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GRAY *v.* MCDERMOTT.

4-3116

Opinion delivered October 9, 1933.

[redacted]

[redacted]

John Sherrill, for appellant.

E. B. Dillon and *Sam Robinson,* for appellee.

JOHNSON, C. J., (after stating the facts). At the conclusion of the testimony on behalf of appellees in the circuit court, appellant requested the court to direct the jury to return a verdict in her behalf. This peremptory instruction was refused by the trial judge, and we think reversible error was committed in so doing.

The law in this State in reference to the liability of a physician or surgeon in the prosecution of his professional services is well settled by this court and may be restated as follows:

A physician is required to possess and exercise the degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing in the same neighborhood, and must use reasonable care

in the exercise of his skill and act on his best judgment. *Dunman* v. *Raney,* 118 Ark. 337, 176 S. W. 339.

In the instant case there are only two alleged grounds of negligence, namely, first, that appellant was negligent in failing to ascertain that the vein was severed by the bullet on August 24, 1930; second, that appellant was negligent in failing to ligate both ends of the vein in the operation on September 3. The first allegation of negligence is bottomed upon the fact that the doctors were negligent in failing to open up the wound to determine whether a vein or an artery had been severed by the bullet.

Appellee introduced no testimony on this point. Appellant introduced five or six physicians and surgeons who testified in the most positive terms that in their opinion it would be bad practice to go into a wound for the purpose of ascertaining whether a severance of a vein had taken place. All the physicians and surgeons who testified in the case agreed that this bullet wound was in a vital spot in the body, and any probing into the wound might cause a puncture of the axillary artery, axillary vein or the nerve controlling the arm, and that the severance of any or either of these would greatly endanger the life and chances of recovery of the patient. All the physicians further testified that the only purpose of entering the wound on August 24 would have been to stop the hemorrhage, and, since the hemorrhage had stopped prior to the visit of the doctors, it would have been an unreasonable procedure to have entered the wound. Furthermore, that the entrance to the wound at that time might carry therein an infection, and, since gunshot wounds frequently sterilize themselves, it was much better to await developments after giving antitoxin.

Furthermore, should a hemorrhage thereafter occur, it could later be discovered, either by the flow of blood or by a clot forming at or near the site of the injury and also from an examination of the pulse or his ability to manipulate his arm. Dr. Hoge, the only expert witness introduced on behalf of appellees, does not controvert this testimony. We conclude therefore that there was no testimony in support of appellee's allegation that ap-

pellant was negligent in failing to enter the wound on August 24, 1930, or subsequently.

On the second issue of negligence, namely, that appellant was negligent in failing to ligate both ends of the vein on September 3, the testimony is likewise uncontradicted. As we understand the record, all the expert witnesses testified and agreed that, where a vein is recently severed, both ends should be ligated, but there is no testimony in this record showing or tending to show that this procedure should be followed where a hole had sloughed off in the vein some days after the original injury, and which was not discovered until after sufficient internal bleeding had taken place to form two blood clots the size of a lemon. As we ascertain from the record, all the physicians agree that it would be the duty of the operating surgeon, under such circumstances, to tie off the bleeding end of the vein, and that it would not be his duty to tie off the end which was not bleeding. According to the physicians' testimony, this is so because after some length of time blood clots would necessarily form in the vein on the proximal end, and that to manipulate this end of the vein would very likely disturb the clot.

It is true Dr. Hoge testified that if a section of the axillary vein was taken out, both ends of the vein should be ligated, but this testimony in no wise conflicts with the testimony on behalf of appellant. No part of this vein was being removed. It was either severed by the bullet on August 24, 1930, or else sloughed off at some later date, thereby producing a hole in the vein and the hemorrhages which produced the blood clots. Therefore, since the uncontradicted testimony shows that this vein was severed at some date prior to September 3, 1930, and the operation on that date was made necessary by reason of such severance, it necessarily follows that the testimony of Dr. Hoge does not conflict with that of appellant's witnesses and made no issue for the jury to pass upon.

The question as to whether or not it was proper or improper for the physicians in charge to open up the wound or probe into it on August 24 or some subsequent

time thereto to determine whether or not a vein had been severed by the bullet; and also the question as to whether the physicians were negligent in failing to ligate both ends of the vein on September 3, when the operation was performed, were questions requiring scientific knowledge to determine. It cannot and should not be left to a jury to speculate whether or not the experts in the practice of their profession have pursued the proper course of procedure. *Davis* v. *Rodman,* 147 Ark. 385, 227 S. W. 612.

The uncontradicted testimony in this case shows that the deceased received from his attending physicians, including Dr. Gray, the degree of skill and learning ordinarily possessed and exercised by members of their profession in good standing in this neighborhood, and that they used reasonable care in the exercise of their skill while attending him after he was shot, and that they exercised their best judgment in administering their services. This is all that is required of physicians and surgeons in this State. It may be that some outstanding surgeon could have or would have done something for Mr. McDermott that was not done by these physicians, but this is purely speculative in so far as this record is concerned. Moreover, this is not the test to be applied in cases of this kind. Reasonable care, skill and learning is all that is required.

For the reasons aforesaid, there is no liability shown by the testimony, and the trial court erred in refusing to so direct the jury.

Since there is no testimony showing liability against the appellant and the cause of action seemingly having been fully developed, the cause of action is here dismissed.

PORTER *v.* STATE.

Crim. 3845

Opinion delivered September 25, 1933.

Mark E. Woolsey, J. P. Clayton and *Evans & Evans,* for appellant.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

JOHNSON, C. J., (after stating the facts). There are three questions presented for determination by this court, namely; first, did the trial court err in refusing to arrest the judgment of conviction; second, did the trial court err in refusing to give to the jury appellant's requested instructions number 4 and 6; third, did the trial court err in propounding to the witness, T. A. Watson, the questions set forth in the statement of facts?

Considering the first question presented for determination, § 2009 of Crawford & Moses' Digest reads as follows:

"FRAUDULENT WARRANTS. If, upon adjudication of any warrant by the county court, it shall be found to have been fraudulently or wrongfully issued without due authority from said court, the court shall indorse such fact thereon and cause it to be deposited, without renewal, in the office of the clerk of said court. Any clerk who shall fraudulently or wrongfully, without authority of law, issue any such warrant shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one year and not more than three years."

The insistence is that the indictment does not allege that the county court of Franklin County made an adjudication that the warrant was fraudulently or wrongfully issued, and that it does not charge that such finding was indorsed upon the warrant, and that it does not charge that the warrant was thereafter deposited with the clerk, and indorsed "without renewal." It is conceded that the indictment follows the latter half of this section. The insistence is that the use of the words "any such warrant" as they appear in the latter half of the section has reference to "shall indorse such fact thereon and cause it to be deposited," as the phrase appears in the first half of the section. We cannot agree with this contention. We think that the words "any such warrant" has reference to the words "fraudulently or wrongfully issued," and with this construction the indictment charges a crime substantially in the language of the statute. It is our conclusion that a criminal violation is charged in the indictment and that the trial court committed no error in refusing to arrest the judgment of conviction.

The next insistence for reversal is that the trial court erred in refusing to give to the jury appellant's requested instructions numbered 4 and 6. This insistence has been carefully considered, but we find that these instructions are fully covered by other instructions given by the trial court. Conceding, without deciding, that the requested instructions numbered 4 and 6 are correct declarations of law, there was no error in refusing to give them, be-

cause they are fully covered by instructions which were given.

It is finally insisted that the trial court erred in interrogating the witness, Watson, while on the witness stand, and the cases of *Sharp* v. *State,* 51 Ark. 147, 10 S. W. 228, 14 Am. St. Rep. 27, and *Arkansas Central Railroad Company* v. *Craig,* 76 Ark. 258, 88 S. W. 878, 6 Ann. Cas. 476, are called to our attention in support thereof.

In the Craig case, cited *supra,* this court said:

"A trial judge has the right to propound such questions to witnesses as may be necessary to elicit pertinent facts; but this must be done in a reasonable and impartial way, so as not to indicate his opinion of the facts."

We think that the questions propounded by the trial court in the instant case are both reasonable and impartial, and that they could not and did not influence the jury in any improper way. There is nothing in the questions propounded to indicate that the trial court had any opinion as to the guilt or innocence of the accused.

No error appearing, the judgment is affirmed.

WHITTED *v.* STATE.

Crim. 3857

Opinion delivered September 25, 1933.

A. M. Bradford, S. S. Hargraves and *Winstead Johnson,* for petitioners.

Hal L. Norwood, Attorney General, and *Roy D. Campbell,* for respondent.

SMITH, J. Appellants were convicted upon a trial under an indictment charging them with the crime of burglarizing the Rice Growers' Bank of Wheatley, in St. Francis County, Arkansas. To reverse this judgment, they insisted that the trial court had erroneously failed to sustain their plea of former acquittal, it being shown that they had been tried and acquitted for robbing this bank, and that, as both transactions were based upon a single act, an acquittal upon one charge was a bar to a prosecution for the other. We overruled this contention, holding that while an offender may commit the crimes of burglary and robbery in one act he may be separately indicted and prosecuted for each offense, and that an acquittal upon one charge was no bar to a prosecution for the other. Upon this holding the judgment of the circuit court sentencing appellants to a term in the penitentiary for the crime of burglary was affirmed. *Whitted* v. *State,* 187 Ark. 285, 63 S. W. (2d) 283.

Subsequently appellants sought their release, under a writ of *habeas corpus,* from the penitentiary, where they are confined pursuant to the judgment which we had affirmed, upon the ground that they had never been indicted by the grand jury for the crime of burglary. The contention was and is that, while appellants were properly indicted for robbery, they had never been indicted at all for burglary, and in support of this contention certain members of the grand jury were called as witnesses, who testified that only one vote was taken upon the matter of indicting appellants, and this vote was to indict them upon a charge of robbery. It was stipulated that members of the grand jury not then present would testify to the same effect.

The foreman of the grand jury testified that the jury voted to indict appellants upon the charges both of burg-

lary and robbery, and that separate indictments were drawn and signed by him and were duly returned into court. This witness was a vice-president of the bank.

The grand jury's stenographer testified to the same effect. He had taken in short hand the testimony upon which the indictments were returned. The matter was impressed upon his mind by the fact that it was the first case which had come under his observation where a person was indicted for both robbery and burglary as a result of a single act. He drew the indictments, but was uncertain whether to draw an indictment for each offense or to draw a single indictment with two counts, one charging burglary and the other robbery. He advised with the prosecuting attorney, who directed him to prepare separate indictments, and this he did. The prosecuting attorney corroborated the testimony of the grand jury stenographer. The circuit court clerk testified that two indictments were returned into open court, both signed by the prosecuting attorney and the foreman of the grand jury, in the presence of the entire grand jury, against appellants, one for the crime of robbery and the other for the crime of burglary. Although separate indictments were returned charging appellants with the crimes of burglary and robbery, respectively, it was not necessary that this should be done. The statute provides that certain offenses arising out of the same transaction may be charged in one indictment, and among others are the crimes of robbery and burglary. Section 3016, Crawford & Moses' Digest. It was not necessary, therefore, that the grand jury vote a second time to indict appellants for the commission of the crimes of robbery and burglary.

Appellants were not tried at the term of court during which they were indicted, but were tried at the next term upon the robbery charged, and were tried at the next ensuing term upon the charge of burglary.

The petition for habeas corpus was denied, and this appeal has been prosecuted to review that action.

The Constitution provides that "No person shall be held to answer a criminal charge unless on the present-

ment or indictment of a grand jury.'' Section 8, article 2, of the Constitution.

Appellants insist that they were tried and convicted upon a felony charge without having been indicted therefor, in violation of the provision of the Constitution above-quoted. But indictments were returned apparently in the manner provided by law, and the question for our decision is whether the validity of the indictment under which appellants were convicted can be questioned in the time and manner here attempted.

Section 3056, Crawford & Moses' Digest, reads as follows: ''Upon the arraignment, or upon the call of the indictment for trial, if there is no arraignment, the defendant must either move to set aside the indictment or plead thereto.''

This statute contemplates that, before the trial of the cause, the accused shall present such objections as he cares to make to the return of the indictment. It does not appear when appellants were advised that there was any question about the validity of the indictments upon which they were tried, but it clearly appears that no such question was raised until they had been acquitted on one charge and convicted on the other. The apparent purpose of the statute quoted is to prevent an accused from speculating on the regularity of the proceedings leading up to his indictment. He cannot take the chance of being acquitted and thereafter, being disappointed in this expectation, raise a question which the statute provides shall be raised upon the arraignment or upon the call of the indictment for trial. The indictment must, of course, charge a public offense. Not even a verdict of guilty cures a failure so to do. Section 3224, Crawford & Moses' Digest. But questions not involving the sufficiency of the indictment to charge a public offense should be raised in the time and manner provided by statute.

It also appears that there was no competent testimony showing that appellants were not in fact indicted. The only testimony tending to show that the grand jury did not vote to indict upon both charges was that of members of the grand jury set out above, and it has been held that such testimony is not competent for this

purpose. The opinion in the case of *Nash* v. *State,* 73 Ark. 399, 84 S. W. 497, reflects the fact that the appellant Nash had been indicted for manslaughter, and the judge of the court referred the charge to the grand jury for further action, and a second indictment was returned, the last being for murder in the first degree. Before being put to trial, the defendant filed a motion to set aside the second indictment, upon the ground, among others, that only eleven members of the grand jury voted for it or concurred in finding it, and he offered to make proof of this allegation. The court declined to hear testimony sustaining the allegations of the motion to dismiss, and in that connection it was said: "The statutes of this State require that the proceedings of a grand jury shall be in secret. They provide: 'Every member of the grand jury must keep secret whatever he himself, or any other grand juror, may have said, or in what manner he, or any other grand juror, may have voted on a matter before them.' Sand. & H. Digest, § 2054. 'A grand juror cannot be questioned for anything he may say, or any vote he may give, relative to a matter legally before the grand jury, except for a perjury he may have committed in making accusation, or giving testimony before his fellow jurors.' Sand. & H. Digest, § 2056. And further provides: 'Any grand juror who shall disclose any evidence given before the grand jury, except when lawfully required to testify as a witness, * * * shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $100.' Sand. & H. Digest, § 1752. Thus the statutes protect the proceedings of the grand jury against publicity, and with especial care they prohibit the disclosure of the votes of the individual grand jurors on finding an indictment. It would be a violation of the policy evinced by these statutes and an invasion of the secrecy of the grand jury room to permit a grand juror to testify as to the number of the grand jurors that voted for an indictment. *State* v. *Gibbs,* 39 Iowa 318; *State* v. *Mewherter,* 46 Iowa 88; *State* v. *Fasset,* 16 Conn. 457; *Gitchell* v. *People,* 146 Ill. 175, 33 N. E. 757; 1 Bishop's New Criminal Procedure, § 874, and cases cited; and Wharton's

Criminal Pleading and Practice (8th ed.), § 379, and cases cited. The concurrence of twelve grand jurors is required to find an indictment. The presentment of an indictment to the court by the grand jury is evidence of such concurrence. This, if it can be, may be disproved, but not by the evidence of a member of the grand jury."

The judgment was reversed, however, but for another reason, and Nash was again convicted of murder in the first degree, and upon his second appeal, reported in 79 Ark. 120, 95 S. W. 147, it was said: "The first error assigned by appellant is the refusal of the court to allow the appellant to introduce as witnesses members of the grand jury which found the indictment in order to show by them that the finding of the indictment was concurred in by only eleven of their members. In somewhat different form, but in essentials, the same question was passed upon when the case was first here. There is a conflict in the authorities on this subject. This court adopted the view that the admission of such evidence contravenes the statutes requiring secrecy of grand jury proceedings, and that the presentment of the indictment by the grand jury in open court is evidence of their concurrence, which can not be overcome by evidence from the members of that body, if at all. The court finds no reason to change that holding."

In the case of *Cook* v. *State,* 109 Ark. 384, 160 S. W. 223, it is recited that the defendant offered to show, in support of his motion to quash the indictment, that it was not concurred in by twelve members of the grand jury—the number required by law to find an indictment. The record there showed, as it does in the instant case, that the grand jury came into court, and that with all its members present, the indictment in question was returned in open court, and was properly indorsed "A true bill," and was signed by the foreman, was handed to the clerk and ordered filed and numbered as the law directs. In sustaining the action of the trial court in refusing to quash the indictment notwithstanding the offered testimony, it was there said: "Where an indictment is properly returned into court, it will be presumed that it was duly found with the concurrence of the requisite number

of the grand jury, and the court did not err in overruling the defendant's motion to quash the indictment. *St. Louis, I. M. & S. Ry. Co.* v. *State,* 99 Ark. 1, 136 S. W. 938; *Nash* v. *State,* 73 Ark. 399, 84 S. W. 497."

In the case of *State* v. *Fox,* 122 Ark. 197, 182 S. W. 906, the facts were that the judge had quashed the indictment on the ground that it was not based on any legal evidence heard by the grand jury. This action of the court was held to be erroneous, it being there stated that the court should set an indictment aside only for the reasons required by the statute. In that connection it was there said: "An indictment is merely an accusation against a defendant and does not even raise a presumption of guilt, and any irregularity in the finding and return of it by the grand jury does not deprive the accused of any substantial right, since the trial before a jury on a plea of not guilty affords an opportunity to establish his innocence or the truth of the charge. *Latourette* v. *State,* 91 Ark. 65, 120 S. W. 411; *Worthem* v. *State,* 82 Ark. 321, 101 S. W. 757."

The cases of *McDonald* v. *State,* 155 Ark. 142, 244 S. W. 20, and *Murphy* v. *State,* 171 Ark. 620, 286 S. W. 871, are to the same effect.

The defendants were tried upon indictments returned into open court in the manner and form required by law, and there was no competent testimony warranting the court in setting them aside. The writ of habeas corpus was therefore properly denied, and that judgment is affirmed.

SWIFT & COMPANY *v.* RUSSELL.

4-2978

Opinion delivered September 25, 1933.

Hugh Basham, for appellant.

Paul McKennon, for appellee.

HUMPHREYS, J. This suit was instituted by appellant against Fred Russell, sheriff, and his bondsmen, in the circuit court of Johnson County, to recover the amount of a judgment it obtained against E. C. Porter in the court of a justice of the peace in Spadra Township, in said county, on the 10th day of February, 1932, for failure to levy and return an execution issued upon said judgment and delivered to said sheriff. The appellees interposed the defense that said sheriff refused to receive and levy the execution because appellant would not pay the fees allowed him by law for levying the process. The cause was submitted to the court sitting as a jury upon the pleadings and testimony, which resulted in a judgment dismissing appellant's complaint, from which is this appeal.

The sheriff testified that he refused to accept the execution because appellant failed to pay his costs when he demanded same. B. B. Logan, the office deputy, testified that he was instructed by the sheriff not to accept the execution from appellant until the costs of service were advanced, and that the execution was not filed with him.

The testimony detailed above is substantial evidence tending to show that the sheriff demanded his fees, in accordance with § 4591, Crawford & Moses' Digest, as a prerequisite to serving the execution. This court never disturbs a verdict when supported by any substantial evidence.

No error appearing, the judgment is affirmed.

MAGNOLIA *v.* DAVIES.

4-3122

Opinion delivered October 9, 1933.

W. D. McKay, for appellant.

Henry Stevens and *A. A. Thomason,* for appellee.

BUTLER, J. The appellee is the owner of a lot in the city of Magnolia on which his residence is located. It is bounded on the north by an alley which has been opened and in use for a number of years. He brought this action in the chancery court alleging that the appellant, acting through its duly authorized agents, constructed a tile drain which terminated in the alley which was the north boundary of his property; that the construction of the drain diverted the surface water from its natural flow into the alley which, before such construction, flowed so as not to injure appellee's property; that by reason of the construction of said drain and the unlawful diversion of the waters the alley was washed and rendered impassable, so that means of ingress and egress to and from his property was destroyed. He alleged that this alley was a public one, recognized and used as such for a great number of years, and that he had used it in going to and from his property; that by reason of the washing of the alley he had been damaged in the sum of $150, and, by reason of the overflowing of his lot, it had been rendered unfit for building purposes, pasture or cultivation, to his damage in the further sum of $350. He prayed judgment for the said sums and that an injunction issue restraining the appellant from fur-

ther maintaining the tile drain and from further diverting the water on his property.

The appellant moved to transfer the case to the circuit court setting up that it was an action for damages triable before a jury, and that plaintiff had a full and adequate remedy at law. On the filing of this motion, the appellee amended his complaint setting up again the unlawful diversion of the water into the alley and the resulting damage to his property. He further alleged that the damage was a continuing one; that there was no way in which he could protect his property, and that he had no remedy for the repeated injuries which would result to him as the same would occur after each rain.

Thereafter, the court overruled the motion to transfer over the objections and exceptions of appellant. Whereupon the appellant answered, joining issue with the appellee on the allegations of his complaint. At the request of the appellant, the issues were submitted to a jury, and testimony was introduced on behalf of the appellee tending to establish his allegations and on behalf of the appellant contradictory to the testimony offered by the appellee. The court thereupon submitted the question of damages to the jury on instructions, the correctness of which is not questioned. The jury returned a verdict in favor of the appellant, and on the 12th day of May, 1932, the court rendered judgment as follows: "It is therefore by the court considered, ordered and adjudged that the plaintiff herein, A. W. Davies, do not have of the defendant, city of Magnolia, damages in any sum, but that the said plaintiff herein do pay any and all costs arising herein."

On the 16th day of December following and at a subsequent term, the court in the same case rendered a decree by which it found that the tile drain diverted the water from its natural flow and conveyed the same in great volumes to its point of discharge in the alley by which the same was washed out; that the said washing has left undesirable sedimentary deposits in parts of the alley and upon plaintiff's land, and that same is continued to be flooded and washed. The court further

found that before the construction of the drain this condition did not exist; that by reason of the discharge of the waters plaintiff was deprived of the use of the alley which he had used for a number of years, and that he was unable to protect his land, and that the water will continue to be diverted and conveyed by the spillway as long as the drain is permitted to remain. The court thereupon decreed that the city be perpetually restrained from maintaining the drain and from further diverting the water and pay all the costs of the suit. It is from this decree that the present appeal is prosecuted.

The basis of the suit in the trial court and the ground upon which the injunctive relief was sought was that the diversion of the water into the alley damaged appellee's property, that the same was a continuing damage which worked an irreparable injury. These questions were submitted to the jury for its determination which found that none of the elements of damage complained of existed. This verdict was not conclusive on the court but advisory. Yet, when the court rendered its judgment based upon this verdict, it must be held to have adopted the conclusion of the jury as its own, and that this would have been its finding, had the question been presented originally to it without the intervention of a jury. *Sullivan* v. *Wilson Merc. Co.*, 172 Ark. 914, 290 S. W. 938. Therefore the question upon which appellee's suit depended was adjudicated, and the court was without power at a subsequent term to render the decree enjoining the maintenance of the drain, since it appears that no damage resulted therefrom.

The decree of the trial court is therefore reversed, and the case dismissed.

RIGHTSELL *v.* CARPENTER.

4-3148

Opinion delivered October 16, 1933.

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Kenneth Lane and *Trieber & Lasley,* for appellant.

E. G. Shoffner, for appellee.

JOHNSON, C. J., (after stating the facts). In holding the two mortgages void in so far as they affect the interests of the three minor children, the trial court evidently based his findings upon the case of *Rose* v. *W. B. Worthen Company,* 184 Ark. 550, 42 S. W. (2d) 1002.

In that case this court had under consideration a mortgage executed by a guardian in behalf of her wards which was duly authorized by the probate court of Pulaski County upon petition therefor, as follows:

"Petitioners pray that, in order to care for the liens, to keep the heirs in school and prevent them becoming subjects of charity, and to prevent waste and loss of the balance of the estate, that petitioner, as guardian and curator, be authorized and directed to borrow $750 at the best possible rate of interest and to mortgage the interest of her wards in the real estate to secure the payment therefor."

The probate court of Pulaski County granted the petition of the guardian and authorized the execution of the mortgage. The mortgage was executed in conformity to the probate court order. This court, in disposing of the question there presented, used the following language:

"Under our former statutes no authority was given executors, administrators or guardians to borrow money and mortgage real property of the estate to secure funds for maintenance and education of the minors. But act 195 of 1927 authorizes such executors, administrators and guardians to borrow money for certain purposes and secure the same by mortgage upon the real estate belonging to the estate represented by them. Section 120b, Castle's Supplement to Crawford & Moses' Digest, provides the procedure and reads as follows:

"When any administrator, executor or guardian presents to the probate court of the county in which any real property belonging to the estate represented by such administrator, executor or guardian is situated, his petition for permission and authority to mortgage the real property, or any part thereof belonging to said estate, in Arkansas, for the purpose of raising money to pay obligations secured by liens against any real property belonging to the estate represented by such administrator, executor or guardian, wherever situated, such probate court shall examine the same, and hear the evidence, and, if satisfied that it would be to the best interest of such estate, then said court shall grant the petition and authorize such administrator, executor or guardian to borrow money and execute notes for the same, secured by a mortgage or trust deed to be executed by said administrator, executor or guardian on any part of the real estate belonging to such estate, situated in Arkansas. Provided, that the homestead shall not be incumbered by mortgage or trust deed except for the purpose of satisfying existing liens against said homestead." There is no authority granted by this statute to borrow money and secure the same by a mortgage or deed of trust except for the purposes specified in the act, and it contains no expression authorizing the borrowing of money for the maintenance and education of the minors. The probate court was without power to authorize the borrowing of money and execution of a mortgage by the guardian, etc., for any other purpose than as expressed in the statute, and its order authorizing it, as well as the mortgage executed in pursuance thereof for money to be used for

any other purpose, were void, and such mortgage constituted no lien against the lands and cannot be inforced against them for any money borrowed and expended for any purpose other than as specified in said statute.

After most serious consideration, we have concluded that the doctrine announced in the Rose case, *supra,* to the effect that no authority of law existed prior to act 195 of 1927 permitting guardians to mortgage or incumber by deeds of trust their wards' interest in real estate in Arkansas for educational purposes is hereby expressly overruled, because:

The Legislature of 1873 passed an act, which is now § 5037 of Crawford & Moses' Digest, which reads as follows:

"The probate court shall order the proper education of minors according to their means, and for that purpose may, from time to time, make the necessary appropriations of the money or personal estate of any minor, and, when the personal estate shall be insufficient or not applicable to the object, upon application the court may order the lease or sale of real estate, or so much thereof as may be requisite, or that the same be mortgaged for not less than two-thirds of its real value, to raise the funds necessary to complete the education of such minor." Act April 22, 1873, p. 185.

This section of the act of 1873 has been brought forward by all the digesters of the statutes of this State since that time and has been treated and considered by every one as a part of the laws of this State. Section 5037, quoted *supra,* in plain and simple language gives to guardians the right and authority, after application to and approval by the probate court, to execute mortgages on their ward's lands for the purpose of raising money for the education of such wards. By the terms of this section of the statute, the ward's rights and interests are protected by the orders and findings of the probate courts, which courts, by constitutional enactment, are vested with superintending control over all such estates. Article 7, § 34, Constitution of 1874. This section of the Digest further protects the interests of the ward, in that the lands must be appraised by disinterested persons appointed by

the probate court. It further protects their interest, in this, that such mortgage cannot be executed until it is determined by the probate court that the personal estate of such ward is insufficient or inapplicable to the object.

We now hold that under the act of April 22, 1873, a part of which is now § 5037 of Crawford & Moses' Digest, guardians and curators do have authority, after approval of the probate court of the county wherein the lands are situated, to execute valid mortgages and deeds of trust upon the wards' lands for educational purposes.

It is insisted in the instant case that § 5037 of Crawford & Moses' Digest has been repealed by act 195 of 1927. Section 2 of act 195 of 1927, which is said to repeal § 5037 of Crawford & Moses' Digest, reads as follows:

"That when any administrator, executor or guardian presents to the probate court of the county in which any real property belonging to the estate represented by such administrator, executor or guardian is situated, his petition for permission and authority to mortgage the real property, or any part thereof, belonging to said estate, in Arkansas, for the purpose of raising money to pay obligations secured by liens against any real property belonging to the estate represented by such administrator, executor or guardian, wherever situated, such probate court shall examine the same, and hear the evidence, and, if satisfied that it would be to the best interest of such estate, then said court shall grant the petition and authorize such administrator, executor or guardian to borrow money and execute notes for the same, secured by a mortgage or trust deed to be executed by said administrator, executor or guardian on any part of the real estate belonging to such estate, situated in Arkansas. Provided, that the homestead shall not be incumbered by mortgage or trust deed except for the purpose of satisfying existing liens against said homestead."

If § 5037 of Crawford & Moses' Digest is repealed by act 195 of 1927, it must be by implication, because no direct repeal is effected by plain terms of the act.

Repeals by implication are not favored in the law. *Houck* v. *State,* 166 Ark. 613, 267 S. W. 127; *State* v.

White, 170 Ark. 880, 281 S. W. 678; *Mays* v. *Phillips County,* 168 Ark. 826, 272 S. W. 62.

This court held in *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649, that "the repeal of any law merely by implication is not favored and the repeal will not be allowed unless the implication is clear and irresistible."

