs on car, $5.65; $21.30 for materials for repairs on car. These items for which the guardian should not have been given credit amount to $362.61.

The guardian did not get the authority of the court to expend any of this money, and the expenditures for the cars, repairs and licenses were all improper for the additional reason that the ward was not using the car at all, and could not use it, being confined in the asylum.

There are numerous other small items in each settlement that were improper charges against the ward's estate, but, no appeal having been taken from the order approving the settlements, and no exceptions filed to said settlements, and the time for appeal having expired,

these items are considered for the purpose of determining whether or not he should be allowed commissions.

The items referred to and the other items mentioned for which he was given credit erroneously, amount to more than the compensation allowed him. Since he has received these amounts, to which he was not entitled, he should not be allowed the item of $684.25 commissions. He should be charged with the amounts the circuit court charged him with, and, in addition to these items, the notes above mentioned and the $2 for recording mortgage and $2.50 auto license.

It is the contention of the appellant that the order appointing appellee guardian is void. However, the abstract does not show what the order was, and the appellant filed exceptions, prayed an appeal, and tried the case as if he were lawfully appointed guardian. We do not deem it necessary to decide this question.

Most of the items for which appellee has taken credit, except the items above mentioned as improper, would be proper claims against the ward's estate, and would have to be paid by some one, such as taxes, treatment of the ward, and necessary expenditures for the ward in the way of medical treatment and other necessities.

For the errors indicated, the judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion, and certify the same to the probate court.

LAYES *v.* HARRIS.

4-3175

Opinion delivered October 30, 1933.

[redacted]

Robert J. White, for appellant.

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

MEHAFFY, J. The appellee brought suit in the Logan Circuit Court for damages for personal injuries to Dana Harris, a minor. Dana Harris was 15 years of age. She, with her mother and others, were riding home from church in a wagon on highway No. 22, about one mile east of Paris, when an automobile, driven by John Layes, Jr., ran into said wagon. Dana Harris was in the back part of the wagon lying down. The wagon was demolished, and Dana Harris was severely injured. It was about 11:30 o'clock at night.

There was a jury trial, verdict and judgment against both appellants, and the case is here on appeal.

The evidence on behalf of appellee shows that the wagon was on the right side of the road. There were no lights on the wagon, and the lights on the automobile were dim. The wagon was near the edge of the pavement on the right side when the car struck it. The car was coming at a fast rate, and hit the center of the wagon bed. The driver made no attempt to pull out, and did not stop.

There is no dispute about the injury to appellee, and there was but little conflict in the evidence as to the manner in which the collision occurred. The instructions are not set out, and it is not contended that the court erred in its instructions to the jury.

The appellant, John Layes, Jr., who was driving the car, said that, when he first saw the wagon, he was within a few feet of it; that it did not have any lights; that he had two headlights, one was bright, and the other a little weaker. He testified that, when he saw the wagon, he turned to the left, but his right front fender and side hit the wagon; that he was about six inches to the right of the black line, going east; that he was going about 35

miles an hour; that, after he hit the wagon, he got scared and kept on going.

As to whether the appellant was guilty of negligence was a question for the jury, and it was also a question for the jury as to whether appellee was guilty of contributory negligence. The jury found against the appellant, and there was substantial evidence to support the verdict as to John Layes, Jr.

The appellee alleged in her complaint that John Layes, Sr., was negligent by permitting a youth under twenty years of age to drive an automobile belonging to him; by sending a youth on a mission for himself, and by permitting John Layes, Jr., to drive an automobile in an unsafe condition when he knew, or had reason to know, that John Layes, Jr., was a careless and reckless driver.

There is some conflict in the evidence as to whether the car belonged to John Layes, Sr., or John Layes, Jr., but this is immaterial, because, in order for the father to be liable for the negligence of his son in driving his father's automobile, the relation of principal and agent or master and servant must exist, or the father must have permitted his son to drive the car, knowing that he was a careless and reckless driver. There is no substantial evidence that John Layes, Jr., was the agent or servant of his father, or that he was a careless and reckless driver. We deem it unnecessary to set out the evidence on these questions, because it is practically undisputed, and shows clearly that John Layes, Jr., was not the agent or servant of his father, and there is no substantial evidence that he was a reckless driver. *Featherston* v. *Jackson,* 183 Ark. 373, 36 S. W. (2d) 405; *Norton* v. *Hall,* 149 Ark. 428, 232 S. W. 934; *Volentine* v. *Wyatt,* 164 Ark. 172, 261 S. W. 308.

There was no substantial evidence upon which to base a verdict and judgment against John Layes, Sr. It therefore follows that the judgment must be affirmed as to John Layes, Jr., and reversed, and the cause dismissed as to John Layes, Sr. It is so ordered.

WALKER *v.* EARNHEART.

4-3084

Opinion delivered October 30, 1933.

[redacted]

E. W. Moorhead, for appellant.

Sam T. Poe and *Tom Poe,* for appellee.

MCHANEY, J. Appellee sued appellant for personal injuries sustained by him on the night of December 3, 1931, when he was struck by an automobile driven by appellant. He recovered a judgment against appellant for $10,000. Only two assignments of error are urged for a reversal of the judgment: (1) That the appellee was guilty of contributory negligence as a matter of law and that the court should so have instructed the jury at his request, and (2) that the verdict is excessive.

The question of the contributory negligence of appellee was submitted to the jury under instructions requested by both parties, and, by its verdict, the jury has found that appellee was not guilty of contributory negligence. The facts are that, on the night of December 3, 1931, about 7:30 P. M., on a dark and rainy night, appellee was walking north on Main Street in North Little Rock and, at the time of the accident, was crossing 16th on the east side of Main Street. Appellant was driving west on 16th Street at the rate of 10 or 15 miles an hour and drove his car upon appellee, striking him with his left fender and left headlight, without seeing him until he felt the impact of the car against him. Appellee was

struck with such force as to knock him eight or ten feet distant. Appellee saw the car approaching from the east, but assumed the car would stop, because at that corner on the east side of Main Street and in the center of 16th Street there is a stop button or sign which required all vehicles to come to a stop before entering Main, but appellant freely admitted that he failed to obey this stop button or sign and failed to see appellee until after he had struck him. Appellee testified that the car had only one light on it and that he thought that it was a motorcycle, but that when he discovered that it was a car, it was right on him, and he tried to jump back, but was struck. Appellant was familiar with the street crossing, and knew that there was a stop sign or button there. Under this state of facts, we think the court correctly refused to instruct a verdict for appellant on the ground that appellee was guilty of contributory negligence as a matter of law. The general rule is that a pedestrian has the same right to the use of a public street as the driver of a motor vehicle, and that each is obliged to act with due regard to the movements of the other, and neither is required to anticipate the negligence of the other. The rule is thus stated in *Murphy* v. *Clayton,* 179 Ark. 225, 15 S. W. (2d) 391: "Drivers of automobiles and pedestrians both have a right to the street, but the former must anticipate the presence of the latter, and exercise reasonable care to avoid injuring them. Care must be exercised commensurate with the danger reasonably to be anticipated. What is ordinary care is a relative term dependent upon the facts and circumstances of each particular case. The question of contributory negligence is one for the jury whether the pedestrian, in crossing the street at an established crossing, has exercised such care as a person of ordinary prudence would exercise for his own safety under the circumstances." Citing cases. Whether the rule would be different where the pedestrian was crossing the street other than at the established crossing, as contended by appellant in this case, it is not necessary to inquire, as the appellee and the other witnesses to the accident, including appellant, testified that he was struck at an established crossing. The fact that appellee was

picked up after the accident by appellant and another witness some distance east of the concrete on Main Street is not conclusive that he was not on the established crossing when he was hit. The court correctly, therefore, submitted the question of appellee's contributory negligence to the jury.