Again, this court held in *Gilliland Oil Company* v. *State ex rel. Attorney General,* 171 Ark. 415, 285 S. W. 16, that "the presumption is against repeal of statutes by implication."

Tested by the rules above announced, it is perfectly evident that act 195 of 1927 does not repeal by implication any part of § 5037 of Crawford & Moses' Digest other than the homestead rights of the minors, which will be discussed hereafter. In other words, we now conclude that act 195 of 1927 gives to guardians the additional right and authority to mortgage their wards' lands for the purpose of refunding subsisting liens against the same, and withdraws all authority of such guardians to incumber their wards' homesteads, except for the purpose of refunding subsisting liens against such homesteads.

It will be noted that the proviso appearing at the end of § 2 of act 195 of 1927 reads as follows:

"That the homestead shall not be incumbered by a mortgage or trust deeds except for the purpose of satisfying existing liens against said homestead." This proviso has the effect of withdrawing all authority from guardians to mortgage or incumber by deeds of trust the homestead rights of minors for any purpose other than "raising money to pay obligations secured by liens against such homesteads."

The effect of our holding is that, under § 5037 of Crawford & Moses' Digest, guardians and curators had the power and authority, with the approval of the probate courts, to execute mortgages and deeds of trust upon the real estate belonging to their wards for educational purposes, which necessarily included the right to mortgage the homestead of such minors. This authority existed up to the effectiveness of act 195 of 1927. This act withdrew all authority theretofore in guardians to

mortgage the homestead except for the purposes expressly recognized in said act.

The two mortgages in the instant case, having been executed after the effectiveness of act 195 of 1927, their validity must be measured by said act.

It follows from what we have said that the mortgage upon lot 10 in block 426, DuVall's addition to Little Rock, the same being the homestead of the minors, is void in so far as the minors' interests are concerned, and the chancellor was correct in so holding. The mortgage, however, covering lot 9 in block 426 is a valid lien against the minors' interest in said lot, and the chancellor erred in holding otherwise.

For the reasons aforesaid, the case is reversed, and the cause is remanded with directions to the chancery court to enter a decree in conformity with this opinion.

TODD *v.* DENTON.

4-3088

Opinion delivered October 16, 1933.

Horace Sloan, for appellant.

Eugene Sloan, Chas. D. Frierson and *Charles Frierson, Jr.,* for appellees.

Foster Clarke and *H. M. Cooley, amici curiae.*

HUMPHREYS, J. This is a contest between appellees and appellant as to the ownership of the southeast quarter of section thirteen (13), township thirteen (13) north, range five (5) east, in Craighead County, Arkansas, containing 160 acres, more or less.

Appellees based their claim of title upon a deed from A. F. Taylor to his daughter, Elizabeth Jane Taylor, of date May 14, 1901, which deed reads in part, as follows:

"Do hereby grant, bargain, sell and convey unto the said Elizabeth Jane Taylor, for and during her natural life, the following lands (here lands are described). If at her death the said Elizabeth Jane Taylor shall have issue or grandchildren, then the above real estate shall vest in such children and grandchildren, or children or grandchildren, as the case may be *per stirpes.* If the said Elizabeth Jane Taylor shall not leave surviving either children or grandchildren, then upon her death such real estate shall vest in the other lawful heirs."

Appellant claimed title in his first pleading under an outright purchase of said land from the State of Arkansas, the State having acquired title thereto under a tax forfeiture sale for the year 1922.

In a subsequent pleading, he claimed title thereto by purchase thereof on June 20, 1931, from the Lake City, Nettleton, and Bay Road Improvement District No. 1, in which the land was located, which district acquired title thereto on May 12, 1926, under a regular foreclosure proceeding for failure to pay the improvement taxes for the years 1922 and 1923.

In a later pleading, he claimed title thereto under a purchase of the land during the pendency of this suit at a levee district tax sale held on October 30, 1931, paying therefor the sum of $268.10, and for which he later received a deed.

On a hearing of the cause, the trial court cancelled the tax deeds relied upon by appellant and quieted and confirmed the title to said lands in appellees and created a lien thereon in favor of appellants for the following amounts:

"Date	Item	Amount	Int. at 10% to 4-1-1933
1930			
Oct. 6	Affidavit for donation	$ .50	
Oct. 6	Donation certificate	10.00	$ 2.49
Nov. 5	Affidavit to exchange for State tax deed	.50	
Nov. 5	State tax deed	161.00	38.72
Nov. 10	Recording State tax deed	1.50	.24
1931			
May 9	Paid taxes and drainage assessments due in 1931	127.37	23.06
Oct. 30	Amount paid for levee tax deed	268.10	38.04
1932			
Jan. 16	Recording levee tax deed	2.00	.24
	Total principal and interest	$570.97	$102.79
			$673.76"

and ordered a sale of the land to pay same, from which is this appeal.

During the progress of the trial, appellant admitted the invalidity of his State tax deed, so it goes without saying that the trial court did not err in cancelling the State tax deed relied upon by him.

Neither did the court err in cancelling the road improvement district deed of date June 20, 1931. At the time, the land in question had reverted to the delinquent landowners under and by virtue of act 11 of the Acts of 1927 and act 153 of the Acts of 1929 passed in aid of said act 11. Having no title, the road district could not convey any to appellant. The purpose and intent of

those acts was to relieve the delinquent landowners from payment of any debts incurred by said road improvement district prior to the passage of said act 11, and for the Highway Commission to pay said debts. This is the construction placed upon these acts in the case of *Tri-County Imp. District* v. *Taylor,* 184 Ark. 675, 43 S. W. (2d) 231. To give effect to appellant's deed would allow the district to receive the benefit of the payment of its debts prior to the passage of act 11 by the Highway Commission and to keep the land of the delinquent owner also, thereby depriving the owner of any benefit under the acts.

Appellant also contends for a reversal of the decree under purchase of said lands during the pendency of the suit at a sale by the St. Francis Levee District for the nonpayment of assessments. At the time of the purchase, appellant was claiming title to the lands under a deed executed to him by said road improvement district and in recognition of a duty on his part to pay the taxes, and his act must be treated as a redemption thereof for his own benefit. In this view of his act, the purchase at the delinquent tax sale redounded to the benefit of himself if he was the owner, or, if not, to the benefit of the true owners thereof, who are the appellees in this case.

Appellant claimed to be the owner of the property under tax titles which proved to be void, so there is no merit in his claims. Under the circumstances, the court was very generous in his allowances and his declaration of a lien upon the land to pay same.

The decree is therefore in all things affirmed.

SMITH, J., dissents.

NORRID *v.* STATE.

Crim. 3856

Opinion delivered September 25, 1933.

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

BUTLER, J. On the 28th day of March, 1933, the Bratt State Bank, located at Siloam Springs, Arkansas, was burglariously entered and robbed by two or more persons acting jointly. Ed Foreman and the appellant were jointly charged with the offense in an indictment charging burglary in the first count and robbery in the second. The trial was severed, Ed Foreman first being put upon trial and found guilty, and on the day following his conviction the appellant was arraigned and entered his plea of not guilty. At the trial which followed, the appellant was convicted on both counts and sentenced to imprisonment in the State penitentiary. From that judgment is this appeal.

On motion for a new trial, error was alleged in that the verdict of the jury was contrary to the evidence, that the court erred in overruling defendant's challenges for cause of certain jurors, in the exclusion of testimony of witnesses offered to establish the good reputation of certain other witnesses who had testified for the defendant on his defense of an alibi, and in overruling his objection to the argument of counsel for the State and failing

to reprimand said counsel, and in overruling the supplemental motion for a new trial in which newly-discovered evidence was alleged. No abstract or brief has been furnished by the appellant, but this has been supplied by the Attorney General's office, from an examination of which and of the record we find none of the assignments of error well taken.

The evidence is uncontradicted that on the date alleged the bank was robbed by three men, the appellant being identified by a number of witnesses as being one of the three. Appellant's defense was an alibi and a number of witnesses testified that on the day and hour of the robbery he was in the State of Oklahoma, but the jury found the issues against him, and, under well-settled rules, its verdict is conclusive on us, there being substantial testimony to support it.

No evidence attacking the general reputation of the witnesses offered to establish the alibi had been offered or introduced on the part of the State, and therefore the evidence as to the good character of such witnesses was inadmissible (§ 4189, Crawford & Moses' Digest), and the court did not err in its refusal to permit the introduction of such evidence.

There was no error in overruling the objection to the argument of counsel for the State or in the refusal of the court to reprimand him therefor, for this argument as preserved in the record appears to have been nothing more than a legitimate criticism of the defense offered and of the character of the witnesses testifying to it.

The alleged newly-discovered evidence contained in the supplemental motion for a new trial was merely cumulative of that offered on the trial of the case, or such as tended to impeach the credibility of the State's witnesses. This character of evidence is not sufficient to impel the court to grant a new trial, and the court did not abuse its discretion in overruling that motion. *Edgeman* v. *State,* 183 Ark. 17, 34 S. W. (2d) 753; *Reeder* v. *State,* 181 Ark. 813, 27 S. W. (2d) 989.

The most serious question raised is that contained in the fourth assignment of error relating to the overrul-

ing of defendant's challenges for cause of the twelve jurors who, on the previous day, tried and convicted his co-defendant, Ed Foreman. It is apparent that the evidence tending to connect the defendant with the commission of the offense and establishing his guilt or participation therein was necessarily involved in the trial of Foreman on the preceding day. On the court's refusal to excuse these jurors for cause, the defendant peremptorily challenged each of them. These jurors, on their *voir dire,* stated that, although they had heard the evidence in the preceding case, they entertained no opinion as to the guilt or innocence of the defendant and could and would give him a fair trial, if chosen as jurors, on the evidence introduced at his trial and nothing else, and would give him the benefit of any reasonable doubt arising from the evidence as to his guilt or innocence and resolve that doubt, if any, in his favor. Whether or not, in the interest of justice, notwithstanding the statements of the jurors, the court should have excused them is a question not necessary for us to decide since the record fails to show that the defendant was obliged to exhaust his peremptory challenges in the excuse of these jurors, and for this reason no prejudicial error appears. *Hanshaw* v. *State,* 67 Ark. 365, 55 S. W. 157; *St. L., I. M. & S. R. Co.* v. *Aiken,* 100 Ark. 437, 140 S. W. 698; *Holt* v. *State,* 91 Ark. 576, 121 S. W. 1072.

In the supplemental motion for a new trial the power to try the case, or to cause a trial jury to be summoned, is questioned because the case was heard and the jury summoned at a special term of the court. Sections 2218-2223 of Crawford & Moses' Digest, both inclusive, prescribe under what circumstances and in what manner special terms of the court may be called and held. An examination of the record discloses that the circumstances existed as named in the statute, that the necessary preliminary orders were made and properly entered on the record of the court, all the facts appearing in said orders necessary to give the court jurisdiction. While the statute does not in express terms authorize the summoning of a special jury or direct the manner in which

it shall be selected, the power of the court to require and direct how a trial jury shall be selected and summoned is a necessary incident to the trial, and the court therefore has inherent power to make all necessary and reasonable orders with respect thereto.

It is not necessary that the order summoning the petit jury should be embraced in the call for the special term. This is so for the reason that it cannot be known in advance whether the grand jury will return indictments; and to issue a *venire facias* for a petit jury before indictments are returned, and when they might not be returned at all, would be causing the officials unnecessary labor and the county unnecessary expense. The statute expressly empowers the court to provide all necessary judicial machinery for the legal trial, which includes the summoning of a petit jury. The summoning of such jury becomes necessary only after the indictments have been returned, and the due and proper course is not to have a *venire facias* for same until the indictments are returned. *Bettis* v. *State,* 164 Ark., at page 21, 261 S. W. 46.

We have examined the indictment and find the same to have been properly framed and duly returned, and the court fully and fairly instructed the jury as to the law of the case.

No error appearing, the case is affirmed.

CURTIS *v.* STATE.

Crim. 3859.

Opinion delivered October 16, 1933.

C. T. Bloodworth, for appellant.

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

HUMPHREYS, J. Appellant was indicted and tried in the circuit court of Clay County, Western District, for the crime of murder in the first degree for killing Jim Sanders in the town of Corning on February 5, 1933. Upon a trial of the cause, appellant was convicted of voluntary manslaughter and adjudged to serve a term of four years in the State penitentiary as a punishment therefor, from which is this appeal.

Appellant assigns three grounds for a reversal of the judgment:

First: The failure of the officer in charge to keep the jury together as instructed and sworn to do, and his taking them, by permission of the prosecuting attorney and without the knowledge of defendant, to the house of Ralph Parish.

Second: The court's permitting the prosecuting attorney over objection to question defendant and his witnesses relative to a supposed immoral relation between Bertha Morgan and defendant.

Third: The improper and prejudicial argument of counsel for the State, both in his opening and closing arguments.

(1) The officer in charge of the 10 jurors who had been selected to try the case left them together for about an hour in the business section of Corning, and, after returning, being unable to find accommodations at the hotel where he could keep them together, he took them

to the home of Ralph Parish, where he could keep them together for the night. Ralph Parish was not friendly to appellant, and had taken some interest in the prosecution. The next morning, when the officer brought the jury into court, appellant objected to them serving on the grounds that the officer had left them together in the business section of the town and that they had spent the night together in the home of Ralph Parish. The court examined each juror as to whether any one had talked to him about the case and whether any one had attempted in any way to influence him, and each one answered the question in the negative. The court also stated that the jury had not been sworn, and that, if appellant could show that any or all of them had been talked to about the case or influenced in any way or had been guilty of any misconduct, he would excuse him or them. This appellant refused to undertake, whereupon the court impaneled the jury to try the case, over the objection and exception of appellant. It was not imperative, in the first instance, for the court to keep the jury together, so the court exercised the proper discretion after examining them concerning their conduct during the short time the officer left them and after finding that they had not been guilty of any misconduct and that no influence had been exerted by any one to prejudice them against appellant.

(2) For the purpose of testing the credibility of appellant, who testified in the case, the prosecuting attorney had a right to cross-examine him concerning his past conduct and immoralities. *Turner* v. *State*, 153 Ark. 40, 239 S. W. 373. The court sustained the objection entered to the cross-examination of Red Brooks touching appellant's relationship with Bertha Morgan except to that part of his testimony relating to the quarrel which resulted in the killing.

(3) The alleged prejudicial argument of the prosecuting attorney was based upon appellant's testimony elicited on cross-examination concerning the time he spent in the home of Bertha Morgan and was a legitimate argument.

No error appearing, the judgment is affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* PARKER.

4-3133

Opinion delivered October 16, 1933.

Ewing, King & King and *R. V. Wheeler,* for appellant.

Church & Gannaway and *Exby, Moriarty & Pierce,* for appellee.

BUTLER, J. Appellant company issued its policy of life insurance on the life of Pliny L. Parker on October 2, 1930. This suit is brought by appellee, the beneficiary named in the policy to recover on the same for the death of said Pliny L. Parker, which occurred on April 20, 1931. Appellant answered denying liability and made his answer a cross-complaint and asked for the cancellation of the policy on account of fraud alleged to have been practiced by Parker in the procurement of the contract of insurance. The fraud was alleged to be in these particulars: That the application contained a warranty of the truth of the answers and that certain false answers were made to questions propounded, the questions being,

did he have any disease serious or not serious within the past three years, and the name of the physician with whom he had consulted or by whom he had been treated; and what physicians he had consulted within the past three years, and if within the past three years he had been continuously, and was then, in good health, and if he had consulted a physician for, or suffered from, any disease of the heart, and what physician not already named had he consulted or been examined or treated by within the past five years? It was alleged that all these questions had been falsely answered in the negative, when in fact Parker had been treated on September 3, 1930, for a disease of the heart by Dr. J. T. Irby who had then and there diagnosed the said disease as angina pectoris, and had informed the said Parker at the time of its nature and character.

The motion to transfer to equity was denied, and on the issues presented evidence was adduced which resulted in the verdict and judgment for the appellee, from which is this appeal.

Dr. J. T. Irby testified on behalf of the appellant on the questions presented by its answer and cross-complaint, and stated that he had been called to treat the assured about nine or ten o'clock on the night of September 3, 1930; that he was with him thirty or forty minutes, examined him with a stethoscope, took his blood pressure, and "I was under the impression that he had an attack of angina and told him so." He testified that angina was a disease of the heart, and that he discussed the condition with Parker and told him to avoid any excitement—to live as quietly as he could—that any excess of overeating, or anything like that, would bring on another attack, which might be his last; that he gave the patient a hypodermic, left two or three tablets for his use and described angina, its causes and effect. He further stated that he saw Parker a day or two after, and that he looked pretty badly washed out as if he was weak; that he looked like a very sick man.

On the part of the appellee, Mrs. Parker testified that she was with her husband all the time that Dr. Irby was present, and that the doctor did not give a hypo-

dermic or take the blood pressure of the patient; that she was present in the room all the time except for a few moments when she went out to get a glass of water. She stated that her husband had eaten a large meal, and about thirty minutes after supper had an attack of indigestion, from which he frequently suffered causing his stomach to feel too full and press against his heart and cause a pain in his chest; that just before she called Dr. Irby that night she gave her husband some soda and water, after which he was better, and when Dr. Irby arrived he prescribed two little tablets that looked like aspirin, but that her husband wouldn't take them, saying he was feeling better and didn't need it. She also said that Dr. Irby did not tell her husband that he had trouble with his heart, and that her husband had only consulted a physician within the past five years on account of a gun shot wound; that in October or November of 1930 Parker had influenza. Dr. Watkins, who examined Parker for the insurance testified that he had treated Parker for a gun shot wound and for influenza; that he had examined him for the policy sued on and that during the examination Parker told him that Dr. Irby had called to see him a night or two before the application for insurance was made, and that the doctor left a little medicine and told him if he had any trouble to take it, but he was all right and did not need it. He said that this information he treated as a visit for a trivial matter and attached no importance to it, and did not think it necessary to include it in the answers to the questions. He stated that he had treated Parker for a number of years, and had never observed any indication of heart disease.

It was in testimony that there was a certain ailment called pseudo or false angina, and its characteristics and its symptoms resembled real angina, except that the pain would endure for an hour or longer, whereas in true angina pectoris the attacks would last only a few minutes and would either disappear or the patient die.

There was testimony given by Dr. LeRoy, called as an expert witness by the appellant company, to the effect that the symptoms in angina pectoris developed sudden-

ly, generally in the extreme or upper left side, the pain spreading down the arm and very violent and excruciating in the region of the heart, extending more or less one way or the other. In addition to that, there was a very great weakness, sweat, fear and a sense of impending death. In addition to that, there is a distinct shortness of breath, headache and things of that sort, the principal thing, however, being great weakness, terrible pain an apprehension of immediate death, pallor and poor circulation.

Dr. Irby did not state that the patient had any of these symptoms. He said "he had quite a bit of pain in his chest and upper part of the abdomen; the pain was in the region of the heart, left side of chest and left shoulder. He (Parker) stated, he had been suffering some little bit when I arrived, possibly an hour or two."

On this state of the testimony, the court, on its own motion gave the following charge to the jury: "Gentlemen of the jury, the plaintiff, as beneficiary named in a certain policy of insurance, New York Life Insurance Company, sues for recovery of the amount of said policy, and the defendant defends on the ground that the policy is voided by an incorrect answer of the deceased, made to one of the questions in the application. You are charged that the burden of proof is upon the defendant to show the incorrectness of said answer." And at the request of defendant, appellant, continuing, the court charged the jury that: "The application of the deceased for a policy of the defendant company reflects, in answer to a question in the application as to whether or not he had ever had a disease of the heart, that the answer was in the negative. You are charged that if you find from the evidence that the deceased had, a short time before the application, had an attack of angina pectoris, a disease of the heart, and had been treated by a physician therefor, and that the answer to this question in the application was made by him knowing that he had had such an attack, and been so treated, your verdict will be for the defendant. If you fail to find such fact, your verdict will be for the plaintiff for the

amount sued for." And on its own motion the court added to this instruction the following sentence: "That is the only issue, gentlemen, in this case."

This was all the instruction requested and given. After the jury had been out and deliberated some time, they returned into court and one of the jurors propounded the following question to the court: "May we ask one more question—Can you give to the jury an instruction on how far the knowledge of the examining physician bound the company?" The court, in answering this question, charged the jury in this manner: "In answer to the question, you are told that if there is any knowledge of the company physician from the testimony here that would affect the merits of the case, as a rule of law, the knowledge of the company physician would be knowledge to the company, unless, of course, you found that there was collusion between the company physician and the applicant to defraud the company, but, as a general rule of law, the knowledge of the physician would be knowledge to the company. At this time, the court does not recall any part of the evidence that would make this rule of law material."

It will be observed that the appellant, by the request for the instruction which has been quoted, pitched its defense on the sole ground that the assured, before the date of the application, was afflicted with a disease of the heart and that he knew of the existence of this disease, and fraudulently concealed the same from the insurance company. The appellant insists that there is no legal evidence to dispute the testimony of Dr. Irby, which conclusively shows that Parker not only had a disease of the heart, but that he was well aware of the fact. Appellant further insists that the testimony which might tend to contradict that of Dr. Irby is negative in its nature and has no probative force, and therefore there is no substantial evidence to support the verdict. Appellant insists that the true rule for determining the weight of negative testimony is that when a witness testifies that he did not hear a conversation this in no manner contradicts the testimony of another witness who states that he did hear it if there are circumstances which explain

why the witness did not hear what was said. Appellant called attention to the fact that Mrs. Parker was absent for a time from the room while Dr. Irby was in attendance upon her husband, and the conversation relative to the nature of his disease between Parker and Dr. Irby could have been had during her absence. This was properly a circumstance for the jury to consider in weighing the testimony of the appellee. The appellant, however, overlooks the fact that according to her statement she was absent from the room only long enough to procure a glass of water and return with it, and that a conversation of the nature testified to by Dr. Irby could scarcely have been begun and concluded in so short a time. Then, too, the intimate and confidential relation existing between a husband and wife makes it hardly possible that so grave a condition, with its probable result, could have been discussed without the appellee knowing something of it.

There are other circumstances which tend to contradict the testimony of Dr. Irby—the absence of the symptoms of angina pectoris, the testimony of Parker's physician, who had treated him for his ailments and who had examined him from time to time, to the effect that he had discovered during his administrations and examinations no evidences of any heart disease. This, together with the testimony to the effect that Parker was subject to spells of indigestion which caused oppression and pain in the region of the heart, was entirely sufficient to raise the question as to whether or not the appellee was in fact afflicted with a disease of the heart and the attack for which he had been treated by Dr. Irby was angina pectoris, or a different and trivial ailment caused by indigestion, and that the attack was a false angina instead of the more serious trouble which Dr. Irby suspected. Here it may be said, that Dr. Irby did not state in positive terms that Parker was suffering from angina pectoris, but stated: "I was under the impression that he had an attack of angina and told him so." These questions were submitted to the jury at the request of the appellant in the instruction noted, and the finding of the jury is conclusive.

The appellant objected and saved his exceptions to the answer of the court to the question asked by the juror relating to the effect of the knowledge of the physician who examined the applicant for the insurance company. This physician related in detail the conversation between himself and Parker from which it appears that he knew of the visit of Dr. Irby, but attached no significance to it, perhaps because in his previous association with Parker in a professional capacity nothing had occurred which would lead him to suspect Parker of having any serious organic disease. The evidence is such that the jury might have concluded that the examining physician, and Parker himself, treated the attack about which Dr. Irby testified as a result of some trivial ailment only. Such ailments, it has often been decided, are not in the contemplation of the parties when application for insurance is made and accepted; and, although the truthfulness of the answers are warranted by the applicant, such ailments would not affect the risk assumed by the insurer, and a false answer would not be a breach of the warranty. *Ark. State Life Ins. Co.* v. *Allen,* 166 Ark. 490, 266 S. W. 449, and cases cited.

The court also correctly answered the question of the juror. The examining physician in questioning the applicant was the representative of the insurer. If he, after having been informed of the facts by the applicant, chose to ignore them, this conduct would estop the company from avoiding the policy on the ground that the questions were incorrectly answered. *Mutual Reserve, etc. Co.* v. *Cotter,* 81 Ark. 205, 99 S. W. 67; *Bankers, etc. Co.* v. *Crowley,* 171 Ark. 135, 284 S. W. 4; *American N. I. Co.* v. *Hale,* 172 Ark. 958, 291 S. W. 82; *Commonwealth, etc.* v. *Tanner,* 175 Ark. 482, 300 S. W. 927; *The Maccabees* v. *Gann,* 182 Ark. 1141, 24 S. W. (2d) 456.

It was lastly argued by the appellant that the court erred in refusing to transfer the case to equity. The court correctly retained the case for the reason that all of the defenses urged were available in a court at law, and adequate and complete relief could there be had. No prejudice could therefore have resulted from the court's

action in this regard. *Hugus* v. *Sanders,* 164 Ark. 385, 261 S. W. 899; *Mott* v. *First Nat. Bk.,* 171 Ark. 7, 283 S. W. 3; *Bassett* v. *Mutual, etc. Ass'n,* 178 Ark. 906, 12 S. W. (2d) 893.

Let the judgment be affirmed.

NEW YORK LIFE INSURANCE COMPANY *v.* JACQUES.

4-3161

Opinion delivered October 23, 1933.

Louis H. Cooke, Feazel & Steel and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Jas. S. McConnell and *J. M. Jackson,* for appellee.

MEHAFFY, J. On April 11, 1930, the appellant issued its policy in the amount of $1,000 to the appellee. It is provided in said policy that, should the insured become totally and permanently disabled, the appellant would waive the payment of further premiums on said policy, and pay an income of $10 per month during the continuance of such disability.

Appellee is 23 years of age, a baker by trade, and knows no other business. He filed suit, alleging that, while said policy was in full force and effect, he became permanently and totally disabled. He became afflicted

with infectious arthritis of the left hip joint; his disability was total and permanent.

Due proof was made, and during the period of March 15, 1931, to January 15, 1932, appellant waived premiums and paid appellee $10 per month. It was alleged that on January 15, 1932, the appellant breached its contract of insurance, and discontinued the payment of disability benefits, and, since that time, has continued to breach said contract by refusing to pay the benefits and waives the premiums.

Appellee alleged that he had an expectancy of 40.17 years. He alleged that he was entitled to receive $10 per month from January 15, 1932, for 40.17 years, and at his death his beneficiaries are entitled to receive $1,000. He asked judgment for the present worth of the disability benefits, and present worth of the $1,000, the amount sued for being $2,999.95.

The appellant answered, denying the material allegations in the complaint. The appellant filed amendment to its answer, alleging that it received information to the effect that appellee was employed part of the time, and that he was examined by a physician, and was not totally and permanently disabled, and so notified appellee; that it subsequently reconsidered appellee's claim, and admitted that he was disabled within the terms of the contract, and tendered him all of the monthly installments to which he was entitled. Appellant renewed its tender, and offered to pay all installments due, and in all respects comply with the contract.

We deem it unnecessary to set out the evidence. It is sufficient to say that there was ample evidence to sustain the claim of total disability, and the appellant admitted and offered to pay. There was a jury trial and a verdict directed by the court in the amount of $1,982.72 with interest at 6 per cent. per annum. Motion for new trial was filed and overruled, and the case is here on appeal.

Appellant first contends that there is no evidence of a repudiation or breach of the contract. Numerous letters from the appellant to appellee were introduced, all of them tending to show that they did not intend to re-

pudiate the contract, but it is admitted that they declined to pay disability benefits from January 15, 1932, claiming that appellee was not totally disabled, and that appellant was not under any obligation to pay the disability benefits. It also advised him that he must pay his premiums.

The evidence tended to show that the appellant had made examinations, determined that he was totally disabled, and paid disability benefits for a number of months, and then declined to pay further, at a time when appellee's disability was the same that it was when they first began to pay disability benefits.

It is the contention of the appellee that appellant was not acting in good faith, and that its conduct was a repudiation and breach of its contract; that it knew appellee's condition and refused to comply with the terms of the contract.

The court directed a verdict, thereby holding as a matter of law that the appellant had breached its contract. This was error. The court should have submitted to the jury the question whether appellant had breached its contract.

The court also refused to permit the appellant to introduce evidence to show that appellee's affliction was such as to prevent him from taking a normal amount of exercise and to make him more susceptible to diseases of all kinds, and refused to permit appellant to show the present values of amounts in controversy at periods of 5, 10, 15, 20, 25 and 30 years. This evidence was offered on the theory that the jury might find that the appellee, who claimed to be totally and permanently disabled, would not live out the full expectancy of a normal, healthy person.

We think the court erred in not permitting appellant to make this proof. The mortality tables were properly admitted in evidence, but those tables are for the purpose of showing the expectancy of a person in health, and, in order to determine the expectancy of a person who is not in good health, it is proper to introduce the mortality tables and all other evidence tending to show his expectancy.

We said in a recent case: "Appellant contends that the court erred in admitting in evidence the Carlyle 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. * * *

"This court, in the case of *Arkansas Midland Rd. 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." *Nat. Life & Acc. Ins. Co.* v. *Sims,* 187 Ark. 969, 63 S. W. (2d) 524.