As to the excessiveness of the verdict, the evidence is in conflict as to whether appellee has been permanently injured. All the witnesses agree that appellee was a large able-bodied man, very strong and active before the injury. He was confined to his bed and home for three weeks, during which time he was attended almost daily by his physician, and thereafter appellee called at the physician's office for treatment until sometime in March, 1932, during all of which time appellee complained of suffering considerable pain. He is a railroad man, and at the time of the injury was a brakeman for the Missouri Pacific Railroad Company, but was working only occasionally, being on what is called the emergency board. One of appellee's physicians testified that his right shoulder was severely injured, the ligaments torn, and that he is suffering some ankylosis therein, as that shoulder is stiff, and that he will suffer therefrom the rest of his life. Also that he received an injury in the lower part of his back, resulting in a fracture of the articular process of the fifth lumbar vertebra, which was also a permanent injury. Also that he found red blood cells in his urine on several examinations which indicated an injury to the kidneys, causing a hemorrhage. Appellee testified that, since the injury, he had suffered pain practically all the time in his back and shoulder; that he had frequent urinations, and that he was unable to perform the duties of a railroad brakeman as he formerly had. Under this state of the record, we are unwilling to substitute our judgment for that of the jury. By this verdict the jury has said that it believed the testimony of appellee's witnesses as to the nature and extent as well as the severity and permanency of his injuries. While their testimony is contradicted by that of other eminent physicians, we cannot say their testimony is not of a substantial nature. We are therefore required to take their

testimony as reflecting the truth on this phase of the case. *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 235, 275 S. W. 329.

No error appearing, the judgment is affirmed.

BOARD OF CONFERENCE CLAIMANTS *v.* PHILLIPS.

4-3159.

Opinion delivered October 30, 1933.

Abe Collins, for appellant.

Lake, Lake & Carlton and *E. K. Edwards,* for appellee.

BUTLER, J. This proceeding had its inception in an action brought by the State, under the provisions of act No. 296 of the Acts of 1929, to quiet its title to lands previously forfeited to the State for the nonpayment of taxes. Included in these lands were 230 acres in Sevier County which in 1929 had forfeited to the State for the delinquent tax of 1928. This suit resulted in a decree rendered October 26, 1931. After the institution of the suit, but before the rendition of the decree, the State, acting through the Commissioner of State Lands, and in conformity to law, conveyed to Floyd Phillips all the State's title acquired by reason of the sale to it for the delinquent taxes and which it might acquire by virtue of the confirmation proceedings then pending. On the 14th of January, after the decree was rendered, appellant intervened, setting up a claim of ownership and, without asking that the decree be set aside, prayed that the State's complaint be dismissed, that appellant be made party defendant, and the forfeiture to the State set aside and its deed to appellee canceled.

Appellee filed answer, proof was taken, and the case submitted. Thereafter, at the regular October term, 1932, of the court, appellant filed an amendment to its answer and motion to reopen the case and prayed for relief as in its original complaint. The case was continued to December 13, 1932, on which date appellant filed a second amendment, alleging that there was no levy of the eighteen-mill school tax, which tax was included in the amount for which the lands were assessed, returned delinquent and sold to the State, concluding with the original prayer and an additional prayer that the decree of October 26, 1932, be set aside. To this amendment a motion to strike was filed, and was by the court sustained.

On the pleadings and proof adduced, the court rendered a decree dismissing the intervention of appellant, from which is this appeal.