Insurance policies like the one herein involved have been construed by this court many times, and we do not deem it necessary to discuss these questions or review the authorities. Some of the recent cases are as follows: *Nat. Life & Acc. Ins. Co.* v. *Whitfield,* 186 Ark. 198, 53 S. W. (2d) 10; *Mo. State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. (2d) 707; *Mo. State Life Ins. Co.* v. *Holt,* 186 Ark. 672, 55 S. W. (2d) 788; *Mass. Prot. Ass'n* v. *Oden,* 186 Ark. 844, 56 S. W. (2d) 425; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 860, 56 S. W. (2d) 433; *Guardian Life Ins. Co.* v. *Johnson,* 186 Ark. 1019, 57 S. W. (2d) 555; *Mo. State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Sovereign Camp, W. O. W.,* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310.

If there was a breach of the contract by appellant, appellee is entitled to recover. If there was no breach

of the contract, then appellee is entitled to recover the disability benefits, and is relieved from the payment of premiums.

For the errors indicated, the judgment is reversed and the cause remanded for new trial, with permission to introduce evidence to show the expectancy of life of appellee, and with directions to submit the question to the jury as to whether there was a breach of contract.

Justices SMITH and BUTLER concur in the reversal of the judgment, but they believe that the evidence shows that there was no breach or repudiation of the contract, and the court should have so declared.

PRODUCERS' SAND & GRAVEL COMPANY, INC., *v.* PATTERSON.

4-3141

Opinion delivered October 23, 1933.

Abe Collins, for appellant.

Shaver, Shaver & Williams, for appellee.

MCHANEY, J. This appeal challenges the sufficiency of the evidence to support the verdict and judgment in appellee's favor for $1,000 against appellant. Only a question of fact is therefore presented for decision. It is conceded, under the well-established rule of this court, that, if there is any evidence of a substantial nature to support the verdict when viewed in the light most favorable, and indulging every legitimate presumption in its favor, it must be permitted to stand. The facts, briefly stated, and about which there is little dispute, are

as follows: Appellant operates a gravel plant and rock crusher on the south bank of Little River, getting its material therefrom. This material is taken from the river bed, dumped into a hopper, from which it passes through a large inclined cylindrical screen having round holes one and one-half inches in diameter. This screen revolves slowly, and the gravel and rock therein is washed by the injection of water. The small rock or gravel pass through the holes in the screen, drop into a chute and are conveyed to the gravel bin in which appellee was working at the time of the injury complained of, removing mud balls and trash or sticks that passed through the screen. The larger rock, such as would not pass through the holes in the screen, gravitated to the lower end of the screen, dropped into another overhead chute, about 10 feet above the floor of the gravel bin, 14 feet long east and west by 13 feet wide north and south, and were conveyed by gravity to the rock crusher on the west side of the bin, where they were crushed. This latter chute was 5½ feet wide at the screen and tapered to two feet wide at the crusher, all the bias being taken from the north side of the chute. It was made of plank or boards, 2 x 12 inches, with sides of the same size, was 5½ feet long and dropped a distance of 2 feet from screen to crusher. The bottom of the chute was 8 inches below the screen, so that, when the rock fell out of the screen into the chute, they fell a distance of 8 inches before striking the bottom of the chute and then on down at an angle or fall of 2 feet in a distance of 5½ feet. Appellee was working, as above stated, in the bin over which this chute passed, on the north side next to the wall, about 5½ feet distant, when, as he testified, a rock as large as his two fists fell or jumped out of the overhead chute, which had no screen or covering over the top, and struck him with great force on the left testicle, causing serious, painful and permanent injuries. No one else saw the rock fall. He made no outcry, nor did he communicate the fact of his injury to any one at the time, although another employee was working in the bin with him on the south side, and other employees were near by. Just what caused the rock to fall out of the chute and to travel a distance of 5½ feet there-

from and at right angles thereto, he was unable to explain. He says the first he saw of the rock it was in front of him on a level with his breast bone, and that it struck him in the manner stated; that he was seriously injured from some cause, there is little room to doubt, as two or more physicians who examined him testified thereto and that the injured part was perishing away.

Appellant contends that it was impossible for the injury to have happened in the manner stated. We cannot agree that it was impossible. While to us it may appear improbable, we cannot say it could not have happened or that it is contrary to the laws of nature, in view of the positive testimony of appellee that he was so injured and the result thereof, corroborated by others that he had received an injury. As said in 18 C. J., p. 19: "But improbability alone is not sufficient ground for holding a fact not proved where it is supported by competent and apparently credible evidence." Nor can we say as a matter of law there was no negligence in failing to guard or screen the top of the chute to prevent rocks from falling out. The evidence shows that rocks did on other occasions fall out of that chute, endangering those working below. Rocks weighing as much as 100 pounds passed through it and with a steep incline of 2 feet in 5½ feet, plus the momentum of such a rock in a fall of 8 inches from the crusher, it was a question of fact for the jury to say whether a rock of smaller size might be thrown by being struck by a much larger one, and whether, in the exercise of ordinary care, appellant should have provided some safeguards to prevent injury to employees working in the bin.

There being some substantial evidence to support the verdict and judgment, the judgment must be affirmed.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* MCCOMBS.

4-3168

Opinion delivered October 30, 1933.

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Owens & Ehrman, for appellant.

R. E. Wiley, for appellee.

JOHNSON, C. J., (after stating the facts). Appellant contends, first, that the trial court erred in refusing to transfer this case to the Federal court. We think this contention has been definitely decided adversely to appellant's contention in the case of *Standard Life Insurance Company* v. *Robbs,* 177 Ark. 275, 6 S. W. (2d) 520, wherein this court held, quoting from the first headnote:

"An action against an insurance company for installments due under a policy totaling $1,700 as not removable to the Federal court, though the total installments to become due under the policy exceed the jurisdictional amount of $3,000."

The doctrine announced in the Robbs case has not been overruled, impaired or modified by any opinion of the Supreme Court of the United States.

It is next contended that the trial court erred in permitting two witnesses, Messrs. Rutland and Balding, to give their opinions in reference to the cause of the death of Mr. McCombs, to-wit: drowning. The record discloses that the two witnesses referred to were embalmers located in Little Rock, and that each of them had had a number of years of experience in handling dead bodies. Among the bodies so handled were deaths caused by drowning. These witnesses, after detailing the facts and circumstances ascertained from the preparation of the body for burial, testified that in their opinion the deceased died from drowning. This court has many times held that a nonexpert witness may testify as to his opinion, after stating the facts on which the opinion is based. *Griffin* v. *Union Trust Company,* 166 Ark. 347, 266 S. W. 289; *Benefit Association* v. *Jacklin,* 173 Ark. 937, 294 S. W. 353; *St. Louis-San Francisco Railway Company* v. *Barron,* 166 Ark. 641, 267 S. W. 582; *Bush* v. *Brewer,* 136 Ark. 246, 206 S. W. 322.

The opinions of the witnesses referred to were competent for still another reason. In *Railway Company* v. *Shoecraft,* 56 Ark. 465, 20 S. W. 272, this court said: "A witness' opinion is admissible as evidence, not only where scientific knowledge is required to comprehend the mat-

ter testified about, but also where experience and observation in the special calling of the witness give him knowledge of the subject in question beyond that of persons of common intelligence."

The next contention is that the trial court erred in giving, modifying and refusing to give certain instructions. The action complained of appears definitely from the quoted instruction No. 2. It will be noted that the theory on which the case was submitted to the jury was that the disease which would take the death out of the policy must be a settled condition as distinguished from a temporary disorder. All instructions requested and given by the trial court were made to conform to this theory. This court has many times held that insurance policies will be construed most favorably to the insured, since the policy is couched in the language chosen by the insurer. *Fidelity & Casualty Company* v. *Meyer,* 106 Ark. 99, 152 S. W. 995; *Maloney* v. *Maryland Casualty Company,* 113 Ark. 174, 167 S. W. 845. It will be noted that the insurance policy uses the general term "disease" to create an exception to the general coverage of the policy. The meaning of the word "disease" could have been restricted by appellant had it so desired, and, since there are no restrictions in the policy in reference thereto, we should give it its usual and ordinarily understood meaning. Webster's International Dictionary defines the word as follows: "A disease is usually deep seated and permanent or at least prolonged; a disorder is often slight, partial and temporary." Since the policy itself gives no definition of the word "disease" as used in the policy, it should be given its usual and ordinary acceptation. When this is done in the instant case, it was perfectly proper for the trial court to tell the jury what, under the laws, was a disease as distinguished from a temporary disorder. We therefore conclude that the trial court committed no error in modifying all requested instructions to conform to this definition. The views here expressed are in accord with many opinions on the subject. See case notes in 34 and 52 L. R. A. (N. S.) 445 and 1203, respectively. Other alleged errors are urged to the instructions given and refused by the trial court, but we

deem them not of sufficient importance to discuss in this opinion. It suffices to say that the trial court submitted the case to the jury under instructions which were fair, impartial and in conformity with the law as we have herein construed it.

The next insistence for reversal is that the trial court erred in allowing an attorney's fee and a 12 per cent. penalty on the amount recovered. The contention is that the prayer of the complaint was for $1,968.75 and appellees recovered only $656.25. It is perfectly apparent from the language used in the complaint that the amount sought to be recovered was 3½ per cent. per annum, interest on the aggregate amount due. This, of course, fixed the amount demanded and the calculation of $1,968.75 was a mere error in figures. At any rate, before the case was submitted to the jury, by permission of the court, the complaint was amended to conform to the testimony, and a recovery was had for the full amount based upon the 3½ per cent. calculations. *Life & Casualty Company* v. *Sanders,* 173 Ark. 362, 292 S. W. 657. Appellant denied liability on the first complaint and continued to deny liability after the complaint was amended.

We therefore hold that plaintiff did recover the amount sued for, and was entitled to a reasonable attorney's fee and a 12 per cent. penalty on the amount recovered. To maintain its position, that appellees are not entitled to recover attorney's fee and penalty in this case, we are cited to *Pacific Mutual Life Insurance Company* v. *Carter,* 92 Ark. 378, 123 S. W. 384. This case is easily distinguishable from the Carter case. In that case the amount of recovery was the main issue, it being contended that the insured had engaged in a more hazardous occupation which by the terms of the policy reduced the amount of recovery. No such contention is here made. A definite denial of liability was asserted and maintained throughout the trial.

No error appearing, the judgment is in all things affirmed.

INTERNATIONAL SHOE COMPANY *v.* WAGGONER.

4-3280

Opinion delivered October 30, 1933.

A. R. Cooper, for petitioner.

Wm. C. Gibson and *Ingram & Moher,* for respondent.

SMITH, J. Petitioner prays mandamus to compel the judge of the Arkansas County Circuit Court and the clerk thereof to issue an execution upon a judgment of that court rendered January 16, 1933. Stays of execution had been granted by the circuit judge from time to time, the last of which expired October 15, 1933.

The clerk has responded that he acted under the orders of the judge, and the judge has made the oral response that there will be no further stay of execution, and that execution may issue at the request of petitioner, the judgment plaintiff.

The case is now a moot one, as the order of this court is not necessary to have an execution issued, and the application for mandamus will be denied for that reason.

It may be said, however, that the circuit court was without authority to order the execution stayed. It was so expressly held in the case of *Taylor* v. *O'Kane,* 185 Ark. 782, 49 S. W. (2d) 400.

TERRY *v.* HARRIS.

4-3317

Opinion delivered October 30, 1933.

[redacted]

W. G. Riddick and *Roy D. Campbell,* for appellant.

Arthur G. Frankel and *June P. Wooten,* for appellee.

SMITH, J. Suit was filed by Brooks Hays in the Pulaski Circuit Court against David D. Terry and Lee Miles, as chairman, and H. G. Combs, as secretary, of the Democratic State Central Committee, the complaint in which contained the following allegations: A Democratic primary election was held on September 26, 1933, in the Fifth Congressional District of Arkansas, for the purpose of nominating a Democratic candidate for Congress in said district. The district is composed of Pulaski, Franklin, Yell and five other counties. At this election the plaintiff, Hays, and the defendant, Terry, were the only candidates. The total number of votes cast in said election, as tabulated and certified to by the various county central committees, was 18,927, of which number Terry received 9,776 votes, and Hays 9,151 votes, giving Terry an apparent majority of 625.

It was alleged that illegal votes were cast and counted for Terry as follows: 300 in Pulaski County, 200 in Franklin County, and 1,450 in Yell County, and that, if only the legal votes cast at said election were counted, Hays will have a clear and large majority. It was also alleged that Terry had paid money to various

persons in Yell, Pulaski and Franklin counties for soliciting votes for Terry, in violation of § 3902, Crawford & Moses' Digest.

The complaint alleged that the defendant, Lee Miles, as chairman, and the defendant, H. G. Combs, as secretary, of the Democratic State Central Committee of Arkansas, under the terms of a resolution adopted by the Democratic State Central Committee, were directed to issue a certificate of nomination to the successful candidate in said election.

It was prayed: (a) That the ballots be purged and Hays declared the nominee; (b) that a finding be made that Terry has been guilty of violating the provisions of the corrupt practice act; and (c) that Miles and Combs, as chairman and secretary, respectively, of the Democratic State Central Committee, "be enjoined from certifying the nominee for Congress in said Fifth Congressional District until further orders of this court."

Attached to the complaint, as an exhibit thereto, is a copy of a resolution adopted by the Democratic State Central Committee on June 20, 1933, under which the election was called and held. It was therein, among other things, ordered that a Democratic primary election be held on the second Tuesday in September, 1933, "for the purpose of nominating a Democratic candidate for Congress from said district, to be voted upon at a special election to be called for the purpose of filling the unexpired term created by the resignation of the Honorable Heartsill Ragon." The resolution provided that "the returns of the election shall be made and certified to the secretary of the State Central Committee within the time, after said special primary election is held, as is now provided by law for such returns and certificate made following general primary elections. The chairman and secretary of the State Central Committee will cast up such returns, based on said certificates, and certify the nominee to the State Election Board."

The resolution requested the Governor not to call a special election "until such time as will enable the holding of the primary herein called and in the second primary, made necessary under the laws of the State of

Arkansas," and that no nominee be certified except the recipient of "a majority of the votes cast at such special election or second primary."

In addition to this complaint, the plaintiff, Hays, filed a "petition," in which he alleged that, unless restrained, Miles, as chairman, and Combs, as secretary, of the Democratic State Central Committee, will issue a certificate of nomination to the defendant, Terry, and it was prayed that the chairman and secretary of the committee be ordered to refrain from issuing such certificate pending this contest and until the further order of the court.

After argument upon this petition, the presiding judge indicated his intention to grant the prayer thereof, but, upon agreement of counsel, that action was held in abeyance until a petition for prohibition could be filed in this court. That petition has been filed, and the facts herein stated have been made to appear, and it is prayed that the circuit court be prohibited from restraining the chairman and secretary of the Democratic State Central Committee from certifying the result of said election until the conclusion of this contest thereof.

It is true, as counsel for respondent contend, that the writ of prohibition does not issue to prohibit a lower court from erroneously exercising its jurisdiction, but issues only when that tribunal is wholly without jurisdiction, or is proposing to act in excess of its jurisdiction. *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13. The question presented for our decision is therefore whether the circuit court has the jurisdiction to restrain the party officers from complying with the resolution under which the primary election was called pending the determination of the contest of that election.

It is settled that the right to contest an election in the courts is one of statutory creation, and one which did not exist before that right was conferred by statute. *Walls* v. *Brundidge,* 109 Ark. 261, 160 S. W. 230; *Cain* v. *McGregor*, 182 Ark. 637, 32 S. W. (2d) 319.

The statute conferring this right of contest is the initiated act No. 1, found in volume 2 of the Acts of 1917,

page 2287, and appearing as § 3757 *et seq.*, Crawford & Moses' Digest.

The order which the circuit court is about to make is one which, if made, will prevent the party authorities from determining and certifying who this nominee is, and we find nothing in the initiated act referred to which has conferred that jurisdiction upon the courts. The act has not deprived the party authorities of the right and duty to determine, in the first instance, who its nominee is for any particular office. The act does confer the jurisdiction upon the courts to review that finding, which review may be made upon an inquiry into any and all relevant facts tending to show which candidate received the majority of the legal votes. *Robinson* v. *Knowlton,* 183 Ark. 1127, 40 S. W. (2d) 450.

Section 3769, Crawford & Moses' Digest, which is part of § 11 of the initiated act of 1917, provides that the county central committee shall certify the nomination of all county and township officers, "and shall certify the vote of all candidates for circuit and district offices to the circuit and district committees (including congressional districts), and shall certify the vote for candidates for United States senate and for all State offices to the State Central Committee."

The statement is made in the briefs and is treated by opposing counsel as an undisputed fact that the congressional committees referred to are nonexistent. It was, no doubt, because of this fact that the resolution hereinabove referred to directed the State Central Committee to "cast up such returns, based on said certificates (of the county committees), and certify the nominee to the State Election Board."

The right to contest the certification of nomination or the certification of the vote is conferred in § 12 of the initiated act, and the procedure is there defined. Sections 3772 and 3773, Crawford & Moses' Digest. But these provisions are not intended to supersede the power of the party committees to determine, in the first instance, who its nominees are. The right conferred, as we have said, is to have that determination and certification judicially reviewed in the manner provided by the act.

It is true the election here contested is a primary specially called to nominate a single candidate, and is not a general primary election; but this fact does not alter the law of the case. The statute must receive the same interpretation in either case.

It is suggested in the brief of the respondent that the Governor may not call a special election at which the party candidate may be voted for until after the termination of this contest and the actual nominee ascertained and declared, and that the certification of nomination should be postponed until the court is prepared to pronounce judgment.

But, if the court has this power in the contest of a special primary election, it has the same power in a contest growing out of a regular primary, and, if so, delay in deciding the contest might operate in having an election held at which the party would have no candidate for the contested office. The law fixes the time when regular primary elections shall be held and general elections following them, and the courts are without power to change those dates, and, if the courts may prevent party committees from certifying the result of a primary election pending its own review and final determination of a contest, it might frequently happen that the party would have no nominee entitled to have his name placed upon the ticket as such, and a general election, which the courts cannot postpone, would result in the election of some person running independently of a party nomination, or as the nominee of another party, in which event the contest would be fruitless to all persons concerned.

It was not contemplated that the party holding the primary election should be deprived of the right to have a candidate voted for as its certified nominee. On the contrary, it appears to have been clearly contemplated that the person certified as the nominee of the party by the appropriate committee thereof should be treated as the candidate of his party until it shall have been adjudged that he is not the legal nominee.

The litigation necessary to determine the question of the nominee at the primary election may be protracted to a date beyond the day of the general election without

the court having determined who the legal nominee is; but it does not follow that the party must be without a candidate. The party does have a candidate under the case stated, that person being the candidate who has been certified by the appropriate party committee as the party nominee. This is made clear by the provisions of § 15 of the act of 1917, which appears as § 3776, Crawford & Moses' Digest. This section provides that, if the person certified by the appropriate committee to be the party nominee is elected at the general election, and it is later determined, after the contest has been heard and decided, that he was not entitled to the nomination, "then such judgment" (that he was not entitled to the nomination) "shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such office in case of death or resignation."

If these statutory provisions do not apply to a contest for a congressional nomination, then there is no authority for such contests. If they are applicable, then the candidate certified by the party committee as its nominee remains such until the court has determined in the manner provided by law that the contestee is not the legal nominee.

We conclude therefore that the circuit court was without jurisdiction to restrain the State committee from complying with the resolution pursuant to which the primary was called, by tabulating and certifying the result of the election, subject, of course, to the judicial review provided by law.

It is therefore ordered that the writ of prohibition issue as prayed, directing the circuit court to take no action preventing the party authorities from certifying the nomination in accordance with the party rules.

CONTINENTAL LIFE INSURANCE COMPANY *v.* GRAY.

4-3165

Opinion delivered October 30, 1933.

Charles G. Revelle, Courtney S. Goodman and *Arnold & Arnold,* for appellant.

Pratt P. Bacon and *Shaver, Shaver & Williams,* for appellee.

HUMPHREYS, J. Appellee brought separate suits in the circuit court of Miller County to recover from appellant the sum of $2,500 less $265 borrowed by the insured from appellant on each of two life insurance policies issued by appellant to her husband, in which she was the beneficiary.

Appellant filed an answer in each case, denying any liability whatever.

The cases were consolidated for the purposes of trial and submitted upon the pleadings and testimony. At the conclusion of the testimony, it was agreed that there was no dispute on the facts, and each party asked for an instructed verdict; whereupon the court instructed a verdict in favor of appellee for $2,500 less $292.05 on policy No. 67782, and a verdict in favor of appellee for $2,500 less $296.60 on policy No. 68195, and rendered judgments in accordance with the verdict, from which is this appeal.

The first policy was issued and delivered on the 26th day of February, 1925, and the second on the 14th day of March, 1925. Each policy was issued in consideration of an annual premium of $70.33, payable annually in advance. Seven annual premiums were paid as they matured, the last being paid respectively on February 26th and March 14, 1931, which carried the policies respectively to February 26th and March 14, 1932. Prior to the payment of the last premiums, the insured had borrowed on each policy $265. Each policy contained a table of nonforfeiture and loan values, showing that, after the payment of the seventh premium, the loan value on each policy was $320. The insured did not pay the premiums on February 26th and March 14, 1932, respectively, either at the time or within the grace period. Insured died on the 7th day of June, 1932.

The main contention of appellant for a reversal of the judgment is that the loan value of $320 was not available during the 7th year or until the 8th annual premium had been paid. We find nothing in the table of loan values supporting such a contention. The paragraphs in the policies relative to "cash loans" and "automatic premium loans" clearly provide that appellant will lend on the sole security of these policies any sum within the loan value stated in the table of loan values for the year in which the loan is made; and that appellant will advance any premium becoming due as a loan against the policy provided the loan value of the policy is sufficient to cover same and provided further that insured shall have made written request therefor, either in the application or otherwise. Under the rule announced in the case of *Missouri State Life Insurance Company* v. *Miller,* 163 Ark. 480, 260 S. W. 705, the loan value of these policies was available after the payment of the seventh annual premium and before the payment of the eighth annual premium. The insured had borrowed only $265 on each policy, leaving a loan balance of $55 on each, which was more than enough in the hands of appellant to pay the premiums beyond the death of the insured, which occurred on June 7, 1932. Forfeitures are frowned upon by the courts, and insurance companies will not be per-

mitted to declare forfeitures for nonpayment of premiums as long as they have funds available in their hands with which the premiums might be paid. The duty rests upon them to pay the premiums out of such funds and thereby prevent forfeitures. *Security Life Insurance Co.* v. *Mathews,* 178 Ark. 775, 12 S. W. (2d) 865. Appellant contends, however, that the premiums had been paid annually, and that there was not sufficient loan value to pay the full annual premium, and that the insured had not exercised an election under the policy to have the annual payments changed to quarterly payments. This makes no difference. A legal duty rested upon appellant to make the application as far as it would go in order to protect the policyholder. We so ruled in the cases of *Mutual Life Insurance Company* v. *Henley,* 125 Ark. 372, 188 S. W. 829, and *Pfeifer* v. *Missouri State Life Insurance Company;* 174 Ark. 783, 297 S. W. 847.

Appellant also contends for a reversal of the judgment because the court imposed the statutory penalty and attorney's fee upon it. This contention is made upon the theory that less was recovered than sued for. Appellant denied any liability whatever or that appellee was entitled to any sum on the ground that the policies had been forfeited. The fact is that appellant really recovered the amount sued for. The only amount that the court deducted was the premiums due to appellant by the insured from February and March, 1932, to the date of the insured's death, which occurred on June 7, 1932. This point was decided adversely to the contention of appellant in the case of *Life & Casualty Company* v. *Sanders,* 173 Ark. 362, 292 S. W. 657.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* TREECE.

4-3115

Opinion delivered October 30, 1933.

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

Partain & Agee, for appellee.

KIRBY, J., (after stating the facts). It is contended for reversal that the testimony was not sufficient to support the verdict, and that the court erred in not sustaining appellant's demurrer to the evidence at the time the appellee rested his case.

The complaint alleged, and it was conceded, that appellee at the time of his injury was working upon one of appellant's bridges upon which was laid its railroad track used in interstate commerce, and that the case falls within the provisions of the Federal Employer's Liability Act.

Appellee was working with an extra gang on one of appellant's bridges near Genneseo, Kansas, and had been engaged in flagging trains during the morning. He was called in by his foreman and given a ratchet wrench and directed to set the screws in the guard rail on the bridge. He called the foreman's attention at the time to the apparent defective condition of the wrench handed him, it being dented as though mashed and very rusty near the ratchet. The foreman told him that he had ordered some new wrenches, that they would arrive soon, and to go ahead with the work with the wrench furnished, assuring him that it could safely be done. He proceeded to the work with the wrench supplied and within 20 or 30 minutes the mechanism of the wrench inside the ratchet slipped, releasing its hold on the screw and causing him to lose his balance and fall from the platform to the ground, 18 or 20 feet below. Both bones in the left ankle were broken, the bones coming through the flesh, and his foot at the heel was turned around at least 3 inches.

The court did not err in refusing to instruct the jury that appellee was barred from recovery for his injury because of assumption of risk, that being a question properly submitted to the jury under the circumstances. Appellee complained to his foreman about the apparent de-

fective condition of the ratchet wrench furnished him, and was told that it could be safely used and to go ahead and use it until it could be replaced with one of the new wrenches ordered and agreed to be supplied shortly, and, such being the case, it was properly a question for the jury. The rule of assumption of risk in using defective appliances applies only where the appliance is used without objection. *Erie R. Co.* v. *Steel,* 286 U. S. 546, 52 S. Ct. 395; *Ry. Co.* v. *Vizvari,* 210 Fed. 118, L. R. A. 1915 C, 9; *Lehigh Valley R. Co.* v. *Skoczyla,* 278 Fed. 378; *Id.* 258 U. S. 631, 42 Sup. Ct. 463.

The chief contention for reversal urgently insisted upon is to the effect that, before bringing the suit, appellee had made a settlement with the railroad company and released it from all further liability, and that it was entitled to a directed verdict on that account. It is true appellee did sign a release and did agree to accept the sum of $900 in settlement of his claim and cashed the draft therefor, but the jury found from the testimony that this was done upon the positive assurance of the physicians of the railroad company and its general claim agent, that he would be completely recovered from his injuries within 8 or 9 months—be as well as he ever was, and could go back to work.

The release was executed upon these representations, and, at the expiration of the 8 or 9 months, his condition as shown by the proof had improved but little. He was injured on May 7, 1931, was given treatment by physicians of the railroad company, confined in the Missouri Pacific Hospital at St. Louis, and the purported settlement was made on November 16, 1931, after he had been called to St. Louis by the appellant. He saw the claim agent after he had been examined by Dr. Stewart at the hospital the last time and made a settlement with him that day and was paid the money immediately. Before the settlement was made, Dr. Stewart, who had attended him during his stay at the hospital, made the following statement, according to appellee:

"Q. Did Dr. Stewart make any statement to you about your leg? A. Yes, sir, he said: 'Your leg is getting along all right.' He said: 'In eight or nine months your

leg will be as good as it ever was, and you can go back to work on the job just as well as you ever could.' That is what he told me."

After appellee talked with the doctor, the claim agent called the doctor on the 'phone about it and he reported to appellee as follows:

"Q. When you talked with Mr. Bailey, did he talk with Dr. Stewart? A. Yes, sir. When I got there he called Dr. Stewart, and he said the doctor said I would be all right in 8 or 9 months and be able to go back to work in that time, and my leg would be as good as it ever was."

Appellee knew he had a bad leg when the release was signed, but "I thought the doctor knew what he was talking about when he said it would be all right. * * * I was depending on what the doctor told me."

Witness had not recovered at the time of the trial, and still appeared to be permanently injured. He testified about the pain and suffering endured; said his ankle was still stiff, his foot hurts, his leg swells, bleeds and still pains him, and that he wears a bandage on it all the time. The doctors testified that he was not getting well, and it depended on what was done with him whether he would get well, and one doctor recommended another operation and said that he might anticipate the loss of a portion of the leg; that he could not do heavy work; that the condition of his leg at the time of the trial was painful and would continue so so long as it was allowed to remain in its present condition.

Dr. Stewart denied that he told appellee what he testified the doctor had said about the condition of his leg, and also that he had told the claim agent what he was reported to have said to him over the 'phone. Stewart also said he did not know how soon appellee would be well, or at the time he was reported to have made the statement about the condition of the leg, that "he would ever be able to return to work."

The testimony discloses that, if the statements made by the doctor and the claim agent were their honest opinions about the condition with which they were dealing in making the release, then said release was secured under a mutual mistake of fact; and, if such opinions were not

honestly entertained, then the release was procured through fraudulent representations of the physician and claim agent, and in either event its effect could be avoided by the appellee. *Steel* v. *Erie R. Co.,* 54 Fed. (2d) 690; *Id.* 285 U. S. 546, 52 S. Ct. 395; *Lion Oil Ref. Co.* v. *Albritton,* 21 Fed. (2d) 280; *Great Northern Ry.* v. *Fowler,* 136 Fed. 118; *Id.* 197 U. S. 624, 25 S. Ct. 800; *Keich Mfg. Co.* v. *James,* 164 Ark. 137, 261 S. W. 24; *Phoenix Utility Co.* v. *Smith,* 185 Ark. 587, 48 S. W. (2d) 238.

This was not a case to cancel and set aside a release as fraudulently obtained by mutual mistake, as was that of *Chicago & N. W. Ry. Co.* v. *Wilcox,* 116 Fed. 913, relied upon by appellant, and the rule of evidence for the determination of issues is not the same. Our rule in equity cases where fraud or mistake is pleaded and affirmative relief sought is the same as announced in the case above. In *K. C. S. Ry. Co.* v. *Sanford,* 182 Ark. 484, 31 S. W. (2d) 963, it was said, after approving the rule in the Wilcox case: "But the instant case is a suit at law and the allegation of fraud or mistake is defensive only, no cancellation of the written instrument being asked, but its consequence merely sought to be avoided."

Little contention is made that the verdict is excessive, and under the circumstances of the case and the nature of the extended injury it does not appear to us to be so.

Several of the instructions given for appellee are objected to, but there were nine instructions declaring the law given on the part of appellee, none of which are set out in the abstract, and the presumptions are all in favor of such instructions declaring the law correctly, and the contention as to error in giving the instructions complained of will be overruled on that account.

Upon the whole case we do not find any substantial error in the record, and the judgment must be affirmed. It is so ordered.

BLAKELEY *v.* BALLARD.

4-3177

Opinion delivered October 30, 1933.

John D. Shackleford, for appellant.

Alonzo D. Camp, for appellee.

McHANEY, J. Appellee and appellant were formerly husband and wife, having been married on April 21, 1930. Appellee is 82 years of age, and appellant is 49. Prior to their marriage in September, 1929, appellee received approximately $10,000 from the Federal Government as compensation for the death of his son, a World War veteran. With $1,500 of this money he purchased a home in Little Rock and, a short time prior to their marriage, he engaged appellant as his housekeeper. In August, 1930, they entered into a contract dividing all of appellee's property equally between them. By virtue of this contract appellant received an automobile and $1,425.95 in cash. Shortly thereafter they separated, and he brought a suit to annul the contract and another to replevin the automobile. Thereafter they went back together again. Appellant in the meantime had purchased a piece of property at Mabelvale with a portion of the money she had gotten from appellee, where they lived together for a time. On October 6, 1930, the suits above mentioned were dismissed. On March 12, 1931, after another separation, appellee filed a suit for divorce

against appellant, and obtained a decree of divorce on October 1, 1931, nothing being said about property rights in that decree. This action was commenced November 12, 1932, which prayed for a cancellation of the settlement agreement, heretofore mentioned, and for a recovery of the property which she had obtained from him, including the real estate described in the complaint, at Mabelvale, and for judgment for $375.95. The ground alleged as a basis for cancellation of the settlement agreement was that fraud, deception, and undue influence were practiced upon appellee, and that he was not mentally capable of making the contract. A trial of the action resulted in a decree canceling the contract, requiring appellant to restore to him all property she had obtained from him by reason of said settlement and divesting the Mabelvale property out of her and vesting it in him.

For a reversal of the judgment, appellant first contends that the decree is not supported by the preponderance of the testimony. Without reviewing the evidence in detail, as we think it would serve no useful purpose to do so, we are unwilling to say that the evidence is not sufficient to support the decree. It is conceded that the settled rule of this court is that we will not reverse the findings of the chancery court unless against the clear preponderance of the testimony. Appellee is very much older than appellant, being 82 at the time of the trial, and she freely admitted that she did not marry him because she loved him, but because she expected to take care of him in his old age and have his property to take care of her in her old age; that he had promised to will her everything he had at his death. The testimony shows that appellee is a man of weak and vascillating mind, and some of the witnesses testified that in their opinion he was mentally incompetent. Without reviewing the testimony further, we are of the opinion that the findings of the court are not clearly against the preponderance of the evidence.

Appellant, for the first time in this court, attempts to plead the statute of limitations, § 6969, Crawford & Moses' Digest, relating to the time in which a new suit must be filed after nonsuit taken, and estoppel in obtain-

ing a decree for divorce without mentioning a settlement of the property rights between them. A sufficient answer to these contentions is that they were not pleaded or relied upon in the trial court. Both are defenses that must be pleaded and relied upon in the trial court in order to be available in this court.

We do sustain the contention of appellant that the judgment rendered against her for $375.95 is without substantial evidence to support it. The proof shows that of the cash received by appellant from appellee in the property settlement, $1,050 was spent for the Mabelvale property, and, in addition, she spent the remainder of the cash in building a house thereon. The decree of the court divests this property out of appellant and vests it in appellee, which carries with it the improvements thereon.

The decree of the court will be modified in this respect by reversing and dismissing the judgment against her for $375.95, and in all other respects the decree will be affirmed.

WEST TWELFTH STREET IMPROVEMENT DISTRICT No. 30 *v.* KINSTLEY.

4-3178

[redacted]

John D. Shackleford, for appellant.

Carl E. Bailey and *Fred A. Donham,* for appellee.

BUTLER, J. This is an appeal from the order of the circuit court sustaining a demurrer to a petition of the appellants seeking to require the treasurer of Pulaski County to pay over to the appellants certain sums claimed to be due and payable under orders of the county court previously made.

It is impracticable to set out the petition in its unabridged form, nor does this seem necessary. The facts pleaded as a basis of the relief sought may be thus summarized: The appellant, West Twelfth Street Road Improvement District No. 30, was organized for the purpose of building a road with its necessary bridges, and appellant, Road Improvement District Annex No. 1 to West Twelfth Street Road Improvement No. 30, was formed for the purpose of building a connecting road with other improved highways. District No. 30 first issued bonds of the face value of $93,000 to complete the improvement and realized, from the sale of these bonds, $85,000. Pulaski County agreed to do the work with the machinery it had on hand to be paid out of the $85,000 at the rate of $7,000 per mile, payment to be made as the work progressed. Under this contract a part of the road was completed, and the county was paid $72,000, which was $16,000 more than it was entitled to for the work performed. The highway was not completed, and it became necessary for the district to issue additional bonds in the sum of $66,000. In order to relieve itself of its obligation to complete the construction of the road, the county entered into an agreement by which it pledged one-fourth of its road funds to the district to be applied in aid of the payment of the bonds issued by the district, and also in aid of the payment of a $15,000 bond issue of district annex No. 1, aforesaid. Of the said one-fourth of its road funds the sum of $1,837.50 was pledged annually in aid of the pay-

ment of the $93,000 bond issue, $1,700 per annum on the $66,000 bond issue, and a sum sufficient to pay one-fourth of the bond issue of district annex No. 1.

To carry into effect these agreements, the Pulaski County court, on the 18th day of May, 1931, made and entered an order relating to its agreement as to annex No. 1, and on the 15th day of June, 1931, made and entered two orders, one relating to its agreement with respect to its aid in payment of the bond issue of $93,000 and the other relating to its agreement as to the $66,000 bond issue. In all of these orders the county treasurer was directed to set aside out of the funds coming into his hands for county road purposes the sums agreed upon, and further, to honor the requisition of the treasurers of the said districts for the amount of said aid on the first day of October of each year, beginning with 1932 and continuing through the period of bond payments and that the treasurer of Pulaski County should pay each year to the treasurers of the improvement districts the said sums and charge the amounts paid against the road revenues of Pulaski County for that year. In the orders there was direction that certified copies of the same be furnished the county treasurer, and that the same should be his authority for obeying the judgment and orders of the court.

At a succeeding term of the Pulaski County court an order was made revoking the orders of May 18 and June 15, 1931, from which last-mentioned order an appeal was taken to the circuit court where the action and order last taken and made by the county court were held to be invalid, and the first mentioned order adjudged to be unaffected by the attempted order of revocation.

It was alleged that at the time of the filing of the petition there was in the hands of the treasurer of Pulaski County the sum of $4,388 which had been allocated to the said improvement districts by virtue of the orders of the county court aforesaid, for which requisition had been made by the treasurers of the said improvement districts and which the county treasurer had refused to honor and to pay said sum as directed by the order of the county court. The prayer was that a writ of man-

damus be issued requiring the county treasurer to comply with the aforesaid orders. The county treasurer demurred to the petition on the ground that the facts stated therein did not entitle the petitioner to the relief prayed.

In support of the action of the circuit court sustaining the demurrer, the appellee contends that the orders of the county court upon which the petition was based were void for the reason that such orders were made without any appropriation having been made by the county levying court. It is argued that the petition of appellant does not show that there was ever an appropriation made by the quorum court for the county court to enter into any kind of contract with the appellant district by which the county should assume the payment of 25 per cent. of the outstanding bonds of the district.

The county court is a court of superior jurisdiction, and, in making the orders, was dealing with a subject-matter over which it was given jurisdiction by the Constitution, and it must be presumed that all necessary steps were taken in the absence of a showing to the contrary, and, if it was necessary that an appropriation be first made by the levying court, that this was done. It further appears from the allegations of the petition that these questions have been settled by a final judgment of the Pulaski Circuit Court.

It is next argued that, if the orders were valid in so far as they bound the county to pay 25 per cent. of maturities on the outstanding bonds of appellant districts, that portion of said orders which directed the treasurer to set aside and pay said funds to such districts upon the requisition of the treasurers of the districts is void because not in accordance with the procedure set forth in §§ 1914-25 and 2029 of Crawford & Moses' Digest, which provide for disbursement by the county treasurer of money in the treasury on warrants drawn by order of the county court, and that all claims against the county be presented to the county court for allowance or rejection after verification in the manner prescribed. These sections deal with those classes of demands which are for materials furnished, or service rendered, and are for the purpose of ascertaining whether they are valid claims

which should be paid. The orders of the county court under consideration were equivalent to an allowance of the claim and sufficiently direct the manner in which they are to be paid, and there would seem to be no necessity for the procedure under the sections mentioned.

It is argued lastly that the appellants are indebted to the county in a sum in excess of that claimed in the instant proceeding, and reference is made to an exhibit filed with the petition of the appellants in support of this contention. That exhibit is a decree of the Pulaski Chancery Court rendered on the 30th day of October, 1931, in which, among other things, it is adjudged that the State of Arkansas have judgment, for the use of Pulaski County, against the plaintiff in the sum of $17,-750. This judgment is only conclusive of the fact that on that date the appellant district was indebted to the county in that sum, but it is not sufficient to sustain the contention of the appellee that the said indebtedness still exists. This is a question to be determined by proof.

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

BANKERS' RESERVE LIFE COMPANY *v.* HARPER.

4-3102

Opinion delivered November 6, 1933.

Dudley & Barrett, for appellant.

Oliver & Oliver, for appellee.

JOHNSON, C. J. On former appeal in this case, 185 Ark. 1082, 51 S. W. (2d) 526, we held that the testimony introduced in said cause made a question of fact for a jury to determine whether or not the release was procured by fraud or coercion. That opinion is the law of this case on that question, the testimony here presented being substantially the same as on the former appeal. Therefore, we conclude that the trial court was correct in submitting the question of the validity or invalidity of the release to the jury, and the jury's finding that the release was procured by fraud and coercion is supported by the evidence.

Appellant insists that the trial court erred in refusing the introduction of a letter written by appellee's sister to appellant in reference to the release. The uncontradicted testimony in this record reflects that this letter was written by appellee's sister to appellant without the knowledge or consent of appellee. The burden was upon appellant to show that the letter was authorized by appellee, and this it wholly failed to do. The trial court was correct in refusing to admit this letter in evidence.

Next, it is said that error was committed in permitting the witness Arnold to express his opinion in reference to the demeanor of Mr. Dow, the agent of appellant who procured the release. Under settled principles of this court, a lay-witness may express an opinion

after detailing the facts and circumstances upon which the opinion is based. *Pacific Mutual Life Insurance Company* v. *McCombs, ante* p. .....

It is said that error was committed by the trial court in refusing to admit in evidence certain records of the hospital, wherein the deceased, Samuel Harper, was confined just prior to his death. Admittedly, these records were not made by the offered witness, neither were they made in his presence or hearing. Therefore the authenticity of these records was not established by any testimony. The trial court therefore did not err in so holding.

It is next complained that the trial court erred in giving and refusing to give certain instructions. It suffices to say that we have carefully read the instructions given and refused by the trial court, and we think they conform to previous decisions of this court.

It is here argued that the case should now be dismissed, because appellee did not, prior to the institution of this suit, return or offer to return to appellant the money consideration for the release. This court has many times held that this was not necessary where the release was procured by fraud. *Union Aid Life Insurance Company* v. *Harkey,* 187 Ark. 87, 58 S. W. (2d) 422. *Industrial Mutual Indemnity Company* v. *Thompson,* 83 Ark. 574, 104 S. W. 200.

Lastly, it is contended that the trial court erred in allowing an attorney's fee of $400. The trial court heard testimony on the reasonableness of the fee, and we can not say that his award is contrary to the testimony.

No error appearing, the judgment of the trial court is in all things affirmed.

EVANS *v.* FARRIS.

4-3187.

Opinion delivered November 6, 1933.

[redacted]

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Thos. J. Watts and *George W. Dodd,* for appellant.

Cochran & Arnett, for appellee.

JOHNSON, C. J., (after stating the facts). We have reached the conclusion that the trial court erred in refusing to direct the jury to return a verdict in favor of intervener for the possession of the car in controversy. There-

fore, it will be unnecessary to set out or discuss the instructions given and refused.

There is no testimony in this record contradicting the testimony on behalf of intervener as to ownership of the car save and except the *ex parte* affidavits of her husband, Will Evans, filed with the Oklahoma State Highway Department in the negotiations for and purchase of license plates for the years 1929, 1930 and 1931. It is the well-settled law in this State that a husband and wife cannot testify for or against each other except in business transactions wherein the husband or wife acts in the capacity of agent. The third division of § 4146, Crawford & Moses' Digest, so provides in plain language. It is practically conceded in briefs that Will Evans would not have been a competent witness to testify against his wife to the effect that he was the owner of the car. Under the law, he should not be permitted to do indirectly that which he is prohibited doing directly by statute. The *ex parte* affidavits of the husband in reference to his ownership of the car were inadmissible for the reasons aforesaid.

The case of *McClintock* v. *Skinner,* 126 Ark. 591, 191 S. W. 230, is cited as sustaining an exception to this general rule. This is not the effect of that opinion. The second headnote to the case referred to reads as follows:

"Where a married woman permits her husband to hold her chattels, and deal with them as his own, she will be estopped as against his creditors to claim them as hers."

There is no contention in the instant case that the intervener permitted her husband to use or deal with the automobile in controversy as his property; there is no contention that she permitted her husband to hold this automobile out to creditors as his property. Under the uncontroverted testimony in this case, intervener has done no act which would estop her from asserting title and ownership to the car in controversy.

For the error indicated, the cause is reversed and remanded with directions to proceed according to law and not inconsistent with this opinion.

GENERAL MOTORS ACCEPTANCE CORPORATION *v.* DRIVER.

4-3173

Opinion delivered November 6, 1933.

[redacted]

Charles E. Sullenger and *Royden Dixon,* for appellant.

E. S. Driver and *Sylvanus W. Polk,* for appellee.

SMITH, J. The question involved in this appeal is whether the estate of Mrs. Mamie B. Driver, deceased, is liable to the General Motors Acceptance Corporation (referred to in the briefs as GMAC) for certain liabilities of the Driver Chevrolet Company, an Arkansas corporation, formerly engaged in the retail automobile business in Osceola, Arkansas.

The Driver Company, referred to in the contracts between the parties as the dealer, sold automobiles to various persons under conditional sales contracts, reserving the title, which contracts were sold and assigned to GMAC, with a guaranty of payment. Various purchasers made default in their payments, and the dealer was required—that event happening—to repossess the cars and pay the unpaid purchase money to GMAC as the holder of the sales contracts evidencing ownership. This

contract or plan was modified to permit the dealer to pay, not upon repossessing the car, but upon the resale thereof, a receipt for the repossessed car being signed by the dealer and delivered to GMAC.

Certain sales of cars were made, the proceeds of which were not delivered to GMAC, whereupon, as a condition for the extension of further credit to the dealer by way of purchasing its sales contracts, the GMAC required the execution of the guaranty which forms the basis of this suit. It reads as follows:

"In consideration of General Motors Acceptance Corporation, hereinafter called the 'Corporation,' hereafter extending credit at any time and to any extent to Driver Chevrolet Company, hereinafter called the 'Dealer,' or to any one else at the request or for the benefit of said Dealer, through issuing, drawing, accepting, indorsing, discounting, purchasing or acquiring any draft, note, acceptance, bill of exchange, letter of credit, or other instrument or obligation, for the account or in the behalf of said Dealer, or hereafter refraining to any extent from inforcing any rights under any contract or arrangement entered into by said Dealer, and of other good and valuable consideration, the undersigned agrees to hold the Corporation harmless from, and does hereby unconditionally at all times guarantee the performance and payment at maturity of, each and all drafts, notes, acceptances, bills of exchange, letters of credit, negotiable instruments, and agreements and other obligations between the Dealer and the Corporation, heretofore or hereafter issued, drawn, accepted, executed, entered into, indorsed, discounted, purchased, or acquired, by the Corporation, for the account or in behalf of said Dealer, including all costs, expenses, and attorney's fees, heretofore or hereafter incurred by said Corporation in connection with the default of said Dealer.

"This is a contract of continuing guaranty, and, until canceled as hereinafter provided, shall not be limited to any amount, and shall at all times include the full indebtedness of said Dealer to the said Corporation.

"The liability of the undersigned for any unpaid balance shall not be affected by any indulgence, compromise, settlement, extension of credit, or variation of terms, effected by or with the Dealer or any other person interested, nor by the amount of Dealer's obligations outstanding at any one time, nor by payments previously made by the Dealer or the undersigned, nor shall it be necessary for the Corporation to procure the consent of the undersigned or give any notice in reference thereto.

"The undersigned hereby does expressly waive and dispense with notice of acceptance of this guaranty, notices of nonpayment and nonperformance, notices of amount of indebtedness outstanding at any time, protests, demands, and prosecution of collection, foreclosure and possessory remedies.

"This guarantee is to remain in full force and effect until written notice of the withdrawal of the same has been served by the undersigned upon the Corporation at its principal office at New York City, provided that such withdrawal shall in no case be effective except as to new transactions subsequent to the actual receipt of such notice.

"The obligation of all parties signing this guaranty, where more than one, shall be joint and several.

"The benefits and obligations hereof shall extend to and bind the heirs, administrators, successors and assigns of the respective parties hereto.

"This guaranty and the performance thereunder shall be construed and determined according to the law of the State of New York."

In March, 1930, the dealer had accumulated many repossessed cars on which balances of purchase money were due, and D. S. Donovan, a representative of the GMAC, was sent to Osceola to dispose of this accumulation. Donovan remained in Osceola about six weeks, during which time twenty-five of the repossessed cars were disposed of, and the controlling question in the case is the one of fact whether these cars were sold for the account and credit of the dealer, or were taken charge of by the GMAC's representative and sold for its accounts.

The balance of purchase money due on the twenty-five repossessed cars and sold by Donovan is the subject of this litigation. There was a separate contract for each car executed at the time of its sale by the dealer and transferred to the GMAC. These contracts were filed with and as parts of the demand of the GMAC against the estate of Mrs. Driver as guarantor under the instrument above copied. The probate court disallowed the claim, and so also did the circuit court on the appeal from this probate order.

The circuit court, on the hearing of the appeal from the probate court, made no special finding of fact, and it does not appear that request was made for special findings of fact. There was a general finding for defendant, and judgment accordingly, from which is this appeal.

It appears to be conceded that, under the contract under which the GMAC bought purchase money notes and contracts from the Dealer, the latter was required to repay any unpaid purchase money which could not be collected on any such contract. Usually the repossessed cars were sold and the proceeds of such sale paid to the GMAC, and the deficiency was paid by the Dealer.

The testimony is sharply conflicting as to how the twenty-five cars in question were disposed of, that is, whether Donovan disposed of the cars for the Dealer or for the GMAC; and the testimony is legally sufficient to support a finding either way. There is a presumption that this issue of fact was found in the defendant's favor, and, as the testimony is sufficient to sustain that finding, this appeal is concluded thereby. It was said, in the case of *International Harvester Co.* v. *Layton,* 148 Ark. 156, 229 S. W. 22, (to quote a headnote in that case), that: "A general finding of the trial court, sitting as a jury, in favor of the defendant, will be sustained if there is any substantial evidence to sustain any of the grounds of defense set up in the answer."

It is therefore unnecessary to consider or decide the interesting questions of law which opposing counsel have discussed, as the court's finding upon this question of fact is decisive of the case.

It is not questioned by either party that under the law the vendor in a conditional sales contract has the option to retake the property sold upon failure of the purchaser to pay the purchase price, in which event the debt is canceled. The vendor may, if he prefers, treat the sale as absolute and sue for the unpaid purchase money. It is not questioned that the twenty-five cars involved in this litigation were taken over from the defaulting purchasers, and this action cancels those debts. These cars were all sold for less than the amount of purchase money then due, and the purpose of this suit is to collect the difference between the balance due on each car when it was repossessed and the price for which it was sold.

But if the GMAC took possession of these cars as owner, and sold them to whom they pleased and for such price as they saw proper to ask, as the defendant contends and as the court, no doubt, found, such action operated to cancel the debt as to each car so disposed of. *Baer* v. *General Motors Acceptance Corporation,* 101 Fla. 913, 132 So. 817; *Singer* v. *Millard,* 171 Wis. 637, 177 N. W. 893; *Frankel* v. *Rosenfield,* 95 Cal. App. 647, 273 Pac. 122.

Thus viewed, the judgment of the court below is correct, and it must be affirmed. It is so ordered.

GLOBE & RUTGERS FIRE INSURANCE COMPANY *v.* PRUITT.

4-3147

Opinion delivered November 6, 1933.

Gaughan, Sifford, Godwin & Gaughan, for appellant.

Saxon & Warren and *H. G. Wade,* for appellees.

SMITH, J. This is a suit to recover the value of an automobile destroyed by fire, the agreed value of which was $475. The case was on trial before a jury, when, at the conclusion of the introduction of testimony, each side requested the court to direct a verdict in its favor, and no other instruction was asked. Thereupon, the court directed the jury to return a verdict for the plaintiffs for $475. Thirteen days later the defendant requested the court to make special findings of fact, which the court declined to do. Judgment was rendered in accordance with the verdict previously directed, and this appeal has been prosecuted to reverse that judgment.

The policy sued on provided that, "if the interest of the assured in the subject of the insurance be or become other than unconditional and sole lawful ownership," no recovery should be had thereon, and, further, that there should be no liability under the policy if, at the time damage by fire occurred, there should be other outstanding fire insurance. The answer alleged that there was additional insurance, and that plaintiffs were not the sole and unconditional owners of the car at the time it was destroyed by fire.

It appears from the testimony that Mixon Chevrolet Company sold the car in May, 1931, to Lambert & Miller, who executed a note for unpaid purchase money, in which the title to the car was reserved to secure the payment thereof. The Mixon company transferred the sales contract and note to the General Motors Acceptance Cor-

poration, and had nothing to do with the collection of the note. On June 26, 1931, Pruitt purchased the car from Miller & Lambert, who took, in payment of the unpaid purchase money, the note of the purchaser, payable to Motor Finance Association, which company carried a blanket policy of insurance with appellant, Globe & Rutgers Fire Insurance Company, covering cars the purchase money notes for which had been assigned to it. This policy is referred to as the master policy, and contemplated insurance on such cars as the Motor Finance Association might become interested in as the owner of purchase-money notes. As insurance on any particular car was desired, the Motor Finance Association gave certain data with reference to the kind of car, motor number, purchaser, cost to purchaser, terms of purchase, and requested insurance on the car to be included in the master policy; whereupon the appellant insurance company, through its local agent, would issue to the Motor Finance Association, and to the purchaser whose note it had acquired, a certificate showing that the car described was insured under the master policy. The insurance thus effected was payable, first, to the holders and indorsers of any unpaid purchase money notes to the extent of their interest, and the remainder, if any, to the purchaser of the car. The certificate or policy here sued on was payable, first, to the Motor Finance Association, and, second, to Pruitt in the manner stated, and the judgment rendered so provided.

The General Motors Acceptance Corporation carried similar insurance upon cars in which it was interested through ownership of purchase money notes, and it had such a policy with the General Exchange Insurance Company based upon the purchase money notes given by Lambert & Miller to the Mixon Chevrolet Company for the car in question.

The insistence is that this policy issued to the General Motors Company and the purchase money note held by it voided the policy sued on.

As tending to prove an outstanding title note owned by the General Motors Company, Mixon, of the Mixon

Chevrolet Company, was called as a witness, and testified that he sold the car to Lambert & Miller on May 15, 1931, and took a note for unpaid balance of purchase money. He took out no insurance, and knew nothing about insurance. He assigned the sales contract and note to the General Motors Company. He received notice from that company that the note had been paid, but the notice did not advise when payment had been made, and he did not know whether the note had been paid before December 1, 1931, the date of the fire.

The local agent who issued the policy or certificate sued on testified that no representations were made as to other insurance on the car, and that the only information which he had as the company's agent in issuing the policy was obtained from the application of the Motor Finance Association, and that he had no contract with Pruitt. Neither the Motor Finance Association nor Pruitt knew there was other insurance on the car, or another title claimant thereto.

The agent of the General Exchange Insurance Company testified that the car was transferred by Lambert & Miller prior to December 12, 1931, and that under the terms of the policy which he had written for his company the transfer automatically voided the policy. A claim was filed under this policy by Miller, but was disallowed for the reason stated, and the claim was abandoned by Miller.

The note executed by Miller & Lambert would not have matured, according to its tenor, until in May, 1932, a date later than the date of the fire, and it is insisted that, the date of payment not having been shown, the presumption arises that the note had not been paid at the date of the fire, and that there was therefore another and a superior claim of title outstanding at the date of the fire. Mixon testified, however, that the note was returned to him before its maturity marked paid; and, in the absence of proof as to the date of payment, we think there is no presumption that the note had not been paid at the time of the fire.

Miller & Lambert were Chevrolet dealers at Smackover, and they bought the car from the Mixon Chevrolet Company, dealers in Camden. It was a sale by one dealer to another, and was upon the assumption that an unincumbered title was being conveyed, and we think the court was warranted, in the absence of proof to the contrary, in finding that payment had been made before the fire.

If this is true, there was no other title claimant at the time of the fire. In the case of *North River Ins. Co. of N. Y.* v. *Loyd,* 180 Ark. 1030, 23 S. W. (2d) 988, we quoted and approved the following statement of the law from the case of *Born* v. *Home Ins. Co.*, 110 Iowa 379, 81 N. W. 676, which is annotated in 80 A. S. R. 300: " 'The general rule to be deduced from the weight of authority is that the violation of a condition in a policy of insurance, which works a forfeiture thereof, merely suspends the insurance during the violation, and that, if such violation is discontinued during the life of the policy, and is nonexistent at the time of loss, the policy revives, the insurance is restored, and the insurer is liable, although he has never consented to a violation of the conditions in the policy, and such violation has been such that the insurer could, had he known of it at the time, have declared a forfeiture thereof." See also *Merchants' Ins. Co.* v. *Barton,* 182 Ark. 725, 32 S. W. (2d) 1069; *Security Ins. Co.* v. *Smith,* 183 Ark. 254, 35 S. W. (2d) 581.

If, therefore, the purchase money note executed to the Mixon Motor Company, and assigned by it to the General Motors Acceptance Corporation, had been paid prior to the fire—and we think the testimony supports that finding—there was no question about the title.

There appears also to be no question but that the sale by Lambert & Miller prior to the date of the fire avoided the policy in which they were interested, as was testified by the agent who issued that policy; and while it appears that Miller did file a claim under that policy, it appears also that he abandoned his claim, so that there is now a single claim of loss, and that against the appellant only.

It must be remembered that neither Pruitt nor the Motor Finance Association, the beneficiaries in the certificate or policy sued on, was aware of an outstanding policy of insurance, or that there was an adverse claim of title, and neither made any representation as to those facts. It may therefore be well questioned whether their policy would be void on account of the earlier policy. *Great Southern Fire Ins. Co.* v. *Burns,* 118 Ark. 22, 175 S. W. 1161.

At volume 3, Cyclopedia of Automobile Law (Blashfield), page 2529, it is said: "Thus, where insured in good faith purchased an automobile, repaired it, furnished new tires, procured insurance against fire and theft for a year, which on expiration was renewed, he was held warranted in believing that he had sole ownership within the requirements of the policy; the original owner from whom the machine had been stolen having been indemnified by an insurance company, and making no claim thereto, and no one else disputing his possession."

Section 1309, Crawford & Moses' Digest, reads as follows: "Upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusion of law."

If it be true that this section applies to the trial from which this appeal comes, in view of the fact that the court directed the verdict which the jury returned upon the request of all parties for a directed verdict, without requesting other instructions—which we do not decide—it may be said that the request for special findings of fact was not made in apt time. The statute contemplates that these findings shall be made upon the trial, or during it, and a request made thirteen days after the trial was not in apt time.

Certain other questions are argued in the brief which we do not regard as of sufficient importance to discuss.

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

HOME MUTUAL BUILDING & LOAN ASSOCIATION *v.* BROWN.

4-3157

Opinion delivered November 6, 1933.

[redacted]

Moore, Daggett & Burke, for appellant.

Peter A. Diesch, for appellee.