Act No. 296, *supra,* under which the suit was brought to quiet the State's title, authorized such a proceeding to quiet title to forfeited lands where the right of redemption had expired and providing for notice to persons having any interest therein and permitting such to defend

for any informality or irregularity connected with the sale, or for any other cause which rendered the sale void upon which the State's claim of title was based. It provided that, if no defense was interposed and successfully maintained, a decree should go quieting the claimant's title and curing all irregularities or informalities connected with the proceeding; but, if the claimant intervening should successfully set up any reason why the sale was void, the decree should go quieting his title free from the claim of the State upon payment of total tax, penalty and costs, tender of the same having been previously made. The act provided that, where no successful defense had been interposed, the decree of the court confirming the sale to the State should operate as a complete bar against any and all persons who might thereafter claim any of said lands in consequence of any informality or irregularity in the proceedings, and title to the land should be considered as confirmed and complete in the State forever. The act gave, however, to those laboring under certain disabilities, the right to appear and contest the State's title to the land within one year after removal of disability, and also gave to the owner of any lands embraced within the decree one year from its rendition to have the same set aside as to him in cases where he had no knowledge of the pendency of the suit and where he was able to set up a meritorious defense to the complaint on which the decree was rendered.

The defenses set up in appellant's intervention and claimed as meritorious were three in number. First, that the clerk and collector failed to comply with the terms of an act approved May 8, 1899, now § 10,017 and § 10,043 of Crawford & Moses' Digest. This act required that the clerk should furnish the collector, thirty days before he began to collect taxes, a complete list of all delinquent lands in the county showing the names of the owners at the time same were forfeited and describing the lands accurately, and making it the duty of the collector to post in three conspicuous places at each collecting precinct a printed copy of said delinquent list of lands, and requiring him to notify each taxpayer who desired to pay taxes on lands before forfeited to the State,

through mistake or otherwise, of said forfeiture. The second defense assigned was that the clerk failed to post and keep posted in or about his office for one year a copy of the notice of sale and of a list of the delinquent lands, as provided by § 10,084 of Crawford & Moses' Digest. The third defense alleged was that the school tax included in the total taxes for which the land was returned delinquent and forfeited to the State was not properly levied.

These questions will be discussed in the inverse order, for the last two, if sustained, will present such defense as if established would entitle the appellant to the relief prayed if we assume they were presented within the time allowed by the act.

It is insisted, on the third ground for reversal, that the records in the office of the county clerk failed to show that the result of the school election was certified to the county board of education and that that board certified such results to the county court as provided by § 8878, Crawford & Moses' Digest, and therefore the sale in 1929 for the tax delinquent for 1928 including the school tax for the district in which the lands were situated, was void, as held in *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. (2d) 553.

The only record offered in evidence to sustain this contention was that of the proceeding of the county levying court which made the levy for the year 1928 in which was included a levy of the eighteen-mill school tax for the district in which the lands involved lay. Because of this, it is contended it will appear that neither was there a certificate made to, or by, the county board of education of the result of the school election, and that the said record shows that the tax was attempted to be levied by the justices as "a committee of the whole," and not as "a quorum court."

The record denominates the proceedings "a term of the quorum court begun and held in the courthouse of the city of De Queen, Sevier County, Arkansas, on November 12, 1928, at ten o'clock A. M., the same being the second Monday in November and the time and place prescribed by law for holding the quorum court for the purpose of levying taxes and making appropriations for the

ensuing year beginning on the first Monday in November, 1928." Then follows the opening order naming the presiding judge, clerk and sheriff and the justices present, the same being a majority of all the justices of the peace in the county. Then follows, among other things, the report of "the committee on canvas in the tax levy of all the school districts" in which it appears that the county superintendent of schools reported the tax voted at the school election of the several districts in varying amounts in all of the districts, save in one in which no election was held on the day fixed by law, and that a special election was held therein on a subsequent day which was by the county board of education declared void. Following the list of districts appears the following: "And, upon motion of the court as a committee of the whole, all voting in the affirmative, the said amount of tax set opposite each list be, and the same is, hereby in all things levied." This record was signed by the county judge and the justices of the peace.

By the terms of § 8878, providing for the canvas and certification of school elections, there is no requirement that the certificate of the result of the election be incorporated in the record of the proceedings of the quorum court. The provision is that, after the county board of education shall have canvassed the returns, it shall certify the result to the county court for proper record. This action of the board is made through the county superintendent who is the agent of the board for that purpose and clothed with the duty of keeping the record of the county board of education and of filing with the county clerk a copy of the proceedings relating, among other things, to the apportionment of the State school funds made to the county, the school district tax voted, etc., and the county clerk shall make official record of such proceedings of the county board of education in a separate or special record book provided for such purpose, etc. Section 4, act 503, 1921.