HUMPHREYS, J. This suit was instituted on November 3, 1931, by appellants in the chancery court of Phillips County against A. M. Coates and Christine Coates, his wife, to foreclose a mortgage for $3,500 executed by the Coates to it on April 1, 1929, upon lot 7 in block 104 in the city of West Helena, Arkansas.

Mr. and Mrs. Coates made no defense to the action, but on June 14, 1932, the appellee filed an intervention as guardian for her husband, Lawrence Brown, alleging that A. M. Coates acquired title to said lot by purchase on November 6, 1929, at a commissioner's sale under a decree of the chancery court of said county rendered on November 26, 1928, in a case wherein the Helena Wholesale Grocery Company was plaintiff and Lawrence Brown and Josephine Brown were defendants, which decree was set aside on the 28th day of March, 1932, in a suit filed for that purpose by appellee in her capacity as such guardian for Lawrence Brown against the Helena Wholesale Grocery Company upon the ground that her husband was insane on the date of the rendition of said foreclosure decree in favor of the Helena Wholesale Grocery Company, and was void because no defense was made thereto by the duly appointed guardian.

Upon a hearing of the cause, the court sustained appellee's intervention and dismissed appellant's complaint for the want of equity, from which is this appeal.

According to the record, Lawrence Brown received goods, wares and merchandise from the Helena Wholesale Grocery Company in consideration of the mortgage he and his wife executed to it in the year 1925, which was prior to any claim of insanity on his part or in his behalf, and that the amount of $3,500 loaned to A. M. Coates by appellant was paid to the Helena Wholesale Grocery Company in satisfaction of its mortgage and decree against the Browns.

The testimony tends to show that Lawrence Brown subsequently became insane and remained in that condition until after the decree in favor of the Helena Wholesale Grocery Company was rendered against him, and was still insane when A. M. Coates bought the lot at the foreclosure sale, and that Coates knew of his condition.

The testimony also shows that on the date appellant loaned A. M. Coates the money and obtained its mortgage, it had no knowledge of the insanity of Lawrence Brown, and that it parted with its money and took its mortgage in good faith, relying on the confirmation of the sale to A. M. Coates.

The testimony fails to show that appellant had knowledge of any fact or circumstance to put it on inquiry as to the insanity of Lawrence Brown at the time the decree was rendered against him in favor of the Helena Wholesale Grocery Company.

The evidence also shows that the record title in the Coates was regular and free from defects.

Under the law, the burden rested upon appellee to show that appellant either knew or was in the possession of facts or circumstances which required it to investigate the state of mind of Lawrence Brown when the decree in favor of the Helena Wholesale Grocery Company was rendered against him. *Scott* v. *Carnes,* 183 Ark. 650, 37 S. W. (2d) 876. The record does not show either actual or constructive notice to appellant that Lawrence Brown was insane at the time, but, on the contrary, the record reflects that Lawrence Brown and his wife were defendants in that case and had been served with process in the foreclosure proceeding, and that they filed answers thereto which had not included the plea of insanity on the part

of Lawrence Brown on the date of the rendition of said decree; and also reflects that the sale was made pursuant to and in accordance with the decree and afterwards was confirmed by the court; and also reflects that the decree was in full force and effect when appellant loaned A. M. Coates the money with which to pay the purchase price, and that same was paid over to the Helena Wholesale Grocery Company in satisfaction of its mortgage and decree against the Browns.

The decree was not void but voidable only. The fact that it was voidable on account of the insanity of Lawrence Brown did and could not affect the rights of an innocent purchaser who acquired the title while the judgment was in full force and effect. *Boyd* v. *Roane,* 49 Ark. 397, 5 S. W. 704.

In the purchase of lands, an innocent purchaser, relying upon the record title, occupies high ground in a court of equity. It was said by this court in the case of *Rubel* v. *Parker,* 107 Ark. 314, 155 S. W. 114, that: "No one can occupy, in a court of equity, higher ground than the purchaser for value without notice, for, if he can maintain that position, his title is established, and his position impregnable."

On account of the error indicated, the decree sustaining the intervention is reversed, and the cause is remanded with directions to the trial court to enter a decree of foreclosure in favor of appellants.

LUMMUS COTTON GIN COMPANY *v.* TAYLOR.

4-3189

Opinion delivered November 6, 1933.

U. A. Gentry and *E. F. McFaddin,* for appellant.

W. S. Atkins, for appellee.

HUMPHREYS, J. This suit was brought in the chancery court of Hempstead County on December 8, 1932, to surcharge the account of appellee, State Bank Commissioner, in the liquidation of the assets of the defunct Bank of McCaskell in said county and for the restoration of part of the assets of said bank received by 46 depositors in settlement of their respective claims against said bank on account of deposits they had in the bank at the time of its failure. The appellant was the largest depositor, having in the bank $2,738.83 on the date of its failure. After the claims of the 46 depositors were compounded in exchange for assets, there remained enough cash to pay appellant 25 per cent. of its claim or deposit, which it accepted. It was alleged in appellant's complaint that the method adopted by the Bank Commissioner and approved and confirmed by the chancery court in liquidating the assets of the bank by exchanging notes and other property owned by it for the claims of said depositors resulted in a preference to some of the depositors to its prejudice, and that the Bank Commissioner and chancery court were without authority under the statute to administer the assets in the manner set out above. It appears from the complaint that the chancery court made the order approving and confirming the settlement made with each of the 46 depositors and that no appeal was taken from this decree.

A demurrer was filed to the complaint, which was sustained by the chancery court, and, appellant refusing to plead further but standing on its complaint, the court dismissed same for the want of equity, from which is this appeal.

The only question arising on the appeal is whether the Bank Commissioner and chancery court had authority to compound the assets of the bank in the manner aforesaid. The statute in force at the time the settlement and adjustment were made is as follows:

"Upon taking possession of the property and business of any bank, the Commissioner is authorized to collect money due, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner shall collect all debts due and claims belonging to it, and for such purposes is authorized to institute, maintain and defend suits and other proceedings in this State and elsewhere, and, upon the order of the chancery court of the county in which it is doing business, may sell or compound all bad or doubtful debts, and on like order may sell all its real estate and personal property on such terms and at public or private sale, as the court shall direct."

This statute was construed in the case of *Duncan* v. *Taylor,* 185 Ark. 1033, 50 S. W. (2d) 978, as giving authority to the chancery court to impower the Bank Commissioner to sell an insolvent bank's assets piecemeal at private sale and to compound debts found to be bad or doubtful by accepting deposits on such terms and considerations as should be fair and equitable. In the Duncan case, referred to above, certain depositors of the insolvent bank sought to restrain the Commissioner from accepting deposits in payment of notes and to trade notes and other assets for property instead of money, and the principle involved is the same as the principle involved in the instant case. The only difference between the two cases is that in the Duncan case an order was obtained from the chancery court to compound or settle the claims before the Commissioner compounded or settled them. In the instant case, the chancery court confirmed the settlement of the claims after they were adjusted with the depositors by the Bank Commissioner. The confirmation in the instant case of the several settlements had the same effect as if the settlement had been ordered originally by the chancery court.

Appellant contends that the act quoted above did not confer authority on the chancellor and Bank Commissioner to compound the assets, but simply authority to sell them, because a later act, act 16 of the Acts of 1933,

conferred specific authority upon the Commissioner to do so. The original act in general terms conferred the same authority as the later act specifically conferred. It was simply declaratory in more specific terms of the prior act.

No error appearing, the decree is affirmed.

BROWN *v.* STATE.

Crim. 3853

Opinion delivered November 6, 1933.

Tom Kahoa, for appellant.

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

KIRBY, J., (after stating the facts). The sufficiency of the evidence to sustain the verdict is challenged here.

Certain harness, definitely described, was stolen from the ice company at Fayetteville. It answered the description of the harness offered for sale by appellant to two different people in Oklahoma, appellant contending that the harness offered for sale belonged to Jim Smith, and was taken on the trip by them to Joplin for sale, and later returned and left at Smith's home. Smith and his son, witnesses for appellant, were shown to have been convicted of accessory after the fact of grand larceny, and appellant himself had twice been convicted of grand larceny.

Appellant's explanation of his possession of the property offered for sale is very unsatisfactory, and he admitted offering harness for sale shortly after the harness was stolen from the ice company, the description of which closely resembles that stolen from the ice company, but no witness who had seen the harness that belonged to the ice company had examined that offered for sale by appellant. Treating the identification from description as sufficient to warrant the belief that it was the same property, no error was committed in telling the jury that the inference arising from the possession of property recently stolen could be considered by them, it being a question whether the property was in the possession of appellant when discovered.

The evidence is sufficient to support the verdict. It is doubtful from the record whether the court failed and refused to give an instruction on circumstantial evidence, no such instruction being requested that would warrant this objection as an assignment of error in the motion for a new trial. *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. (2d) 909.

Moreover, the court gave correct instructions upon the credibility of witnesses, the weight to be given to the testimony, the presumption of innocence and reasonable doubt, and could have refused to give the instruction on circumstantial evidence without committing error. *Taylor* v. *State, ante* p. 8.

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

MILLS *v.* STATE.

Crim. 3861

Opinion delivered November 6, 1933.

T. J. Watts, Elmer A. Riddle and *R. S. Wilson,* for appellant.

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

MEHAFFY, J. The appellant was indicted by the grand jury of Crawford County for murder in the first degree. The jury found him guilty of voluntary manslaughter, and fixed his punishment at seven years in the State penitentiary, and judgment was entered accordingly. A motion for new trial was filed and overruled, and the case is here on appeal.

W. S. Bushmiaer, a deputy sheriff, testified that he was called to St. John's Hospital at Ft. Smith the day that appellant was charged to have shot Tom Williams. He found Williams in the hospital, and he had been shot. He arrested the appellant near the hospital. Appellant had been drinking. Some twenty-four hours before the death of Williams, witness had a conversation with him, at a time when Williams thought he was going to die. He did die the next day. Witness testified that Williams said

Guy shot him; that he had mistreated him the day before; that he had kicked him, and Williams said that he expected the officers to look after it; he said that he knew that he was going to die, and wanted the officers to attend to it. Williams told witness that Guy had told him he asked too damn many questions, and that appellee kicked him around like a dog, and had drawn a gun on him before. Witness later recovered a coat lying on the side of the road, and found in the pocket Williams' and his wife's picture. Witness talked to Williams four or five times in all; never heard Williams say it was an accident, Witness called at the hospital about 12:00 Friday night, and Williams died about 12:00 Sunday.

Albert D. Maxey, sheriff of Crawford County, testified that he was called to the hospital and had a conversation with Williams, and Williams did not say it was accidental. Williams did not want to talk much about it. He said that Guy told him to dance or he would shoot him. Williams told witness that Guy pulled his gun and said: "Dance, God damn you!" He said Mills was then going to shoot himself, and that he did not think Guy intended to kill him. He said he did not have any right to shoot him. Williams said he was going to die.

Dr. Fred Krock testified that he knew Tom Williams and treated him for gunshot wounds, and that he died from complications from these wounds. He was in the hospital ten days. There was a bruised area over the right hip. He was conscious until a few minutes before his death. Witness told him he had very little chance to recover. Williams told him two days before his death that he was not going to get well. Witness said that Williams told him that Mills tried to kill himself. He also stated that it was an accident and unintentional. The bruise on his hip could have been caused by his fall to the ground. It could have been caused by having been knocked down on the ground and slid around.

Arch Howell, a deputy sheriff, testified that he arrested George Sites in April, and Sites made a statement to him. Sites said: "We make whiskey over on our side, and we drink it." Found a card at the still site, and

on it was written: "Oh, you snitcher, you thought you would run me in, but I ran my beer green, and made forty gallons." Has seen appellant's handwriting, and the writing on the card is his. Witness testified that there was no ill feeling between appellant and himself.

Several witnesses testified for the appellant, practically all of them testifying that the shooting was accidental.

Appellant testified that they were drinking a little, and that he did not intend to discharge the gun; admitted that he drew a gun on Vicory, and told him to dance; had a fight with Bo Montgomery one time.

Appellant contends that the judgment should be reversed because the prosecuting attorney used the following words in his opening statement to the jury: "I think the testimony will show that Guy Mills was engaged in the manufacturing and selling of liquor—over there with Guy Mills a number of things happened that Tom knew about. The testimony will show that Guy Mills beat Tom with a rubber hose, possibly stomped him. He made the statement another time that Tom knew too damn much."

The statement of the prosecuting attorney above copied left out a statement which followed immediately after the word "liquor" in the first sentence, and is as follows: "Tom Williams was a man who was homeless. I think the testimony will show that Tom was the sort of a fellow that would take a spell of being good, and he would tell everything he remembered during that time."

At the close of the statement the appellant objected to the remarks, and the court said: "That will be sustained so far as the direct charges are concerned; as to the others, it will be overruled," and the appellant excepted.

Just what part of the statement he excepted to, it is difficult to tell, and it is not shown just what the court meant by the "direct charges." No suggestion was made by the appellant at that time that the court state particularly what portion of the remarks he meant by "direct charges." He probably had in mind that charges affecting the credibility of the appellant as a witness were ad-

missible, and that the other part was not admissible. and to that part he sustained the objection.

The evidence that the prosecuting attorney said in his opening statement would be introduced was competent. "It is certainly true as a general rule, both in civil and criminal cases, that the evidence must be confined to the point in issue; and in criminal cases there is perhaps a greater necessity, if possible, than in civil proceedings to enforce the rule; but in neither class of cases does this rule exclude all evidence that does not bear directly upon the issue; on the contrary, all evidence is admissible which tends to prove it, and no facts are forbidden to be shown, except such as are incapable of affording any reasonable presumption or inference in elucidation of the matters involved in the issue." *Stotts* v. *State,* 170 Ark. 188, 279 S. W. 364.

The appellant did not request any instruction with reference to the statement of the prosecuting attorney.

Section 3171 of Crawford & Moses' Digest is as follows: "The prosecuting attorney may then read to the jury the indictment, and state the defendant's plea thereto, and the punishment prescribed by the law for the offense, and may make a brief statement of the evidence on which the State relies."

In the instant case the prosecuting attorney was evidently undertaking to make a statement of the evidence upon which the State relied, and we do not think there was any error in the ruling of the court as to the objections made by the appellant.

The appellant also urges that the case be reversed because the prosecuting attorney, in his closing argument, said: "Gentlemen of the jury, I told you in the opening statement that Guy Mills was engaged in the making of liquor and selling it, and we have proved that; I told you that Guy Mills had been going around shooting at people, and we proved that; I told you Tom Williams, the deceased, had learned too damn much about Guy Mills' business, and I think we have proved that."

The appellant cites *Holder* v. *State,* 58 Ark. 473, 25 S. W. 279, as sustaining his contention. In that case the

court held that the action of the attorney for the State was highly reprehensible.

There is nothing reprehensible in the conduct of the prosecuting attorney in this case. He was merely stating that he had proved the things to which he had called attention in his opening statement, and, when objection was made, the court said: "The prosecuting attorney may argue his theory of the case," and the appellant simply said: "Save our exceptions."

The appellant's attorney objected on the ground that the argument was not supported by the record in the case. We think the evidence tended to show the facts as stated by the prosecuting attorney, and that there was no error in the court's permitting the argument. He was simply stating to the jury what the State had proved, and the evidence was admitted without objection.

The evidence, if believed by the jury, was sufficient to justify the verdict, and the case is therefore affirmed.

MAXWELL *v.* STATE.

Crim. 3862

Opinion delivered November 6, 1933.

Rains & Rains and *R. S. Wilson,* for appellant.

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

McHaney, J. Appellants were indicted, tried, convicted and sentenced to a term of three years each in the State penitentiary on a charge or robbery. The facts are that on May 28, 1933, the appellants robbed a number of people who were on a fishing party on Lee Creek in Crawford County. They first accosted Mr. and Mrs. Harmon, Harmon's sister, his mother and a little negro boy, and robbed them of certain personal property. All three of them were together at the time of this robbery. They left appellant, Oliver, in charge of these victims while the other two appellants went up the creek a short distance where Henry Geren and Paul Latchley were fishing and robbed Geren of $1.70. Shortly thereafter Oliver came up with the other victims, where they all remained for some forty-five minutes or an hour, when the three appellants left together.

For a reversal of the judgment against them, three grounds are urged as error: (1) That the court erred in permitting the sheriff to sit at counsel table advising with the prosecuting attorney and prompting him as to what questions to ask the witnesses; (2) certain prejudicial statements, actions and attitude of the court toward the defendant's attorneys, and (3) refusal of the court to instruct a verdict of acquittal as to appellant, Oliver.

1. The record fails to disclose any activity on the part of the sheriff or any participation in the trial, except the remarks of counsel for appellants in making an objection in which he stated: "This morning and this afternoon the sheriff had set by and prompted the prosecuting attorney." In response to that statement, the court said: "Gentlemen, I do not think that is necessary. We have been two-thirds of the day on this case. You have been prosecuting attorney, Mr. Wilson, and you would not object to the sheriff giving you help. All this spatting is wrong and acting like a bunch of school boys." To these remarks of the court, appellants' counsel excepted,

and this exception forms the basis of the second assignment of error. We think no error was committed in these regards, and that appellants' exceptions thereto are not well taken. The record fails to disclose any activity on the part of the sheriff except that counsel stated that the sheriff had sat by and prompted the prosecuting attorney. The sheriff is an officer of the court, and his duties no doubt demanded his presence, and we see no objection to his prompting the prosecuting attorney regarding matters within his knowledge when called upon by him. The point was ruled adversely to appellants' contentions in the recent case of *Ridenour* v. *State*, 184 Ark. 475, 43 S. W. (2d) 60.

Regarding the remarks of the court above set out, we think it fairly inferable that the language used was addressed to both the prosecuting attorney and counsel for appellants, was not offensive, and was not intended to be so. It was more an expression of impatience at the delay of both sides in trying the case, and was an attempt merely to hasten the trial. Nothing was said or done by the court pertaining to the merits of the cause. The remarks were provoked by an objection made by the prosecuting attorney to the examination of a witness by counsel for appellants wherein the latter made the objection first above quoted. We think there was nothing in the remarks calculated to prejudice the jury against counsel for appellants any more than against the prosecuting attorney or to convey to them the suggestion that one was making frivolous objections and saving captious exceptions any more than the other. *Vasser* v. *State*, 75 Ark. 373, 87 S. W. 635.

3. The court correctly refused to direct a verdict for appellant, Oliver, for the reason assigned that he was not present when the other two robbed Geren. It is true that Oliver was some distance away guarding the other victims, but it is also true that they were all three participating in the same common purpose, all being conspirators, having the common purpose of committing the crime of robbery. In such case the act of one would be the act of all, and the crime was not completed until their

purpose had been accomplished and they had left the scene of their crime. Moreover, the act of Oliver in guarding the first victims was in aid of the other two in robbing Geren, for, if they had been left to themselves, they might have spread an alarm and the robbers been captured. He was therefore equally guilty with the one who actually took the money from Geren.

Affirmed.

MARTIN *v.* TAYLOR.

4-3184

Opinion delivered November 6, 1933.

J. B. Milham, C. T. Cotham and *Tom W. Campbell,* for appellant.

John L. McClellan, A. C. Thomas, McDaniel & Nall, Robinson, House & Moses and *W. R. Donham,* for appellee.

MCHANEY, J. Appellant and four others organized the Benton Trust Company as a banking corporation on December 4, 1930, showing a paid-up capital of $50,000 and surplus of $5,000, they owning all the stock and all being officers and directors, appellant being the president. On the same day they borrowed from the Union Trust Company of Little Rock $39,500, executing their demand note therefor signed by the five of them, which, together with $15,450 in sundry checks, making a total of $55,000, was deposited in said Union Trust Company to the credit of the Benton Trust Company, hereinafter called the new bank, for which a duplicate deposit slip was delivered

to them showing such deposit. On the same day said parties called on the Bank Commissioner, presented their articles of incorporation, exhibited to him said duplicate deposit slip and represented to him that the named capital and surplus in the new bank had been fully paid in cash by them. Thereupon, the Bank Commissioner issued and delivered to them a charter for the new bank. On the same day the new bank entered into a written contract with the Bank Commissioner to purchase the assets of the insolvent Benton Bank & Trust Company, then in the hands of the commissioner for liquidation, in which it was stated that the capital and surplus of $55,000 had been fully paid in cash. This contract was presented to and approved by the Saline Chancery Court on the petition of the commissioner December 5, 1930, and said new bank thereupon opened for business. On the same day an entry was made in the books of the new bank showing it had on deposit in the Union Trust Company $55,000. Three days thereafter, December 8, one of the organizers took the duplicate deposit slip back to the Union Trust Company, surrendered it, and received in exchange therefor said note for $39,550 and a new duplicate deposit slip for $15,450 to the credit of the new bank. Up to that date, December 8, no entry had been made on the books of the Union Trust Company showing the original transaction. On the same day, December 8, entries were made on the books of the new bank, one crediting the Union Trust Company with $55,000, and another charging it with $15,450. The new bank continued in business less than one year, was found to be insolvent and was taken over for liquidation by the Bank Commissioner. On discovery of the facts by the commissioner, he brought this action against appellant and the other organizers to recover the sum of $39,550, alleging that they were jointly and severally liable to him as commissioner in charge of the new bank, "said indebtedness being for money had and received by the defendants and unlawfully and without right appropriated by them for the purpose of paying their individual note as aforesaid."

Trial resulted in a decree against appellant and the four others for the amount claimed. In its findings of

fact the court was of the opinion that the $39,550 transaction with the Union Trust Company was a "paper' transaction; "that said sum of $39,550 is an unpaid stock subscription on the part of the defendants herein for which they are jointly liable and that judgment should be entered against them for such sum, together with the cost of this action." Appellant alone has appealed.

The language last above quoted forms the basis of the principal attack on the decree, it being contended that the decree is at variance with the pleadings and proof; that the action was one for conversion of the funds of the new bank, but that the trial court, without any evidence, treated it as one for stock subscriptions. Assuming without deciding that appellant is correct in this contention, still it can avail him nothing if the decree of the court is right. There is no rule better settled in this court than that appeals in equity cases are tried here *de novo* and that a correct decree based on an incorrect reason is no ground for reversal. In other words, if the decree is right, it will be affirmed, even though the trial court reached its conclusion by an erroneous route, as said in *Gage* v. *Ark. Central Rd. Co.,* 160 Ark. 402, 254 S. W. 665.

The evidence in this case is undisputed. Neither appellant nor the other organizers testified, nor did they offer any testimony in their behalf. It is not denied that they deposited the $39,550 in the Union Trust Company to the credit of the new bank. This represented the value of so much stock issued to them. They represented to the Commissioner that they had paid for their stock in full and in cash, exhibiting the duplicate deposit slip. The Commissioner issued a charter to them in good faith, believing they had paid for their stock, which in fact had been paid for. The deposit in the Union Trust Company was the property of the new bank, and it could not lawfully be used to pay their individual debt. The course pursued amounted to a fraud on the bank, the commissioner and all of its creditors who became such on the faith of its capital and surplus having been fully paid. By the entries made on December 8, 1930, the capital stock of the new bank was impaired to the extent of $39,-

550 and the bank was then insolvent under the definition of insolvency in § 717, Crawford & Moses' Digest, subdivision 4.

The net result of the whole transaction with the Union Trust Company was that appellant and the other organizers paid their individual debt with the funds of the new bank, and thereby became indebted to it in said sum. No effort was made to show that they had paid the new bank said sum or had in any manner discharged same. The decree of the court adjudging them to be so indebted is therefore correct, no matter what reason was given therefor.

Affirmed.

LOUISIANA OIL REFINING CORPORATION *v.* HALTOM.

4-3186

Opinion delivered November 6, 1933.

Jeff Davis, for appellant.

Powell, Smead & Knox and *Gaughan, Sifford, Godwin & Gaughan,* for appellee.

BUTLER, J. Appellant corporation in January, 1930, completed a small oil well on a certain forty acres of land in Ouachita County, Arkansas, and operated the same until about April 15, 1931. At that time it made an arrangement with one Whittaker to operate the well for the company, which he did until about June 1, 1931, when the well was closed down and its operation abandoned. On August 16, 1932, the appellant entered upon the property to remove the oil well equipment when appellee, G. W. Haltom, forbade it to move the same, claiming it as his own. Appellant thereupon brought this action in replevin to recover the possession of the said equipment, executed its bond, and the property was delivered to it and removed from the premises.

Appellee Haltom filed answer to the complaint denying that the appellant was the owner of the properties mentioned in the complaint, admitted the possession of the same in himself and denied that he unlawfully detained the same. On a trial of the cause there was a judgment in favor of the defendant for the return of the property, or for its value in the sum of $1,435.50, from which judgment is this appeal.

At the conclusion of the testimony in the court below the appellant moved for a directed verdict, and now on appeal insists that the verdict should have been directed in its favor for two reasons.

It is insisted first that the appellant proved that in 1926 it acquired an oil and gas lease on the property upon which the oil well in controversy was later drilled. It placed the material in the well and installed the proper pumping equipment, all of which was the property of the appellant at the time, and it was the same property that it demanded of the appellee, permission to remove which was refused, and the same that is involved in this lawsuit, and therefore, in order for the appellee to be en-

titled to a money judgment against the appellant for the value of the property it obtained under the writ of replevin, it was necessary for him to affirmatively show himself to be the owner of the fee simple title to the land on which the property was located. It is further contended that in neither the pleadings nor proof is there any claim or showing made of such title. It is therefore argued that the property taken may have been handled in such a manner that its identity may have been lost, and, if it should subsequently appear that some other person than appellee was the owner of the fee, appellant might have to pay for the property twice.

There were some others joining in the lease with Haltom to the appellant's predecessor in title. Just what their interest was does not appear from the record, but it seems plain that the title of Haltom was not placed in issue in any way, but that it was conceded that he was the owner. While reference to the ownership of the land in the record is slight, the inference to be drawn from what does appear is that it was Haltom's property upon which the well was located, and in the affidavit made by the appellant to obtain the writ of replevin it was affirmed that "the property was placed upon the premises of G. W. Haltom where the same is now located." It might be also said, in answer to the argument that appellant might have to pay twice for the property, that, the judgment being in the alternative, all that would be necessary for it to avoid the contingency feared would be to return the property, in which event the judgment would be satisfied. The appellant should have anticipated that the judgment might be adverse to it, and therefore, if the identity of the property has been lost so that it cannot be returned, that is to be attributed to the acts of appellant of which it ought not to complain.

The second and serious ground for reversal of the case is "that under the circumstances as disclosed by the testimony the appellant's delay in going upon the leased premises to remove the equipment which constituted its oil well was so clearly not an unreasonable delay that the learned trial court should have so found as a matter of

law." That part of the lease under which the appellant claims the right to remove the oil equipment reads as follows: "Lessee shall have the right at any time to remove all machinery and fixtures placed upon said premises including the right to draw and remove casings." It seems to be the rule, supported by authority and reason, that this clause should be construed so as not to give the lessee an indefinite length of time to remove his equipment after expiration or abandonment of his lease, but that the right reserved to move the equipment must be exercised within a reasonable time, and a failure to do so would result in the forfeiture of the lessee's right in the property which would thereafter be considered as a part of the realty and title thereto vested in the lessor. *Midland Oil Co.,* (1924) C. C. A., 3 Fed. (2d) 112; *Michaels* v. *Pontius,* 83 Ind. App. 66, 137 N. E. 579; *Standard Oil Co.* v. *Barlow,* 141 La. 52, 44 So. 627; *Shellar* v. *Shivers,* 171 Pa. 569, 33 Atl. 95; *Terry* v. *Crosswy,* (Tex.) 264 S. W. 718; *Gartlan* v. *Hickman,* 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694; *Bache* v. *Central C. & C. Co.,* 127 Ark. 397, 192 S. W. 225; *Heim* v. *Brock,* 133 Ark. 593, 202 S. W. 36.

As to whether the appellant after June 1, 1931, did any act on or about the oil well to indicate that it had not abandoned the lease, the testimony is in conflict. This question was presented to the jury by appropriate instructions, and learned counsel for the appellant recognizes the rule that where there is substantial testimony to support the finding of the jury it is conclusive on this court. He assumes, and justly so, that under the finding of the jury the lease terminated on the first of June, 1931, and that the appellant did no further act relating to its dominion over the lease, or right thereunder, until August 16, 1932, a period of about fourteen and a half months, but earnestly insists that, under the circumstances disclosed by the testimony, the trial court erred in refusing to hold as a matter of law that the appellant was justified in the delay in removing the equipment from the well on appellee's land.

It was shown that at the time the appellant ceased to operate the well it was making seven barrels per day of the market price of twenty cents per barrel, giving a gross monthly income for all of the oil produced in the amount of $42, while the operating expenses were greatly in excess of that amount. During the entire year of 1931 and 1932 the business of producing oil, in common with all other interests, was laboring under severe economic depression and at no time after June 1, 1931, until the beginning of this suit, did the price of oil improve in the Union County oil field, of which the well in question may be deemed a part, and at the time of the trial in one of the important oil fields of the county all of the wells were shut down because no one would buy the oil and all the storage tanks were filled to capacity. Counsel insist that the appellant did not intend to abandon the lease on June 1, 1931, and that in November, 1931, it obtained permission from the Conservation Department of the State of Arkansas to cement the well at the bottom for the purpose of excluding water from it and for increasing its production of oil. It is pointed out that the well is located in the middle of a cotton field and that the equipment left upon it occupies only a small space of ground so that it could not have been any inconvenience or expense to the appellee, and that to remove the equipment would have been very much more expensive to it than the fair rental value of the small portion of appellee's cotton farm which was occupied, or the damage which might have been sustained to it during the fourteen and a half months of the delay, and, as for the authority for the position taken, we are referred to the cases of *LeCroy* v. *Barney,* 12 Fed. (2d) 363; *Standard Oil Co.* v. *Barlow,* 114 La. 52, 74 So. 627, and *Collins* v. *Mt. Pleasant Oil & Gas Co.,* 85 Kan. 483, 118 Pac. 54. In *LeCroy* v. *Barney,* it was held that a delay of nine or ten months, as a matter of law, was not an unreasonable length of time in which to exercise the privilege under lease for the removal of the equipment. The reason given by the court for its holding was that the petition did not claim nor did the agreed statement of facts disclose that any injury to the plaintiff accrued from his delay.

Standard Oil Co. v. *Barlow, supra,* was a suit to enjoin the oil company from removing a casing from a well drilled for oil which proved unprofitable and was abandoned. Eight months later the company was preparing to remove the casing from the well when the action was begun, praying for an injunction to prevent the removal and for damages to the lands of the lessor alleged to have been caused by the drilling and attempted operation of the well. The case was tried by the district judge who awarded the petitioner damages for injury to his land but denied the prayer for an injunction. In affirming the judgment, the Supreme Court adopted the reasoning of the trial judge by which it reached the conclusion that the facts did not justify a finding that the company had abandoned its property and that it had not delayed beyond a reasonable time in which to exercise the right of removal reserved in its lease.

Collins v. *Mt. Pleasant O. & G. Co., supra,* was an action to cancel an oil and gas lease. The answer alleged facts by which the company sought to justify its delay in the operation of the well and to avoid the cancellation of its lease, praying that, in the event the lease should be canceled, it be allowed to remove the casing from the well. An interval of four years elapsed after the completion of the well, and it had been discovered that it was unprofitable to operate. The Supreme Court held upon appeal that the facts proved were sufficient to avoid the lease but not to vest title in the lessor to the casing remaining in the well. There was no evidence of any injury resulting by reason of the delay in removing the casing.

In the first case the decision of the court was grounded, among other things, on the fact that a delay of eight months was not unreasonable when no circumstances were alleged or proved from which any inference of injury caused by the delay could arise. In the last two cases relied upon both appear to have been equitable proceedings, and the appellate courts were not circumscribed, as is this court, where a case comes on appeal based on a determination by a jury of a question

properly for its decision and where there is any substantial evidence which warrants the submission of the question to the jury.

In the instant case we are unwilling to hold, as a matter of law, that the leaving of the derrick and other equipment standing in appellee's cotton field, or the cessation of the well's operation, resulted in no injury or inconvenience to him. Something more than the actual ground occupied must be taken into consideration—the right of ingress and egress to and from the well over the cultivated lands of the appellee. Then, too, there is evidence that just off the lands of the appellee and nearby the well operated by the appellant an oil well was drilled and operated by the Magnolia Petroleum Company which had the effect of draining away a part of the oil from the lands of appellee, so that it was the duty of the appellant to either operate the well itself or to procure its operation for the purpose of protecting the lessor's lands from drainage from the off-set well. Therefore, we are unable to say that no injury was sustained by the appellee because of the actual occupancy of the land and of the continuous operation of the off-set well which, it was shown, had been operated during all the time the appellant's oil well was shut down, and was in operation when this cause was tried. The general rule is that it is a question for the jury to determine from all the facts and circumstances in the case what is a reasonable time in which any act may or may not be done, and therefore, in this case, it was a question for the jury to answer whether the appellant exercised its rights under the lease within a reasonable time. The trial court did not err in so holding, and its judgment must therefore be affirmed.

SHEPARD *v.* MCDONALD.

4-3181

Opinion delivered November 13, 1933.

[redacted]

Lee Miles and *Trieber & Lasley,* for petitioner.

Hal L. Norwood, Attorney General, *Robert F. Smith,* Assistant, and *Owens & Ehrman,* for respondent.

JOHNSON, C. J. Seeking judicial review of the acts of Ed F. McDonald, Secretary of State, approving a referendum petition upon act 78 of the General Acts of 1933, this suit was instituted by petitioner in this court as an original proceeding. In substance, the petition alleged: That on June 10, 1933, respondent, Ed F. McDonald, Secretary of State, filed and approved an insufficient referendum petition against act 78 of the Acts of 1933 and issued his certificate suspending the effectiveness of said act until voted upon and approved by the people of the State of Arkansas at the general elections to be held in 1934; that said petition for referendum, filed and approved as aforesaid, was insufficient, in that the ballot title required to be submitted therewith was defective and misleading; that the action of the defendant in

approving said petition and in issuing such certificate was unauthorized, unlawful and void. The prayer was that said petition be judicially determined insufficient, and that the certificate issued suspending and referring said act number 78 of 1933 be declared null and void.

The respondent filed his demurrer to said petition as follows:

First, the court is without original jurisdiction to determine the sufficiency of the referendum petition and defective ballot title; second, that the petition was not filed within the time required by law; third, that the complaint states no cause of action against the Secretary of State.

There are four questions presented for determination, namely: First, is the ballot title a part of the referendum petition? Second, does this court have original jurisdiction to determine the sufficiency of a referendum petition? Third, the time when such suit must be filed. Fourth, is the Secretary of State a necessary and indispensable party to such proceeding?

Adverting to the first issue raised, is the ballot title a part of the referendum petition? We think this question was definitely decided in *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. (2d) 356, wherein this court said: "As the ballot title here submitted might mislead, we have concluded that it was defective and insufficient and that the amendment was not sufficiently complied with in this respect."

The fact is, this is the exact point which was decided by this court in the Westbrook case for the following reasons: The Initiative and Referendum Amendment, commonly known as Amendment 13 to the Constitution of 1874, provides: "The sufficiency of all state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the State, which shall have original and exclusive jurisdiction over all such cases. The sufficiency of all local petitions shall be decided in the first instance by the county clerk or the city clerk, as the case may be, subject to review by the chancery court."

From the language used in the amendment, it is perfectly apparent that there could be no serious question raised in reference to the original jurisdiction of this court in a suit wherein the contention was that the petition for referendum, standing alone, was insufficient. It was insisted by respondent in the Westbrook case that the ballot title was a part of the referendum petition, and that his acts in refusing to file said petition, because of an insufficient title, should be sustained. This court sustained the Secretary of State's position for this reason. Since this court has definitely determined this question in the Westbrook case and cited eminent authority in support of it, we shall refrain from discussing the question further. We do announce, however, that the ballot title submitted on a referendum petition is a part and parcel thereof and must be so considered.

The second question presented, to-wit, the original jurisdiction of this court to judicially determine the sufficiency of a referendum petition, is decided by the amendment when thus construed. If the paragraph of the amendment heretofore cited has any meaning, it is that the Supreme Court "shall have original and exclusive jurisdiction" over all questions in which the sufficiency of a State-wide petition shall be involved. We have no hesitancy in saying that, under the plain language of the amendment itself, this court does have original and exclusive jurisdiction to determine the sufficiency of the referendum petition against act 78 of 1933.

As to the third question presented, that is to say, the time in which petitions should be filed in this court bringing in question the sufficiency of a referendum petition, but little need be said. The amendment places no limitation upon the time in which such suits shall be brought; neither have we any statute placing a limitation thereon. Therefore we announce the rule in the language of the Supreme Court of North Dakota in *Preckel* v. *Byrne*, 62 N. Dak. 356, 243 N. W. 823, which State has an initiative and referendum amendment not dissimilar from our own.

"The action of the Secretary in passing upon the sufficiency of a petition may be reviewed at any time,

'but if the sufficiency of such petition is being reviewed at the time the ballot is prepared, the Secretary of State shall place the measure on the ballot, and no subsequent decision shall invalidate such measure if it is at such election approved by a majority of the votes cast thereon.' That is, no subsequent decision of the court reviewing the action of the Secretary in passing upon the sufficiency of the petition shall invalidate the measure. When approved by the electors, it becomes a law, subject to the same rules of construction and interpretation as an act of the Legislature, and its constitutionality may be determined in the same way."

The complaint in the instant case was filed within thirty days after the filing of the petition for referendum with the Secretary of State. The Initiative and Referendum Amendment grants the petitioners for referendum thirty days in which to amend their petition. Certainly a citizen and taxpayer should not be limited to less than thirty days in which to file his suit, provided, it does not interfere with the submission to the voters at a general election.

The fourth question presented, is the Secretary of State a necessary and indispensable party in all such proceedings? This court so decided in the Westbrook case, cited *supra*. However, it is now insisted that, since the initiative and referendum provides:

"At the time of filing petitions the exact title to be used on the ballot shall by the petitioners be submitted with the petition and on state-wide measures shall be submitted to the State Board of Election Commissioners who shall certify such title to the Secretary of State to be placed upon the ballot." That we were in error in so deciding.

If it be granted that the Secretary of State has nothing to do, in the first instance, with the sufficiency of the ballot title, he certainly has the duty of certifying the ballot title to the election officials of the several counties of the State. Therefore, when it is determined that such petition and ballot title are insufficient, he may be restrained from certifying out to the election officials of

the several counties of the State such defective ballot title. In other words, as the law now is, the Secretary of State has the imperative duty of certifying out to the election officials of the several counties of the State the ballot title as it appears on file in his office, and when it is determined, if it is so determined, that such ballot title is insufficient, then he should be restrained and enjoined from so doing.

It has been specifically agreed between counsel for petitioner and respondent that the question of the sufficiency of the ballot title in the instant case be reserved for decision until the jurisdictional questions have been determined. Therefore we do not here decide or discuss the sufficiency of the ballot title in the instant case.

For the reasons aforesaid, respondent's demurrer to the petition is overruled.

MEHAFFY and MCHANEY, JJ., dissent.

[redacted]

LEONARD *v.* HELMS PRINTING COMPANY.

4-3249

Opinion delivered November 13, 1933.

[redacted]

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

Ned Stewart, for appellee.

SMITH, J. This is an appeal from an order of the Pulaski Circuit Court awarding a writ of mandamus directing the State Treasurer to pay three certain warrants held by petitioners, who published the journals of the House and Senate of the regular session of the 48th

General Assembly and the journals of the first and second extraordinary sessions of that body.

Funds to pay for these publications were not available, and certificates were issued by the State Auditor for the amounts due therefor. This was done pursuant to the authority of § 4463, Crawford & Moses' Digest, which provides that, "in all cases where the law recognizes a claim for money against the State, and no appropriation shall be made by law to pay the same, the Auditor shall audit and settle such claim, and give the claimant a certificate of the amount thereof, under his official seal, if demanded, and report the same to the Governor, who shall lay the same before the General Assembly." Certificates thus authorized were issued for the publication of each of these three journals.

At the ensuing 49th session of the General Assembly, there was passed an act No. 5 (Acts 1933, page 13), entitled: "An act to reduce the cost of operating the several departments, institutions and agencies of the State of Arkansas, to place each of them on a cash basis of operation, to provide for the issuance of certain evidences of indebtedness in payment of outstanding obligations, and for other purposes."

Section 4 of this act found and declared the fact to be "that the revenues of the State are insufficient to discharge the obligations now owing and at the same time to carry on the essential departments of the government." After thus reciting the reason for the legislation, it was enacted, in the same section, that "all unexpended balance in, and moneys accruing to, the General Revenue Fund from and after the passage of this act shall be, and are hereby, impounded and all thereof except the portion going into a sinking fund as herein provided are hereby set apart and dedicated to the payment of the current expenses of the various departments of the government, to the end that the State may operate on a cash basis and within the limits of its income, and that the outstanding obligations may be retired in an orderly manner." This act was approved January 27, 1933.

There was passed at the same session act 229, approved March 28, 1933 (Acts 1933, page 706), which made the following appropriations: $11,104.70 to pay for printing the journals of the regular session; $1,430 to pay for printing the journals of the first extraordinary session, and $1,755.80 to pay for printing the journals of the second extraordinary session. It was specifically provided that each of these sums should "be paid from the sinking fund authorized by act No. 5 of the Forty-ninth General Assembly," set out above.

To make act 5 effective, another section thereof provided that: "For the purpose of retiring the obligations of the State of Arkansas payable from the general revenue fund, the Treasurer of State shall, on and after July 1, 1933, provide a sinking fund into which he shall place twenty per cent. of all moneys accruing to the general revenue fund from all sources. Said sinking fund shall be used solely for the retirement of warrants and obligations outstanding against the general revenue fund on January 10, 1933."

It was the opinion of the court below that the act 229 required the payment preferentially of petitioners' claims without reference to other claims payable out of the sinking fund authorized by act 5, and upon that theory the writ of mandamus was awarded.

The question for decision is therefore whether it was the intention of the General Assembly, in enacting act 229, to pay the warrants there authorized out of the first moneys accruing in the sinking fund, or to place the holders thereof along and in a class with the holders of other warrants and obligations which accrued prior to January 10, 1933, and enable the holders thereof to exchange the certificates of indebtedness for the bonds which act 5 authorized.

It is apparent that these acts, passed at the same session of the General Assembly and each dealing with the unpaid obligations of the State, must be read and construed together. *Wilkin* v. *Special School District of Hazen,* 181 Ark. 1029, 29 S. W. (2d) 267. When thus read, we think there was no intention to give petitioners

the preference in payment which is prayed. On the other hand, we think it more reasonable to hold that the act 229 merely placed petitioners on a basis of equality with other holders of the State's obligations existing prior to January 10, 1933.

The act 229 expresses no purpose to give a preference. In fact, it was enacted to authorize the payment of petitioners' claims out of this sinking fund and pursuant to the provisions of § 4463, Crawford & Moses' Digest, which required the Governor to lay before the General Assembly the fact that there was such a claim, to the end that its payment might be provided for. This the act 229 authorized, and, by virtue thereof, it may be paid in the manner provided by act 5, but not preferentially, for no such legislative purpose was expressed or manifested.

The judgment of the court awarding the writ of mandamus is therefore reversed, and the petition will be dismissed.

JOHNSON, C. J., dissents.

BALDWIN *v.* PILGREEN.

4-3191

Opinion delivered November 13, 1933.

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

H. B. Means, for appellee.

HUMPHREYS, J. Appellee recovered judgment for $2,000 damages against appellant in the circuit court of Hot Spring County for injuries alleged to have been received on the night of the fifteenth of March, 1932,

while walking on a pathway along the railroad track just north of the depot in Malvern, through the negligence of appellant in permitting a lump of coal to fall from the tender and knock him down, causing the wheels of the train to pass over and mash off the ends of two of his fingers.

The testimony introduced tended to show that he might have been injured in one of three ways: First, in the manner alleged; second, by a robber; and, third, by an unknown person who knocked him off the running-board of an automobile.

After the rendition of the judgment, and at the same term of court, appellant filed a supplemental motion for a new trial on the ground of newly-discovered evidence, which motion was regular in form and in compliance with all the statutory requirements of such a motion. The newly-discovered evidence was to the effect that about twelve o'clock on the night appellee was injured, Mrs. Linnie Martin and Andy Graham saw him, appellee, riding on the running board of an automobile in which a man and a woman were riding; that this automobile had stopped on First Street near the point where appellee was found; that appellee was trying to get the woman out of the car, at which time the automobile door slammed, and appellee hollered as though he were in pain; that the man in the automobile struck appellee, which caused him to fall off of the car into the street, where he was later found.

This testimony was relevant and material to the issue involved, and was of such character and cogency that it might have had the effect of changing the result, and on this account the court should have granted a new trial. The rule as applied herein was announced and applied in the case of *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. (2d) 20.

On account of the error indicated, the judgment is reversed, and the cause is remanded with directions to sustain appellants' supplemental motion for a new trial.

Mr. Justice McHaney concurs.

PERRY *v.* STATE.

Crim. 3863

Opinion delivered November 6, 1933.

Leonard D. Caudle and *Festum Gillam*, for appellant.

Hal L. Norwod, Attorney General, and *John H. Caldwell*, Assistant, for appellee.

BUTLER, J. A jersey heifer had been stolen in Sebastian County, and the appellant was indicted, tried and convicted, on the charge of having received the same knowing it to have been stolen, and on appeal presents various assignments of error for reversal. In addition to the bill of exceptions certified by the presiding judge, appellant prepared in proper form a bystanders' bill of exceptions under the provisions of § 1322 of Crawford & Moses' Digest. As the truth of the matters set out therein was not controverted by counter affidavits as provided in said section, these must be taken as true, although they conflict with the statements contained in the bill signed by the judge. *Boone* v. *Holder*, 87 Ark. 461, 112 S. W. 1081; *Wingfield* v. *State*, 95 Ark. 71, 128 S. W. 562.

At the trial the defendant did not testify, and exception is taken and assigned as error to that part of the argument of the prosecuting attorney to which objection was made as in effect a comment on the defendant's fail-

ure to testify in his own defense. The language objected to appears in the bystanders' bill of exceptions and is as follows: "Take Carl Mortenson, the poor, little, freckled-face, stuttering kid, raised around here. Practically all of you know him. He would never have thought of this. He said so. It has never been denied. Perry said that: 'If you have got any 'hot stuff' over there, bring it over. I can use it.' By 'hot stuff' he meant anything that Carl would steal. In fact, the defendant has not denied a single, solitary iota of evidence that has been given against him from the stand here today. There's the brains of this thing,' [pointing to defendant] Herman Perry."

The necessary effect of this language was to direct to the jury's attention the failure of the defendant to testify. This court, in *Bridgeman* v. *State,* 170 Ark. 709, 280 S. W. 982, said: "This court is committed to the rule that, under § 3123 of Crawford & Moses' Digest, it is improper and presumptively prejudicial for the prosecuting attorney to call the attention of the jury to the failure of the accused to testify. *Lee* v. *State,* 73 Ark. 148, 83 S. W. 916, and *Starnes* v. *State,* 128 Ark. 302, 194 S. W. 506."

In overruling the objection made to the argument, the court said to the appellant's attorney: "You have opened the way. He is only arguing the point you raised." This action of the court and the reason given is sought to be justified by the rule announced in *Collins* v. *State,* 143 Ark. 604, 221 S. W. 455, on the theory that in this case, as in that, the error had been invited by appellant's counsel. In *Collins* v. *State, supra,* in announcing its conclusion, the court said: "But it appears from the record that the objection to this remark was overruled because counsel for defendant had stated that appellant had not taken the stand for the reason that it was not necessary for him to do so, the inference being that there was nothing for appellant to deny; and to that statement the prosecuting attorney replied that appellant could have taken the stand and denied selling the stuff. This is a case of invited error. Appellant's counsel should not

have commented upon appellant's failure to take the stand. He should have based his argument upon the testimony which went to the jury without commenting upon the fact that appellant had not testified at all. The statute is a shield, and not a sword. It gives the defendant the right to testify at his election, and provides that his failure to make such request shall not create any presumption against him. But it does not give his counsel the right to discuss the failure to make this request and to furnish explanations concerning it."

It was on the testimony of Carl Mortenson, the admitted thief, that the State chiefly relied to establish the charge that the animal stolen was in defendant's possession with the guilty knowledge of the commission of the larceny. Several persons had testified as to the repeated statements of this witness that defendant knew nothing about his having stolen the animal. In commenting on the action of Mortenson and the testimony of these witnesses, appellant's counsel in his argument to the jury, said: "What was Mortenson's story of this affair all the way through up to the time and sometime after he was placed in jail? He said that Perry did not know anything about it. He told Jim Efurd that Perry did not know anything about it. He told Jess Wilson in Perry's presence that Perry did not know anything about it. Perry told Jess Wilson, in Mortenson's presence, that he, Perry, did not know anything about it. About what? About the heifer having been stolen, of course. We say that Perry did not know anything about it, about the heifer having been stolen, and when you hear from Perry again he will still be saying that he did not know anything about it."

This is the statement which, it is claimed by the appellee, brings it within the rule announced in *Collins* v. *State, supra.* Here the statement of appellant's counsel and the language used is quite different from that used in the case of *Collins* v. *State.* Appellant's plea had put in issue the truth of the charge, and it was of itself a denial, and the statement just quoted, as we view it, can in no just or fair sense be interpreted as any reference

to the failure of the defendant to testify, or an attempt to justify that omission, as was done by defendant's counsel in *Collins* v. *State, supra,* but was a legitimate argument based on the evidence that Mortenson's testimony in the court was unworthy of belief, and that, although the animal was in appellant's possession, he knew nothing of its having been stolen. If the testimony of appellant's witnesses were true, this evidence justified the conclusion he reached which he sought to impress upon the jury and which he had a right to urge for their acceptance.

Learned counsel for the State contends that, even though the argument complained of was not invited and was prejudicial, that prejudice was removed because the court had instructed the jury to the effect that, while having the right to testify, defendant's failure to do so was not to be considered by the jury in determining his guilt or innocence. To sustain this position, we are referred to the cases of *Ingram* v. *State,* 110 Ark. 538, 162 S. W. 66, and *Starnes* v. *State,* 128 Ark. 302, 194 S. W. 506. In our opinion, these cases do not support the contention made. In the first case the court noticed that in *Tiner* v. *State,* 110 Ark. 251, 161 S. W. 195, any opinion was withheld as to whether comment by the prosecuting attorney would be reversible error where the court directed the jury to disregard it. The court then proceeded to notice the contrariety of view of the courts on this question and the tendency of the more modern or recent cases to hold that, where such reference has been made and is withdrawn and corrected by the charge of the court, it does not constitute reversible error. In adopting that view, this court held in the case then before it that, when attention of the court was called to comment by the prosecuting attorney of defendant's failure to testify, and he reminded the jury that they had been instructed not to consider that fact and emphasized again its duty in that respect, this served to cure the error. In *Starnes* v. *State, supra,* the court approved and followed the rule laid down in the Ingram case. In that case, when the prosecuting attorney violated the rule the court im-

mediately instructed the jury as to their duty, charging them not to consider the failure of the defendant to testify or draw any unfavorable inferences against him on that account. In the instant case, the court, while having first instructed the jury on the failure of the defendant to testify and define their duty in that regard, subsequently approved the argument of the prosecuting attorney which appellant construed as a comment on his failure to testify, thus nullifying the force of the charge which had before been given.

Because of the statute, we must presume that prejudice resulted when not removed by prompt action of the court. As said in *Bridgeman* v. *State, supra*: "The Legislature has seen fit to pass the statute in question, and there seems to be no discretion with the court in passing upon the probable injury of such allusion. This being true, we have no alternative except to reverse the judgment."

Because the judgment must be reversed, it becomes unnecessary to notice the other alleged errors as they are not likely to occur again, and, since there must be a retrial of this case, we refrain from commenting on the weight and sufficiency of the evidence.

Reversed and remanded for a new trial.

WILLIAMS *v.* PRIDDY.

4-3304

Opinion delivered November 13, 1933.

A. M. Dobbs, for petitioner,
Dean, Moore & Brazil, for respondent.

HUMPHREYS, J. This is a petition for a writ of prohibition by petitioner to prevent the judge of the circuit court of Conway County from proceeding in a suit for damages by Bishop Luie against petitioner, his deputy, J. S. McCuen, and his official bondsmen for injuries received by Bishop Luie through the negligent driving by his deputy of a stolen automobile with his prisoner, on highway No. 64 near Blackwell, in said county. The petitioner herein resided in Sebastian County, and the negligent act alleged against the deputy was that he turned off the accustomed right-hand side of the highway onto the left-hand side thereof and ran into a wagon in which Bishop Luie was riding. All the defendants in the damage suit, including petitioner herein, resided in and were served with process in some other county than Conway County, where the suit was brought and is pending.

Petitioner herein appeared specially and moved to quash service upon him on the ground that the suit should have been brought in the county of his residence, and that, by reason of the failure to do so, the circuit court of Conway County was without jurisdiction to entertain and try the cause.

The motion was overruled over the objection and exception of plaintiff herein, and this suit for a writ of prohibition followed.

It is provided by § 1175 of Crawford & Moses' Digest that a suit against an officer shall be brought in the county of his residence, and petitioner contends that this suit falls within said section of the statute and should have been brought in Sebastian County, where he resides.

Respondent's position is that the suit for damages on account of the injury received at the hand of plaintiff's deputy was properly instituted in Conway County under the second subdivision of § 1165 of Crawford & Moses' Digest, which is as follows:

"An action against a public officer for an act done by him in virtue or under color of his office or neglect of official duty must be brought in the county where the cause or some part thereof arose."

In support of respondent's position, the case of *Edwards* v. *Jackson,* 176 Ark. 107, 2 S. W. (2d) 44, was cited. In the Edwards case, the allegations of the complaint disclose that the sheriff was acting in his official capacity directly with Edwards when Edwards was killed. Not so in the instant case. Petitioner's deputy was simply traveling along the highway taking a stolen car and a prisoner to Ft. Smith on highway No. 64 in Conway County and negligently ran into a wagon in which a third party was riding who was wholly disconnected from the duties the deputy was engaged in performing. The proper construction of the second subdivision of § 1165 of Crawford & Moses' Digest is that the official act complained of must be official conduct resulting in or causing the injury. Unless the official act itself results in the wrong or bears some relation to the injury inflicted, the venue is governed by said § 1175 and not by the second subdivision of said § 1165. *Ussery* v. *Yarnell,* 181 Ark. 804, 27 S. W. (2d) 988; *Leonard* v. *Henry,* 187 Ark. 75, 58 S. W. (2d) 430. The instant case is ruled by the Leonard and Yarnell cases, *supra,* and not by the case of *Edwards* v. *Jackson, supra,* cited by and relied upon by the respondent herein.

The writ is therefore granted.

CONTINENTAL CASUALTY COMPANY *v.* TOLER.

4-3246

Opinion delivered November 13, 1933.

[redacted]

[redacted]

[redacted]

Cockrill, Armistead & Rector, for petitioner.

John L. McClellan, Sam T. & Tom Poe and *McDonald Poe,* for respondents.

KIRBY, J., (after stating the facts). Petitioner insists that the action of the circuit court in overruling the motion to quash service of summons and retaining jurisdiction of the suit of Floyd against it was erroneous.

We do not agree with this contention, however, holding that insured was entitled to maintain the action filed against the petitioner in the circuit court of Grant County, Arkansas, the county of the residence of insured under the provisions of the statute, §§ 6150-51, Crawford & Moses' Digest, as amended by § 5 of act 493 of 1921; § 5975e, Castle's Supp., 1927, to Crawford & Moses' Digest.

The policy of insurance sued on was a policy of insurance on the life of a human being, as well as a policy of accident insurance within the meaning of said statute, §§ 6150-51, Crawford & Moses' Digest, etc., which expressly allows the beneficiary or his assigns to maintain an action against the insurance company that has taken the risk in the county of the residence of the party whose life was insured, or to maintain an action against such accident insurance company that had taken the risk in the county of the residence of the party insured or in the county where the accident occurred, and that a service upon the Insurance Commissioner as prescribed by law returnable to the court having jurisdiction under this statute shall be good service. *Travelers' Protective Ass'n* v. *Gilbert,* 101 Fed. 846.

The venue statutes relate to both life and accident insurance, and the fact the policy is one providing indemnity against loss of life by accident as well as accidental injury can make no difference whether it be considered one or two policies, since the statutes expressly provide where the suit should be brought in either case, and an action for insurance against injury by disease in the same policy necessarily takes the same venue.

The court did not err in so holding and in overruling the motion to quash service and in retaining jurisdiction; and the petition will be denied. It is so ordered.

SMITH and BUTLER, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* BAKER.

4-3193

Opinion delivered November 13, 1933.

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

P. S. Seamons, for appellee.

MEHAFFY, J. F. Y. Baker and John Finley brought separate suits against the Missouri Pacific Railroad Company for damages, alleging that the appellant negligently allowed culverts on its road to become clogged with mud, sticks and debris to such an extent that the surface waters could not pass through said culverts, thereby flooding the lands of appellees, and causing the destruction of growing crops.

The complaints were the same, except the description of the lands and the amount sued for. Finley asked damages in the sum of $800, and Baker asked damages in the sum of $1,100.

The appellant filed answer in each suit, denying the material allegations in the complaints. There was a verdict and judgment in favor of Baker in the sum of $250, and in favor of Finley in the sum of $162. The case is here on appeal.

There was some conflict in the evidence, but there was ample evidence to justify the jury in finding that the culverts had become clogged and partially stopped up, so

as to retard the flow of the water, and cause it to damage the crops.

It is first contended by the appellant that the evidence is insufficient to support the verdict. Several witnesses testified in substance that in the mouths of the two culverts was everything that grows, cockle burs, grass, weeds, blackberry bushes and debris. None of the witnesses testified that the culverts were completely stopped up, so that no water could pass through, but they testified that they were partially filled, so as to retard the flow of the water, and cause the water to stand on the land and damage their crops.

It is next contended that the court erred in refusing to give instruction No. 3 requested by appellant. That instruction, among other things, told the jury that it was the duty of the appellees to minimize the damages by opening the drain, and charge the appellant with the expense of doing so. The instruction also stated that any part of said damages that they could have thereby prevented they cannot recover for.