The county board of education and the county superintendent of schools are public officers, and it is to be presumed that they have performed the duties imposed by law. Since the proceedings of the county board of

education, included in which is the certificate of the result of the school election, are required to be by the county clerk recorded in a special record book, the record of the proceedings of the quorum court would not be the proper place where such record might be found, as it is not "the special record book" prescribed. If, in fact, there had been no such certificate made or filed by the county board of education, that might have been proved in the same manner as was done in the case of *Thomas* v. *Spires, supra.*

The record affirmatively shows that all the proceedings of the county judge and justices were the acts of the quorum court, and it would be immaterial that they were designated as "acting as a committee of the whole," as this would in no way alter the legal effect of the proceedings.

On the second point raised, the question whether the delinquent list was posted "in or about the office of the clerk before the day of sale and for one year thereafter," was one which was determined by the court adversely to the contention of the appellant on evidence which we think justified the conclusion reached. Several witnesses testified that they did not observe any such notice posted on the walls of the office previous to the sale in 1929 for the delinquent taxes of 1928, or at any time during the year following. But none of these witnesses stated that there was not in fact any such notice posted, and none gave any reason why their attention should have been directed to this matter. The clerk, on the other hand, gave positive testimony that he had in fact posted the list and notice of sale and kept same posted in a proper place and for the required period.

Adverting to the first reason assigned for reversal, we are of the opinion that the duties imposed upon the clerk and collector by the act of May 8, 1899, now §§ 10,017 and 10,043 of Crawford & Moses' Digest, do not relate to or affect the validity of the sale, or serve to alter the law governing the right of redemption. When lands have been forfeited to the State for delinquent taxes, it is no longer subject to taxation, and, where taxes are erroneously paid thereon, the remedy for their recovery pro-

vided by §§ 10,180 and 10,181 of the Digest was such that the trouble and expense did not justify its invocation where small sums were involved, and, as a consequence, the tax erroneously paid would be lost by the individual. The act of 1899 is composed of four sections. The first two sections make it the duty of the clerk to furnish the collector with a list of delinquent lands, and of the latter to post the same at the places in the county which he attends for the purpose of collecting taxes. Section 4 provides that the act "shall not repeal any law on this subject," and in § 3 the reason and purpose of the act may be discovered. That section is as follows: "It is hereby made the duty of said collector to notify each taxpayer who desires to pay taxes on lands heretofore forfeited to the State, through mistake or otherwise, of said forfeiture." The reason for the act appears to have been the difficulty in recovering taxes erroneously paid and its purpose was to obviate the necessity for the expense and delay incident to their recovery, by advising the taxpayer of the forfeiture to the State.

Appellant calls attention to statutes of other States providing for notice after the sale of that fact and the time in which redemption therefrom is allowable; and the effect given to these statutes by the court, which is, that failure to comply with their terms holds the title derived from the sale in abeyance, or renders it, as some courts hold, void, and by others, as postponing the right of redemption beyond the time when notice as required by the statute was given. These authorities have no application to the statute here under consideration for the reason, as we have seen, that its purpose was otherwise than that of the statutes and adjudications to which we have been referred.

The result of our views is that the sale of 1929 is not subject to the attack made in the case at bar, and was effectual to convey complete title to the State. For this reason, it becomes unnecessary to determine the effect of the confirmation decree or to decide whether or not it would inure to the benefit of the appellee for, if there were no irregularities or informalities in the conduct of the sale, or in the proceedings relating to the levy of the

tax, the title to the lands would vest in the State, and there would be no necessity for a decree confirming the same.

It follows from the views expressed that the decree of the trial court is correct, and it is therefore affirmed.

JOHNSON, C. J., disqualified and not participating.

[redacted]