It is true the evidence shows that it would not have cost very much to clear the culverts out, but we do not agree with the appellant that this was the duty of the appellees.

The first case relied on by appellant as supporting this contention is the case of *Wisconsin & Arkansas Lumber Company* v. *Scott*, 167 Ark. 84, 267 S. W. 780. That was a case where a suit was brought for negligently burning plaintiff's fence, and the court held that, if the fence was negligently burned, still if the appellee knew of such destruction in time that, by the exercise of ordinary care, he could have prevented the escape of his stock, and failed to exercise such care, then the proximate cause of his damages was his own negligence. However, this was the landowner's fence. He could have repaired the damage on his own land without trespassing on the land of another.

The next case is *Louisville, N. O. & Texas Rd. Co.* v. *Jackson*, 123 Ark. 1, 184 S. W. 450. That case also holds that it is the duty of a person to minimize his damages.

Appellant cites other cases, but none of the cases relied on hold that it is the duty of a person to minimize his damages where he must commit a trespass in order to do so.

It is ordinarily the duty of one who has been damaged by the negligence of another to exercise reasonable care to minimize the damages, but we have never held that a person should minimize his damages by committing a trespass on another's property. The appellees in this case could not have cleaned out the culverts without trespassing on appellant's land.

In the case of *Wolf* v. *St. Louis Independent Water Co.,* 15 Cal. 319, the court said: "There is nothing in the point that plaintiffs might, by ordinary diligence, have avoided the injury of which they complain. They could have done so only by the commission of a trespass, and surely they are not to be denied redress because they have chosen to appeal to the law, rather than violate it." To the same effect is the case of *White* v. *Chapin,* 102 Mass. 138.

The Illinois court said: "If, however, the obstruction is on the right-of-way of appellant, appellees have no right to enter thereon to remove it, as the law will not require them to commit a trespass to remove the obstruction, even if it would, as contended, cost but a trifle, nor can appellant require them to enter its right-of-way to remove obstructions." *C. R. I. & P. Ry. Co.* v. *Carey,* 90 Ill. 514. See also *Fromm* v. *Ide,* 23 N. Y. S. 56; *Gulf C. & S. F. Ry. Co.* v. *Reed,* (Tex. Cir. App.), 22 S. W. 283; *Wabash Rd. Co.* v. *Campbell,* 219 Ill. 312, 76 N. E. 346, L. R. A. 3 (N. S.) 1092.

It was therefore not the duty of the appellees to minimize their damages by trespassing on appellant's property.

It is next contended by appellant that the court erred by permitting evidence that the culverts were not large enough. The evidence tending to show that the culverts were too small was brought out in answer to a question of appellant's attorneys. The court, at the request of appellant, gave the following instruction: "You are instructed that the fact that there is a railroad embank-

ment there or that the drains under the embankment may not be as large as necessary in the opinion of some witnesses cannot be considered by you in arriving at your verdict, as this suit is based solely upon the allegations that the drains were stopped up."

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

DELLINGER *v.* TILGHMON.

4-3198

Opinion delivered November 13, 1933.

Williamson & Williamson, Moore, Gray & Burrow and *Everett B. Gibson, Jr.*, for appellant.

W. F. Norrell and *R. W. Wilson*, for appellee.

MEHAFFY, J. Appellee, Marvin Tilghmon, brought suit in the Drew Circuit Court against the appellant for damages for personal injuries alleged to have been caused by the negligence of the appellant, Ottie Dellinger. Ottie Dellinger owns and operates the Dellinger Truck Line, and is a public carrier of freight for hire over the highway between Monticello and Little Rock, Arkansas, and intermediate points, using a one ton Chevrolet truck with trailer.

On September 25, 1931, appellee was riding on one of appellant's trucks which was operated and controlled by Travis Blackledge, who was alleged to have been the agent, employee, foreman and vice-principal of Ottie Dellinger. It was alleged that on said day Blackledge carelessly and negligently drove said truck off of the highway into a deep ditch, and against a high embankment or side of said ditch; that appellee was thrown from his seat out of said truck, on the ground, and was run over by the truck; that the freight and merchandise in said truck were thrown upon appellee, and his right leg was crushed and broken above the ankle; that the leg had to be amputated; that his body was otherwise bruised; and that he was seriously and permanently injured, both internally and externally.

Appellant filed answer, denying all the material allegations of the complaint, and alleging that appellee and Blackledge were fellow-servants, which precluded appellee from a recovery for the negligence of the fellow-servant. The case was tried, and resulted in a verdict and judgment in favor of appellee, and the case is here on appeal.

It is first contended by the appellant that the court erred in refusing to direct a verdict for the appellant. There is no dispute about the injury to appellee, and the evidence was ample to submit the questions to the jury.

If appellee and Blackledge were fellow-servants, then no recovery could be had because of the negligence of Blackledge. If, on the other hand, Blackledge was a vice-principal, or if appellee was a passenger, then in either event he would be entitled to recover. The case will have to be tried again, and it is unnecessary to set out the evidence. But it is sufficient to say that we all agree that the evidence was sufficient to submit the questions to the jury.

It is next contended that the court erred in giving appellee's instruction C. It reads as follows: "If you find from a preponderance of the evidence that the defendant, Ottie Dellinger, doing business as Dellinger Truck Line, agreed that the plaintiff, Marvin Tilghmon,

might ride from Monticello to Little Rock and return for the consideration of services rendered and to be rendered by the said Marvin Tilghmon in loading and unloading freight, and that while so riding the truck in which he was riding was carelessly and negligently driven off the highway, if you find that this was due to negligence, and that plaintiff, Marvin Tilghmon, was injured as the result of negligence in the driving of said truck off the highway, your verdict should be for the plaintiff."

A majority of the court agree that this instruction should not have been given. Instructions were given at the request of the appellant, submitting the question whether appellee and Blackledge were fellow-servants, and instruction C, quoted above, authorized the jury to find for the appellee if they found that Blackledge was negligent, and the appellee was injured as a result of that negligence.

A majority of the court are of the opinion that, whether Blackledge was a fellow-servant or vice-principal, and also whether appellee was a passenger, are questions that should have been submitted to the jury, and, for that reason the majority holds that instruction C should not have been given.

If appellee was a passenger in the exercise of ordinary care and injured by the negligence of appellant's servant, he is entitled to recover. If Blackledge was a vice-principal, and not a fellow-servant, appellee is entitled to recover. If, on the other hand, Blackledge and appellee were fellow-servants, appellee could not recover for the negligence of Blackledge.

A majority of this court is of the opinion that these questions should be submitted to the jury under proper instructions.

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

TRI-STATE TRANSIT COMPANY OF LOUISIANA, INC. *v.* MILLER.

4-3194

Opinion delivered November 13, 1933.

E. W. Moorhead, for appellant.

Robert C. Knox, L. B. Smead and *C. E. Wright*, for appellee.

McHANEY, J. Appellee brought this action against appellant and others to recover damages for an injury to his right hand, in which the little finger was crushed and severely injured when it was caught between the door and the long rod which controls the opening of the door on a passenger bus owned and operated by appellant, while a passenger on said bus traveling from Shreveport, Louisiana, to El Dorado, Arkansas. The accident occurred in Union Parish, Louisiana, just before the bus reached Junction City, Arkansas. It happened in the following manner, according to the testimony of appellee and his witnesses: While passing over a section of highway under construction, the connection between the foot

accelerator of the bus and the carburetor was broken, or became disconnected, so that the driver could not feed the car sufficient gas to pull through the newly constructed highway, and it became stalled. Appellee was sitting in the front seat, on the right-hand side. The driver got out of the bus, raised the hood and attempted to adjust the connection. He asked appellee to press down upon the foot accelerator for some purpose, with which request appellee attempted to comply and unconsciously caught hold of the rod above-mentioned, and, while attempting to assist the driver in the manner stated, a team of mules owned by the other defendants to the action, Wilson and McKenzie, were being driven by the bus for the purpose of hitching on to it and pulling it out at the request of the driver of the bus, when a single-tree, to which one of the mules was hitched, caught in the door through which the driver had left the car and which had been carelessly left open by him, pulled it forward and caught appellee's hand between the rod and door, severely injuring it as aforesaid. To a complaint alleging the facts as above stated, appellant, on January 9, 1933, filed a pleading which it denominated "substituted separate answer of the Tri-State Transit Company of Louisiana, Inc." This answer recited that "for the purpose of this answer this defendant admits the allegations of the plaintiff's complaint as to how said plaintiff was injured," but denied that it was negligent or that he suffered permanent injuries to his damage in the sum claimed. It then made specific admissions as to the manner of appellee's injuries as alleged in his complaint, predicating same on the statement that they were made "for the purpose of this answer." It then alleged that the injury occurred in the State of Louisiana and was governed by the laws of that State; that appellee, at the time of his injury, was assisting the driver of the bus, was an emergency employee himself, and was a fellow-servant of the driver, and that, by reason thereof, the extent of appellant's liability is controlled and governed by the Workmen's Compensation Law of that State, pertinent parts of which are pleaded; that appellee, being an emergency employee, brought himself under the pro-

visions of said law; and that the full extent of its liability for the injury complained under said law is the sum of $3 per week for 150 weeks, or a total of $450, together with the sum of $250 allowed by said law for medical expenses, or a total of $700, for which amount it offered to confess judgment together with interest and cost in full satisfaction of appellee's claim. This answer was superseded and withdrawn by its "second substituted answer," which denied in detail the material allegations of appellee's complaint, pleaded contributory negligence and the fellow-servant rule in force in the State of Louisiana, contending again that appellee was an emergency employee and was a fellow-servant with the driver of the bus. Other pleas were made in this answer which we do not deem necessary to set out.

A trial of the case resulted in a verdict and judgment in appellee's favor for $2,300. For a reversal of the judgment against it, many assignments of error are argued, but we do not deem it necessary or proper to discuss all of them. Inasmuch as the case must be reversed on one ground, many of the errors complained of may not occur on a subsequent trial.

One of the assignments of error urged is the insufficiency of the evidence to support the verdict. We have carefully examined the evidence and find it sufficient to take the case to the jury, considering it in the light most favorable to appellee, as we are required to do under the settled rule of this court. Nor can we agree with appellant that appellee was guilty of contributory negligence as a matter of law, under the facts in this case, nor that he lost his status as a passenger and became an emergency employee of appellant or a fellow-servant of the driver of the bus. There is no dispute of the fact that appellee was a passenger on said bus, and that appellant is a common carrier of passengers for hire. Appellee was in no sense, according to his evidence, engaged in assisting the driver in making repairs. He was merely asked to press down upon the accelerator so that the driver could make the repairs, a matter wholly incidental to his status as a passenger.

The only assignment of error which we deem to be well taken is the introduction in evidence, over appellant's objections, of its substituted answer hereinabove set out and which was withdrawn and replaced by the "second substituted answer," on which the case went to trial. Said answer was filed for a particular purpose, was in the nature of a demurrer and an offer of compromise. It admitted the allegations of the complaint for the purpose of contending that appellee was an employee and was subject to the Louisiana Workmen's Compensation Act. It offered to confess judgment for the maximum amount allowed under said act if he were an employee. Its introduction in evidence was manifestly prejudicial, if erroneously done, for the reason that it admitted to be true, "for the purpose of this answer," all the allegations of the complaint as to how the injury occurred. Said answer was not verified, but was signed only by appellant's attorney. In the "second substituted answer," the previous answer was specifically withdrawn. Under such circumstances it was erroneous and prejudicial to admit in evidence the withdrawn answer. In *Railway Co.* v. *Clark,* 58 Ark. 490, 25 S. W. 504, this court held that it was error to permit the appellee to read the original answer of appellant as an admission after same had been withdrawn, and *Holland* v. *Rogers,* 33 Ark. 251, and other authorities were cited in support of the holding. This case was cited with approval in *Murphy* v. *St. L., I. M. & S. R. Co.,* 92 Ark. 159, 122 S. W. 636, where it was held, to quote a headnote, that: "Interrogatories prepared by plaintiff's counsel and submitted to defendant's counsel, but subsequently abandoned by plaintiff without being propounded to the intended witness, are not admissible, either as testimony or as admissions of plaintiff's counsel." The rule announced in *Railway Co.* v. *Clark* appears to be against the great weight of authority, for in 14 A. L. R. 65 it is stated: "With but few exceptions pleadings are admitted, other conditions being proper, against the pleader in the proceeding in which filed, * * * as evidence of admissions against interest therein contained." The exceptions there noted are California, Arkansas, Mississippi, Missouri, Washington

and Nebraska. Our own case of *Holland* v. *Rogers* and *Railway Co.* v. *Clark, supra,* are cited in support of the minority rule. In *Valley Planting Co.* v. *Wise,* 93 Ark. 1, 123 S. W. 768, 26 L. R. A. (N. S.) 403, it is held that "a statement contained in a pleading filed by a party in another action between the same parties may be proved against him, but such admission is not conclusive and is subject to explanation." That referred to a pleading on which the case went to trial between the same parties in the other action. In *Taylor* v. *Evans,* 102 Ark. 640, 145 S. W. 564, where error was assigned for the refusal of the trial court to permit defendant to read in evidence the original complaint, and where plaintiff had testified that he did not know what allegations were made in the complaint, this court said: "The evidence being competent only for the purpose of showing an admission, or as establishing a contradictory statement of the plaintiff, it is not admissible, where it does not appear that the plaintiff knew of the allegations of the original complaint, or at least where it affirmatively appears that he was not aware of the contents of the complaint. It would be without probative force, either as an admission or as a contradictory statement, unless it was shown that plaintiff was aware of the contents of the paper." In the recent case of *Greer* v. *Davis,* 177 Ark. 55, 5 S. W. (2d) 742, it was held that defendant's answer is competent as an admission, whether verified or not. But this was an answer on which the case went to trial and was an answer filed by appellant *pro se.* It was his own pleading upon which the case went to trial, signed by himself, and certainly was competent in the trial of that case. Here, however, as was the case in *Railway Co.* v. *Clark,* the pleading was withdrawn and a second substituted answer filed. It no longer remained a part of the record in the case, and was incompetent as evidence thereafter. The holding in *Railway Co.* v. *Clark,* may be a little too broad, for the authorities generally appear to hold that if a pleading is verified by the party in whose interest it is filed, it becomes a judicial admission and remains competent evidence where superseded by a substituted pleading.

The admission of this withdrawn answer in evidence, being erroneous and prejudicial, constitutes reversible error. The judgment will therefore be reversed, and the cause remanded for a new trial.

ÆTNA LIFE INSURANCE COMPANY *v.* CARROLL.

4-3199

Opinion delivered November 13, 1933.

Owens & Ehrman and *J. M. McFarlane,* for appellant.

Robert J. Oliver and *Arthur G. Frankel,* for appellee.

McHANEY, J. This is an action by appellee against appellant to recover $1,000, penalty and attorney's fees, based on a policy of group life insurance issued by appellant to Terry Food Stores, Inc., covering the employees of the latter. Certificates were issued and deliv-

ered to the employees and deductions were made from their monthly wages to pay for same. The policy provided that the employer should pay the monthly premium, which should become due on the first of each month, with 31 days of grace allowed the employer in which to pay. It further provided that: "In the event of termination of employment with the employer, the insurance under this policy shall automatically cease at the end of the policy month in which employment terminates." And it also provided for a conversion privilege under certain conditions upon termination of the employment; that is, the insured might, upon written application therefor and payment of first premium within 31 days after termination of the insurance under the group policy, obtain a policy under the conditions set out.

Appellee's husband, Thomas P. Carroll, was an employee of Terry Food Stores, Inc., on and prior to May 31, 1932, and held a certificate for $1,000 under said group policy. Said certificate contained this clause: "Said policy provides for termination of insurance whenever the insured ceases to be in the employ of the employer."

The undisputed proof shows that Thomas P. Carroll worked for Terry Food Stores, Inc., up to and including May 31, 1932, at which time he was discharged as store manager at 23rd and Arch streets, Little Rock, but that he worked as checker thereafter on June 4 and June 11. He died June 18, 1932. Deduction from his salary was made for the May premium, but no deduction was made from his wages for the two days' work in June for premium, and the whole amount due him was paid to his widow after his death. Sometime prior to June 14, 1932, Terry Food Stores, Inc., notified appellant's Little Rock office that Carroll's and two others' employment had been terminated, and requested a cancellation as to them. This notice was received June 14, was forwarded to the home office June 15, and received there June 17, and were canceled as of May 31, 1932. In accordance with appellant's custom, on June 1, 1932, it sent Terry Food Stores, Inc., a statement showing the total premium due for the month of June based on em-

ployees covered in May. This statement included Carroll and the other two because at that time no notice of cancellation had been given or received, and it was the custom of appellant to render bill on the first of each month for employees covered during the previous month. And it was also the custom for Terry Food Stores, Inc., to pay the full amount of the statement, and appellant would issue a credit memorandum for cancellation and deduct same from the next month's statement. That was their system of bookkeeping. After receipt at the home office of the notice to cancel as to Carroll and the other two, appellant issued a credit memo on June 23. Terry Food Stores paid the June 1 statement on June 24, which included Carroll and the others as above stated.

Under this state of facts, appellant requested a directed verdict in its favor on the ground that the undisputed facts showed that Carroll was not an employee of Terry Food Stores, Inc., within the terms of the policy at the date of his death or at all after May 31. The court refused this request, and submitted the question as to whether he was an employee or not to the jury, all over appellant's objections and exceptions. There was a verdict and judgment in appellee's favor.

The only question for our determination is, did the court err in refusing to direct a verdict for appellant? In other words, was Thomas P. Carroll an employee within the meaning of the policy? Both the policy and the certificate clearly made this a condition precedent. The policy provided that it might be continued from month to month, "but only while the insured remains in the employ of the employer, upon payment by the employer at the beginning of each month," etc. Other provisions relative to a continuation of the employment are set out above. It is well settled in many jurisdictions, in fact in all, so far as our investigation discloses, that such a provision in a group policy is valid, binding and enforceable. *Colter* v. *Traveler's Ins. Co.*, 270 Mass. 424, 170 N. E. 407.

The undisputed proof is that Carroll's employment with Terry Food Stores, Inc., terminated May 31, 1932, and notice thereof was given to appellant's local office

June 14; that he was not thereafter employed except as an extra man on two Saturdays, June 4 and 11. We think the fair intendment of the policy related to regular or salaried employees—those regularly engaged in the service of the employer. The employer so understood the matter and sent in the notice of cancellation. Appellant so understood it, accepted notice of cancellation and credited the employer with the premium. There is no claim that Carroll paid the premium for June, or that he exercised the conversion privilege. Nor does the fact, if it be a fact, that future employment was promised him change the situation. The question is, was he an employee at the time? We hold that he was not, and that the court erred in submitting the question to the jury.

Appellee argues that the 31 days of grace allowed to the employer continued the policy in force to July 1, and that, Carroll having died within that time, appellee should recover, whether the June premium was paid or not. That would be true had the contract been between appellant and Carroll, or if the relation of employee and employer had continued during June. The grace period was personal to the employer. It is also argued that the conversion privilege ran for 31 days, and, since his death occurred on June 18, he had until July 1 to exercise said right. The right of conversion, however, presupposes a termination of the employment. The very beginning of said conversion privilege clause is: "Upon termination of employment with employer, the company will, if desired, issue to the insured * * * a policy * * * on the following conditions." It is true the insured has 31 days in which to exercise the right of conversion, but during the time he neglects to do so, he is not insured, and, if he dies without having exercised the option, his beneficiary cannot recover. It all goes back to the same proposition that he must be in the employ of the employer.

For the error in refusing to direct a verdict in appellant's favor, the judgment will be reversed, and the cause dismissed. It is so ordered.

FRANCIS *v.* TURNER.

4-3163

Opinion delivered November 13, 1933.

S. S. Hargraves, Louis L. Cohen and *Mann & Mann,* for appellant.

Marvin B. Norfleet, for appellee.

BUTLER, J. In March, 1929, Charles Turner died in St. Francis County, Arkansas, without issue, leaving surviving his widow, Mrs. Marcella E. Turner, and two sisters, Mrs. Alma T. Francis of Munson, Iowa, and Mrs. Sadie B. Purinton of Chicago, Illinois, the sole heirs at law. Soon after Mr. Turner died, his widow accompanied by H. A. Sulzer, went to Forrest City and consulted with an attorney, and after some discussion, at Mrs. Turner's suggestion, Sulzer was appointed administrator and gave bond as such with Mrs. Turner as a surety thereon. Having obtained the information that

Turner had some property in Mississippi, Mr. Sulzer and the attorney proceeded to that State where they discovered that Turner had on deposit $30,000 in a bank in Tupelo, Mississippi, and an additional sum of $316.68 accrued interest. On the day after their return to Forrest City, Mrs. Turner was informed of this, and on the same day she executed to the attorney a power of attorney to convey her interest in some property in Munson, Iowa, owned by her deceased husband in his lifetime. The attorney was further authorized to proceed to the residence of the two sisters for the purpose of securing their interest in the Turner estate. The attorney left on this mission and arrived in Munson, Iowa, on April, 1929, where he secured a deed from Mrs. Francis. He went on to Chicago, arriving there the evening of the next day, and on the day following secured a like deed from Mrs. Purinton. By these two deeds all the interest of these two ladies in the estate of the deceased, Turner, was conveyed to his widow in consideration of the sum of $3,000 in cash paid to Mrs. Purinton and the conveyance under the power of attorney to Mrs. Francis of the Munson. Iowa, property at the agreed value of $2,000 and $1,000 in cash paid to her.

Previous to these events no inventory has been filed, but soon after the return of the attorney to Forrest City with the deeds an inventory was filed. After the death of Turner, his widow wrote two letters to Mrs. Francis who immediately forwarded them to her sister in Chicago. The first letter, written March 23rd, requested information as to the value of her husband's property in Iowa, which was a store building which had been renting for $40 per month, and in this letter a suggestion was made that the sisters might take it as their share in the estate. The letter indicated that the value of the estate was small. The next letter was written on April 10th, following, and contained expressions in line with the letter of March 23rd. The general effect of these letters was that the widow found herself left with very limited resources. When these letters were written, Mrs. Turner did not know of the large sums on deposit in Mississippi, but she

learned this in a day or two after her second letter was written and took no steps to correct the impression her letters were calculated to convey.

This suit was begun by the sisters filing a complaint in the St. Francis Chancery Court alleging that the deeds had been secured through false representations regarding the value of the estate which induced them, with the information they had previously received from Mrs. Turner, to believe that the estate was much smaller than it really was; that the representations made were relied upon, and in reliance upon the same the deeds were executed. Certain allegations were made whereby liability against the administrator in his settlement was sought to be established. Testimony was adduced for the plaintiffs and the defendants, Mrs. Turner and the administrator, and at the trial the court found that the conveyances were not procured by fraud, the complaint was without equity, and the same was dismissed. The decree, in so far as it related to the administrator, is not challenged by the appeal.

To support the finding and judgment of the trial court in upholding the conveyances attacked, appellees invoked two familiar principles recognized by this court from the earliest times: (1) the finding of the chancellor is highly persuasive and will be sustained unless it is against the preponderance of the evidence, and (2) that, in cases where fraud is alleged as a foundation for a cause of action to entitle the party asserting it to the relief prayed, the fraud must be clearly proved.

With these fundamental rules in mind, we proceed to an examination of the evidence relating to the procurement of the deeds questioned, viewed in the light of the interest or bias of these witnesses to be inferred and the attendant circumstances established in connection with another settled principle, namely, that an attorney for an estate represents the heirs and distributees and legatees to the extent that it becomes his duty, where the value of the estate is material to those interested in dealing between themselves or others, not only to refrain from making any misrepresentation or concealment, but

to also fully disclose the value of the estate and its probable assets, so that all interested may exercise an informed judgment. 23 C. J. 1170, § 387.

The dealings of the attorney with the two sisters may be treated as a single transaction in so far as the representations made by him in consummating the purpose of his visits to them is concerned. As to this the evidence is in conflict. The two sisters and Mrs. Purinton's attorney who was present when her deed was procured, testifying on the part of the appellants, were sharply disputed by the testimony of the Arkansas attorney and his wife who accompanied him on his journey. These five persons were the only witnesses to the transactions. The testimony of the witnesses for the appellants tended to establish these facts: that the attorney from Arkansas correctly advised them regarding the law of descent and distribution in Arkansas, but did not advise them of the items of property going to make up the *corpus* of the estate, stating that the value of the estate was about $12,000. He offered them $3,000 each for their respective interests, stating that there would be some expense incurred in the course of the administration, and that, after the debts had been paid, some time would elapse before the distribution was ordered, and that at the time some of the assets in the State of Mississippi were being withheld from the administrator for some reason then unknown to him.

The attorney for Mrs. Purinton advised that perhaps it might be well to check up the statements of the visiting attorney, but Mrs. Purinton declined this advice because of her knowledge of the reputation of Mrs. Turner and relied on the statements of the attorney as to the value of the estate.

The testimony of the Forrest City attorney, in which he was corroborated by his wife, tended to dispute that of Mrs. Francis, Mrs. Purinton and the latter's attorney, and was to the effect that he stated that, after the widow's allowance under the Arkansas statute had been deducted and expenses paid, the estate would approximate about $15,000 in value, and after $3,000 was

paid to each of the sisters about $9,000 would be left for the widow from the one-half of the estate which the sisters would inherit: quoting from the attorney's testimony, "I told her, from the figures I had then and estimating the estate and considering the statutory allowance of the widow in Arkansas the expenses of the administration and such bids as I had heard of, that the half they (the sisters) were interested in under the laws of Arkansas to be worth about $15,000 and with the $6,000 paid to them there would remain to the widow about $9,000." His testimony was further to the effect that, disregarding the advice of her attorney, Mrs. Purinton (the deed from Mrs. Francis having already been obtained) accepted the proposition made on the ground that she never expected to go to Arkansas, and that "a bird in the hand was worth two in the bush." In his testimony, he did not claim that he had revealed the two cash items, one of $5,107.89 then in the bank at Forrest City and one of $30,316.68 then on deposit in the bank at Tupelo, Mississippi, these two items aggregating the sum of $35,424.57 cash on hand. He contented himself with the statement professed to have been made to Mrs. Purinton and her attorney that "I told him (the attorney) that I considered the half the sisters were interested in under the laws of Arkansas to be worth something like $15,000."

It was testified to by Mrs. Francis and Mrs. Purinton that they believed in, and relied upon, the statements they testified that were made to them as to the value of the estate, and, acting on this information, they executed the deeds; that they would not have done so had they been advised of the true value of the same.

Soon after the return of the attorney to Forrest City with the deeds of the two sisters, an inventory of the estate was filed for the first time disclosing that the value of the estate, inclusive of the store house in Iowa, amounted to the sum of $41,545.57. Of this amount $35,424.57 was cash on hand. It was shown that the deceased owed no personal debts, and that the net value of the estate was the sum mentioned, less any inheri-

tance tax which might be due the State and the expenses incident to the administration.

It was, and is, the contention of the appellees that the attorney who procured the deeds from Mrs. Francis and Mrs. Purinton, was not the attorney representing the estate or the administrator thereof in his official capacity; that he at no time represented the administrator as such, but only as his personal attorney and that he was the attorney for Mrs. Turner. The record, however, discloses that he did in fact represent the estate, and that he was paid out of the estate his fees as attorney. It may be true that he considered himself in the negotiations with the two sisters as the attorney merely of Mrs. Turner and might have, and doubtless did, overlook the fact that he was also the attorney for the estate, owing to the heirs the duty of making full disclosures of the value of the estate. In law he occupied the same position to them as he did to Mrs. Turner which was a position of trust with respect to all those interested in the estate.

The witnesses who testified as to the transactions between Mrs. Francis and Mrs. Purinton on the one hand and the attorney from Arkansas on the other by which the deeds were procured, may all be said to be interested in the result of this litigation or biased in favor of one or other of the parties. As far as their testimony is concerned, it might be said to be evenly balanced in respect to the truth of the facts narrated by them. But, if the testimony on behalf of the appellants is accepted as true, and if indeed the attorney of Mrs. Turner did inform Mrs. Francis and Mrs. Purinton that the half of the estate to which they would be entitled was worth about $15,000, this did not correctly state the amount to which they were entitled by at least $3,500, and when the value of the Iowa property is added, by $5,500—no insignificant sum in these times. Except for some items of small value, as we have seen, the principal value of the estate consisted of cash, stock of merchandise $750, personal property $1,000 and land in St. Francis County valued at $2,371 and a store building in

Iowa worth $2,000, so that there was nothing problematical about its value. But the statements of the appellants' witnesses are reinforced by cogent circumstances. The fact that Mrs. Turner had, just a short time before the advent of the Arkansas attorney in Iowa and Illinois, conveyed the impression to the two sisters that she was a poor woman, and that she might not have money enough to pay the expense of a visit to them which she desired to make, and after learning of the value of the estate made no effort to undeceive them, but at once sent her attorney to buy their interest, the fact that no inventory of the estate had been filed until after the procurement of the deeds, and the true value of the estate, confirm and support the statement they made that they were not correctly advised. The evidence shows that there was no intimate relationship or association between Mrs. Turner on the one hand and the sisters of her deceased husband on the other. They were comparative strangers. One of the sisters had visited Mr. and Mrs. Turner only once in a quarter of a century and the other not at all, and there was no reason to suppose that the sisters of Mr. Turner would feel it their duty to give to Mrs. Turner a large sum of money. It is against ordinary experience and observation to believe that they would part with an estate valued at practically $20,000 for the sum of $6,000, and it must be remembered that at no time in the testimony of the attorney did he admit or say that he ever at any time told them of the amount of actual money on hand.

It is our opinion, accepting at its face value the statements of the attorney relative to what occurred in his conferences with Mrs. Francis and Mrs. Purinton, he displayed a lack of candor and frankness, whether intentional or unintentional, which, in connection with the letters Mrs. Turner had written, were calculated to and did deceive those with whom he was dealing. Mrs. Francis and Mrs. Purinton must have relied on the statements of the attorney and the letters they had received from Mrs. Turner, and they had the right, con-

sidering the position which the attorney occupied, to rely upon his statements. It is our opinion that the finding of the court below is contrary to the preponderance of the evidence. We think, also, the circumstances so persuasively support the evidence adduced by the appellants that it is sufficient to preponderate in favor of the appellants to a degree sufficient to satisfy the rule that proof of fraud must be plainly shown.

But the statement is made by the appellees that, even though the testimony of Mrs. Francis and Mrs. Purinton be accepted as true, they were not deceived and were paid a sum equal to at least one-half of the value of the estate. They argue that, as the thirty thousand odd dollars was on deposit in the State of Mississippi, it became the absolute property of the widow by virtue of the laws of that State, and therefore was not a part of the estate of Turner to be distributed under the laws of Arkansas, but, by virtue of the Mississippi laws, was to be distributed under the laws of that State.

While the answer filed by the appellee alleged her ownership of the deposit under the laws of the State of Mississippi, there was no evidence adduced on this question except a reference by her attorney, when testifying, to the effect that, in consulting with the legal department of the bank in Tupelo, Mississippi, where the deposit was, that department regarded Mrs. Turner as being entitled to the deposit under the laws of that State. We have carefully searched the record and find that this reference and the letter from the bank to the attorney, introduced by him as an exhibit to her testimony, were the only references made to the claim of ownership set up in appellee's answer. On the contrary, the inventory of the estate of the intestate was introduced in evidence as an exhibit to the testimony of one of the witnesses, which shows that the deposit was listed as a part of the assets of the estate, and it was proved that Mrs. Turner consented to the withdrawal of the money from the Mississippi Bank by the administrator of the estate of her deceased husband. These proved facts made a *prima facie* showing that the $30,000 deposit was a part of the Turner estate.

The question really in issue, and the one which the trial court's "opinion and statement of facts" disclosed was presented to, and considered by it, was whether or not the deeds involved were void because of fraud in their procurement, and, in the absence of proof that the deposit was localized under the laws of Mississippi within the meaning of her statutes as construed by the court of that State, the deposit in so far as it affects that question, was treated as if it was, in fact, the property of the estate as shown by the inventory.

It follows that the judgment of the trial court must be reversed, and the cause is remanded with directions to cancel the deeds from Mrs. Francis and Mrs. Purinton to Mrs. Turner, and for further proceedings according to the principles of equity and not inconsistent with this opinion.

MERRITT *v.* M. W. ELKINS INVESTMENT COMPANY.

4-3320

Opinion delivered November 13, 1933.

Ohmer C. Burnside, for appellant.

John L. Carter, for appellee.

BUTLER, J. The question involved in this case is how and in what manner shall three school district warrants issued to the appellee be paid. One of the warrants was issued by the Lakeside Special School District in the

sum of $1,025, and the other two, aggregating the sum of $1,010, were issued by the Wellford School District.

The services for the two districts were the same, and the finding of fact by the trial court regarding the issuance of the warrants is the same with respect to each of the districts except as to the amounts. The finding of fact as to the Lakeside Special School District will be sufficient for an understanding and determination of the question presented, which is as follows:

"This cause coming on to be heard, and both parties being represented by counsel, and it being agreed and stipulated that it should be heard in vacation, and the court, being well and sufficiently advised as to the law and facts, doth find that the board of directors of the Lakeside Special School District, of Lake Village, Chicot County, Arkansas, entered into a certain contract with M. W. Elkins Investment Company of Little Rock, Arkansas, for the refunding of $26,500 outstanding bonds against said district; that the said school district agreed to pay said investment company $1,025, and in pursuance of said contract the board of directors of said district issued its warrant No. 15 to said investment company for the sum of $1,025 against the debt service fund of said district; that the said M. W. Elkins Investment Company has made proper demand on the defendant herein, and that said defendant has refused to pay said warrant out of the debt service fund."

In addition to the above statement, it may be further said that the expression "debt service fund" in the warrant was intended to be, and was, treated by the parties and by the court as equivalent to "building fund" mentioned in the statute which authorized the making of the contract between the appellee and the school districts. The court found that the warrants were properly drawn, and they were ordered paid out of the "debt service" or "bond and interest" fund.

It is admitted that the contract was properly entered into and the services performed; and that the warrants are valid under the provisions of act No. 169 of the Acts of 1931. That act provides that for the security of the

payment of bonds issued by any school district a special fund may be created to continue until the bonds are paid, and on election the electors shall determine the amount of tax for the building fund, and, "if a majority of the votes cast are for the building fund, it shall amount to voting a building fund tax of the amount or rate shown for each succeeding year until all bonds then outstanding or issued within a year after such election are paid."

By § 66 of the act it is provided: "All school districts in Arkansas proceeding under this act to borrow money and issue bonds, in addition to other security herein authorized, may and are hereby authorized to establish a building fund in an amount sufficient to pay the maturities of bonds, principal and interest, as they accrue, of said issue of bonds, that said building fund shall be set aside out of the first revenues of the district from whatever source derived, and shall be held by the county treasurer solely in the manner and for the purposes set out throughout this act."

By § 67 it is provided: "No part of any building fund shall be used for any other purpose in any year than to pay the bonds and the interest thereon maturing that year, and that may be past due, until such maturities are paid in full, or until the funds are set aside to pay the full amount of such bonds, after which any surplus in the building fund that year may be used for other school purposes. * * * The county treasurer shall see to it that all warrants on the building fund of any school district are drawn only to pay maturities of principal or interest on bonds of that district, as shown by the records in his office, and he shall countersign all warrants on the building fund before they are valid."

It will be observed by a reading of § 67 that payments out of the building fund are restricted to the payments of the bonds and the interest maturing in any given year. But it also provides that, when there is a fund set aside sufficient to pay the full amount of the bonds and interest maturing in that year, the surplus, if any, in the building fund "may be used for any other school purposes." This surplus then may be used to pay any

valid obligation of the district for which a proper warrant has been drawn, and consequently the surplus reverts to and becomes a part of the general fund.

From the allegation of the complaint noted, which was accepted as true and was in effect a statement that there were sufficient funds in the hands of the treasurer to the credit of the building fund to pay the warrants maturing and the accrued interest during the current year, leaving a surplus sufficient to pay the warrants of the appellee, the trial court concluded that the order to pay the appellee's warrants out of the building fund was justified by the language of the statute which provided: "After which any surplus in the building fund that year may be used for other school purposes." Appellee points out that it is held in the case of *Park* v. *Rural Special School Dist. No. 26,* 173 Ark. 892, 293 S. W. 1035, and other cases cited that a brokerage fee for negotiating the sale of bonds may be paid out of the proceeds of the bonds sold; but in this case payment is not sought in that manner, but from a special fund created for a special purpose, in which there is no statutory provision for the inclusion of a broker's fee, and its payment must be made in the manner provided for that of other obligations of the school districts. But the effect of the court's order is to give warrants of the appellee preference over other outstanding warrants of the school district, whereas the surplus, if any, should be used to pay warrants issued for other school purposes which would include all other obligations of the districts as well as the warrants of the appellee.

By § 1 of act No. 24 of the Acts of 1933, it is made the duty of the treasurer to register all school warrants in the order of their presentation; and by § 3 of that act it is provided that where no funds are in the treasury to pay school warrants, the treasurer shall indorse the warrant "Not paid for lack of funds," giving the date and registration number and signing the same officially. He is required to keep a record of each school warrant and pay the same in the order of their registration number.

It would appear, therefore, that such surplus, if any, should revert to general funds of the district to be devoted to the payment of any school warrants in the order of their registration, those of the oldest registration having priority. We are of the opinion that the trial court erred in its order, and the case will be reversed and remanded with directions that appellee's warrants be ordered paid out of the general funds of the district in the order of their registration; the same to be treated as a registration on the common fund and payable in the order of their date and registration number.

NATIONAL EQUITY LIFE INSURANCE COMPANY *v.* SEAMSTER.

4-3195

Opinion delivered November 13, 1933.

Beloit Taylor and *M. J. Harrison,* for petitioner.

Duty & Duty and *Bernal Seamster*, for respondent.

BUTLER, J. The Farmers' Trust Company issued debenture bonds in the sum of $750,000 and pledged with a trustee real estate mortgage bonds to guarantee the outstanding debenture bonds. The trust agreement was duly executed and recorded in Benton County, the domicile of the Farmers' Trust Company and the trustee named. The First Mortgage & Investment Company took over the assets of the Farmers' Trust Company and assumed its liabilities including the aforesaid debenture bonds.

John R. Duty is the trustee in succession of the trustee named in the trust agreement and Bernal Seamster is the receiver of said investment company. Seamster, as receiver, and Duty, as trustee, filed a complaint in the Washington Chancery Court alleging the above facts and

that at the time John R. Duty was designated as trustee he received first mortgage bonds aggregating the principal sum of $81,000 and real estate mortgages securing the same; that under the terms of the trust agreement he became the owner of the bonds and mortgages for the purpose of holding the same for the guarantee of the debenture bonds with the right to dispose of the same in the event of the default in the payment of said bonds at public or private sale, a sufficient amount of the mortgages to pay the matured debenture bonds in default with interest, or to foreclose or take such other steps as would be necessary to protect the bondholder. It was alleged that some of the officials of the investment company, without the knowledge of the trustee, abstracted the mortgages from their place of deposit and sold same to the National Equity Life Insurance Company, an insurance company organized under the laws of the State of Arkansas, with its principal place of business in the city of Little Rock; that said investment company made written assignments of said mortgages to the insurance company which appear now of record in the office of the recorder of Washington County; that of these mortgages there were two covering lands situated in Washington County; that no title was in the investment company which it could transfer to the insurance company and that said transfer and assignment is void. The complaint concluded with a prayer that the court by its decree divest the insurance company from all apparent title or interest in and to said mortgages as shown by the records of Washington County, Arkansas; that it be enjoined from receiving any further payment thereon, and that the assignment be canceled and the trustee restored to all the rights and ownership of said mortgages given him by the indenture of trust.

On this complaint a summons was issued and served on the insurance company on the 20th day of April, 1933, at its office in Little Rock. Within apt time the defendant insurance company appeared specially in the Washington Chancery Court and filed its motion setting up that it was a domestic corporation with its principal place of

business in Little Rock; that it had no agent for service and no branch office in Washington County; that the service of summons was had upon it in Pulaski County by the sheriff of that county; that the suit was improperly brought in Washington County and that defendant was entitled to be sued in the county where it was domiciled, and it prayed that the service be quashed and for all other proper relief.

On the 29th day of June, the court heard said motion, overruled the same, refused the prayer thereof, and required the defendant to answer within twenty days from that date, to all of which rulings exceptions were duly saved, and a petition filed in this court asking a writ to be directed to the Washington Chancery Court prohibiting it from proceeding further in the case.

It is the contention of the petitioner that the action brought in the Washington Chancery Court involved as the principal question the ownership of the mortgages in controversy. It contends that in equity the mortgagor is considered the owner of the property until he is barred by his own default or by judicial decree, the mortgage being regarded merely as a security for a debt; and therefore the decree in the case where the question of the ownership of a mortgage is presented would operate only indirectly and incidentally upon the estate or title to the land. Petitioner therefore argues that the cause of action stated in the complaint is transitory and that the venue to try the action lies in Pulaski County.

It is insisted by the respondent that the action is for a recovery of an interest in real estate, and, as the real estate is situated in Washington County, or a part of it, that the action is local, and the suit was properly instituted in Washington County by virtue of § 1164 of Crawford & Moses' Digest, which provides that actions shall be brought in the county in which the subject of the action, or some part thereof, is situated, where, among other things, the action is for the recovery of real property or of an estate or interest therein.

It is the opinion of the majority, in which the writer does not agree, that the contention of the respondent is

correct that the cause of action stated is for the recovery of an interest in real estate and the venue was properly laid in Washington County and the service upon the petitioner a valid one. It is their opinion that the instant case is ruled by the case of *Fidelity Mortgage Co.* v. *Evans,* 168 Ark. 459, 270 S. W. 624, and that the allegations in the complaint and the prayer for relief in the instant case make it analogous to an action to remove a cloud upon the title which was held to be a local action in the Evans case, *supra,* in which the court said: "Clearly one purpose of the action, as shown by the allegations of the complaint and the findings of the decree of the court, was to have surrendered and canceled the outstanding mortgages. These mortgages were clouds upon the title. Appellee Dilling, who had purchased the land from Nichols, and appellee Evans who held the purchase money notes which were secured by vendor's lien, was entitled to have the outstanding notes and mortgages executed by Nichols and wife surrendered and canceled. The action in this respect affected the land in Logan County and gave the chancery court of that county jurisdiction of the subject-matter. * * * It is manifest that under the pleadings and prayer for general relief the action and decree of the court affected the lands in Logan County. These allegations were sufficient to give the chancery court of that county jurisdiction of the subject-matter." See also the case of *Ark. Mineral Products Co.* v. *Creel,* 181 Ark. 722, 27 S. W. (2d) 1003.

The prayer of the writ will be denied; it is so ordered.

TERRY *v.* HARRIS.

4-3350

Opinion delivered November 13, 1933.

Walter G. Riddick and *Roy D. Campbell,* for petitioner.

June P. Wooten and *Arthur G. Frankel,* for respondent.

PER CURIAM. Petitioner Terry prays a writ of mandamus to compel the circuit court of Pulaski County, before which tribunal an election contest is now pending, to require certain testimony to be admitted; to which petition the presiding judge has responded that the testimony in question is believed to be privileged, and that he is therefore without authority to compel its production.

The question arises upon the following facts: Petitioner Terry has been certified as the Democratic nominee for the office of congressman from the Fifth Congressional District, and Hays, his opponent in the primary election, is contesting the nomination. It is conceded that the contest may be instituted only upon the affidavit of ten qualified Democratic electors of that district supporting the allegations of the complaint, charging facts sufficient to show that the contestant—and not the contestee—received a majority of the legal votes cast in the primary election which is under review. It is conceded also that, under the rules of the party holding the primary, the affiant, in addition to possessing the qualifications of an elector, shall not have voted against any

regular party nominee at any election held within two years prior to the primary election under contest. This affidavit, which is required by § 3772, Crawford & Moses' Digest, is therefore a jurisdictional prerequisite, without which the right of contest does not exist.

The contestant filed an affidavit in proper form, signed by twenty-five persons, who averred their eligibility to make the jurisdictional affidavit; and the contestee has put in issue the eligibility of affiants by alleging that, within less than two years prior to the holding of the primary under contest, these affiants, or more than fifteen of them, had voted against a Democratic nominee, and that therefore the complaint was not supported by ten eligible affiants as required by law. If this be true, the contest must be dismissed for that reason.

The trial court held that it was permissible to show that the affiants had voted against a Democratic nominee within the time limited by the party rules, and were therefore ineligible to make the affidavit, and that the affiants might be asked how they had voted, but could not be required to answer, for the reason that their ballots were secret, and that it was their privilege to preserve this secrecy, unless they waived the privilege. It is prayed by this proceeding to require the affiants to answer such questions as may be asked them touching their qualifications to make the jurisdictional affidavit, and to have produced the ballots alleged to have been cast in opposition to the Democratic nominee.

It was held, as respondent points out, in the case of *Dixon* v. *Orr,* 49 Ark. 242, 4 S. W. 774, that: "The testimony of voters who participated in the election upon the point for whom their ballots were cast is admissible. But the secrecy of the ballots is established by law, and a qualified elector cannot be compelled to disclose for whom he voted. It is only when he chooses to waive his privilege that his evidence can be had." Whether this rule now applies, we do not decide.

We are of the opinion that the affiants here called as witnesses have waived their privilege to have their ballots kept secret. They have made themselves essential parties to this litigation by doing the thing without which

there could be no contest of the election, that is, by supporting with their affidavit the allegations of the contestant's complaint. Having thus made themselves parties to this proceeding by alleging their eligibility to make the essential affidavit, they have waived such privilege as the law conferred.

The contestee therefore has the right to examine these affiants upon their qualification to make the jurisdictional affidavit, and to inquire of them whether, within the time specified by the party rules, they have opposed a party nominee, thereby rendering themselves ineligible to make the affidavit. The testimony of the affiants themselves is admissible, and we think this testimony may be corroborated or contradicted by the production of the ballots, the casting of which is alleged to have disqualified them, or the ballots may be offered as original evidence.

The writ of mandamus will therefore be awarded as prayed, and the trial court is directed to permit the affiants to be examined upon their eligibility, and, if necessary, to produce their ballots. Authority for this ruling is furnished by the case of *Giboney* v. *Rogers,* 32 Ark. 462, in which case the facts were as follows: Giboney was under indictment for a felony, and he wished to take depositions of witnesses residing out of the State. Upon the refusal of the trial court to make the necessary order to enable the defendant to take the depositions, he applied to this court for a writ of mandamus requiring the trial court to make the order. Having concluded that the defendant was entitled to this testimony, it was ordered in the case cited that a writ of mandamus issue to the trial judge requiring him to make the necessary order for that purpose. So, here, if it be true that the affiants are not eligible to make the supporting affidavit, that may be shown, and the writ of mandamus will be issued as prayed.

It is the opinion of Mr. Justice Smith that the questions here disposed of have been prematurely decided.

Counsel for contestant ask us to decide whether all persons who voted for the independent candidate in the July 18 election may be required to appear and testify as to how they voted and whether the production of their

ballots may be required. We do not decide these questions, nor whether such a vote is a disqualification. These are questions to be decided by the trial court, which may be reviewed only by appeal to this court.

MAGNOLIA PETROLEUM COMPANY *v.* TURNER.

4-3197

Opinion delivered November 20, 1933.

Cockrill, Armistead & Rector, for appellant.

J. H. Lookadoo and *M. Rountree,* for appellee.

JOHNSON, C. J. This is an action seeking recovery for an alleged common-law tort and arose under the fol-

lowing circumstances. Appellee, Connie Turner, is a minor and a resident of the State of Arkansas. Appellant, Magnolia Petroleum Company, is a Texas corporation, but is authorized and doing business in this State wherein proper service of summons was had upon it. On all material issues the testimony presented is not in dispute and it may be summarized as follows:

"In July, 1931, appellee was employed by appellant to perform manual labor for it in and around Kilgore, in the State of Texas. In pursuance of the contract of employment, appellee began the discharge of his duties, and, while being transported by appellant from Kilgore to his place of work on August 4, 1931, the truck on which appellee was being transported was negligently and carelessly wrecked by the driver, and appellee was seriously and permanently injured. The contract of employment, the service to be rendered thereunder by appellee and the injury received by him, all occurred in the State of Texas."

The principal defense offered by appellant was to the following effect:

"That, under the laws of the State of Texas, on the date of the contract of employment and on the date of the injury, there was no common-law liability for torts existing in favor of appellee and against appellant. The uncontradicted testimony shows that on the date of employment and on the date of the injury appellant was a subscriber under the Texas Employers' Liability and Workmen's Compensation Insurance Law, and that appellee had served no notice upon it reserving his rights to prosecute a common-law action for tort at the time or subsequent to his employment."

The controlling question here presented for adjudication is, whether or not the Texas Workmen's Compensation Laws afford an exclusive remedy under the circumstances of this case. Article 8306 of Vernon's Annotated Texas Statutes. Section 3, in part, provides: "The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee

of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for."

Section 3a of article 8306, cited *supra,* reads as follows: "An employee of a subscriber shall be held to have waived his right of action at common law or under any statute of this State to recover damages for injuries sustained in the course of his employment if he shall not have given his employer at the time of his contract of hire, notice in writing that he claimed said right or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within five days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law or under any statute may thereafter waive such claim by notice in writing, which shall take effect five days after its delivery to his employer or his agent. Any employee of a subscriber who has not waived his right of action at common law or under any statute to recover damages for injury sustained in the course of his employment, as above provided in this section, shall, as well as his legal beneficiaries and representatives, have his or their cause of action for such injuries as now exist by the common law and statutes of this State, which action shall be subject to all defenses under the common law and statutes of this State. (Acts 1917, p. 269)."

Section 3c of article 8306 provides: "From and after the time of the receipt by the Industrial Accident Board of notice from any employer that the latter has become a subscriber under this law, all employees of said subscriber then and thereafter employed shall be conclusively deemed to have notice of the fact that such subscriber has provided with the association for the payment of compensation under this law. If any employer ceases to be a

subscriber, he shall on or before the date on which his policy expires give notice to that effect to the Industrial Accident Board, and to such subscriber's employees by posting notices to that effect in three public places around such subscriber's plant. (Acts 1923, p. 384)."

In the case of *Castleberry* v. *Frost Johnson Lumber Company of Texas,* (Tex. Civ. App.) 268 S. W. 771, the Texas court held that the Workmen's Compensation Act, heretofore referred to and cited, afforded an exclusive remedy to all employees against subscribing employers and used the following language in support thereof: "If the definition quoted is the correct meaning of the term 'damages,' then we must hold that the Legislature used it in that sense, intending to bar all actions against the employer by his employees, unless it clearly appears that it was used in a different sense. Under article 5246-7, as quoted *supra,* it appears beyond doubt that damages, both actual and exemplary, were included in the scope of the legislation, because we find in article 5246-7 the Legislature referring to exemplary damages, excepting from its provisions exemplary damages where the death of the employee is brought about by the gross negligence of the employer. *Robertson* v. *Magnolia Petroleum Co.* (Tex. Civ. App.) 255 S. W. 223. We must conclude, then, that the word in its broadest application was being considered by the Legislature, and was so used by them, and that in excepting one class of litigants from its provisions it was the legislative intent to include all others. The maxim *expressio unius est exclusio alterius* has application."

It is insisted on behalf of appellee that the Texas Workmen's Compensation Laws are procedural in effect, and therefore should not be permitted to control procedure in this State.

This court in the case of *St. Louis Iron Mountain & Southern Railway Company* v. *Brown,* 67 Ark. 297, 54 S. W. 865, held: "In all actions *ex delicto* for injuries to person or property, the right to recover, and the limit of the amount of the judgment, are determined and governed by the laws of the place where the injury was done."

In 29 Cyc. 564, subdivision 4, under the head of Negligence, the rule is stated thus: "The law of the State where the injury occurs governs the right of the injured party to redress."

As construed by the Texas courts, the Workmen's Compensation Statutes of that State, are not merely procedural, but on the contrary take away from all employees of subscribers under said act their common-law rights of action for torts committed in that State, and substitutes therefor a compensatory award, and this, regardless of all necessary elements which constitute a common-law tort.

It is contended on behalf of appellee that he did no affirmative act at the time of his employment waiving his right to prosecute a suit under the common law for a tort committed in Texas. Section 3 of 8306, heretofore referred to, answers definitely and certainly this contention. This provision, in effect, provides that all such employees shall look for compensation solely to the association. Section 3a provides, in effect, that such employee shall be held to have waived his right of common-law action, if he shall not have given his employer, at the time of his contract of hire, notice in writing that such right was preserved.

The Supreme Court of Rhode Island in the case of *Pendar* v. *H. & B. American Machine Company,* 35 R. I. 321, 1916A. L. R. A., p. 428, had this exact question under consideration, and the first headnote reads as follows: "An employee cannot maintain an action in one State to recover damages for injuries received in another State where the contract of employment was made, if, at the time he entered into his employment, he failed to comply with the requirements of the local statutes that he notify the employer, who carried an employers' liability insurance policy, that he intended to rely on his common-law rights, which failure the statute makes a waiver of the right to maintain a common-law action."

It will thus be seen that not only the statutes of Texas provide an exclusive remedy for common-law torts committed in that State by a subscriber of the Work-

men's Compensation Law, but that such enactments are supported by eminent authority.

It is next insisted by appellee that, since he was a minor, under the age of 21 years, at the time he made his contract of employment, and at the time he received his injuries, he was not and is not precluded by the Workmen's Compensation Law of Texas. In *Scott* v. *Thompson & Ford Lumber Company,* (Tex. Civ. App.) 291 S. W. 565, 568, the Texas court held: "The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for. It thus plainly appears that the Legislature, in enacting the law, contemplated that minors would be employed, and made provisions for their protection. The court did not err in directing a verdict for appellee, and therefore the judgment is affirmed."

It is our duty to follow the construction placed upon the statute in question by the Texas courts. Since the Texas court has specifically held that a minor does waive his common-law tort action, unless he gives written notice of his intention to preserve the same, we are, of necessity, constrained to hold likewise.

It is next said that to give effect to the Texas law in this State would be against our rule of public policy. This contention was advanced in *Bradford Electric Company* v. *Clapper,* 286 U. S. 145, 52 S. Ct. 571, wherein the court held:

"It is true that the full faith and credit clause does not require the enforcement of every right conferred by a statute of another State. There is room for some play of conflicting policies. * * * A State may, on occasion, decline to enforce a foreign cause of action. In so doing,

it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability."

From what we have said, it is obvious that the right of appellee to maintain this action in the State of Arkansas is and should be determined by the fact as to whether or not he has such right in the State of Texas. It is perfectly evident from authority herein cited that appellee has no right to maintain this action in the Texas courts. Since no such right exists in Texas, such privilege will not be afforded him by the laws of this State.

We therefore reach the conclusion that appellee is not entitled to bring and prosecute this common-law action in this State, as by his own act he has extinguished such right in the State of Texas.

The judgment is therefore reversed, and the cause of action dismissed.

MURPHY *v.* CONTINENTAL SUPPLY COMPANY.

4-3206

Opinion delivered November 20, 1933.

Walter L. Brown, for appellant.

Robert A. Kitchen, for appellee.

JOHNSON, C. J. On June 18, 1930, appellant, P. E. Murphy, wrote the following letter to appellee:

"If you will let Mr. W. M. Kemp have a string of 2,600 feet, 2½-inch tubing, I will guarantee that he pays you within ninety days' time for same. Please mail me

copy of invoice of same. Beg to thank you very much for this favor.

"Yours truly,
"P. E. Murphy."

In pursuance of the request and directions contained in said letter, appellee sold and delivered to W. M. Kemp the tubing referred to therein for the sum and price of $758.54. The indebtedness was not paid by Kemp, and this suit was instituted by appellee against appellant upon the written guaranty.

After hearing all the testimony introduced in said cause, the trial court directed the jury to return a verdict in favor of appellee.

But one contention is argued by appellant for reversal, as follows: "The letter written by P. E. Murphy to the Continental Supply Company was an offer to pay for the tubing. He was entitled to notice of the acceptance of his offer and of the shipment of the tubing."

McCollum v. *Cushing,* 22 Ark. 540, is cited as authority for this position. Without going into a detailed discussion of the letter referred to in the McCollum case, we think, in effect, that there is a marked difference between it and the letter in the instant case. The letter in the McCollum case was merely an offer of guaranty and so demonstrates upon its face, whereas in the instant case there is an absolute guaranty of the contemplated obligation. Therefore we conclude that this case is not ruled by the McCollum case.

In *Fall City Construction Company* v. *Boardman,* 111 Ark. 415, 163 S. W. 1134, this court, quoting from 20 Cyc., page 1407, said:

"Both the English and American cases hold generally that the rule requiring notice by the guarantee of his acceptance of guaranty applies only where the guaranty is in legal effect an offer or proposal. Where the transaction is not merely an offer to guaranty the payment of debts, and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that the promisee should act upon it; he need not notify the promisor of his acceptance."

It is our conclusion that the guaranty in the instant case falls squarely within the rule announced in the Boardman case, cited *supra,* and that the trial court was correct in so deciding.

The judgment is affirmed.

CASE *v.* TAYLOR.

Opinion delivered November 20, 1933.

Williamson & Williamson, for appellant.

J. Paul Ward, for appellee.

JOHNSON, C. J. Appellee, Walter E. Taylor, State Bank Commissioner, recovered a default judgment against appellant, H. R. Case, in the Stone County Chancery Court in a sum in excess of $8,000. The indebtedness was secured by a pledge of $10,000 in common and $5,000 in preferred stocks of the Batesville White Lime Company. This stock was directed to be sold by John F. Grammer, Special Deputy Bank Commissioner in

charge of the North Arkansas Bank, insolvent, at public sale in Batesville, Arkansas, after having advertised said sale for ten days by at least one insertion in a weekly paper in Stone County and in Independence County, and by giving the defendant written notice of said sale, etc. The sale was effected, and a report thereof made by the Special Commissioner, whereupon appellant interposed the following exceptions thereto:

"First, that the sale can only be made by the circuit clerk, as ex-officio commissioner.

"Second, that no notice of sale was published in Independence County pursuant to the decree.

"Third, that John F. Grammer was an interested party in the proceedings, therefore could not be legally appointed special commissioner."

Section 2196 of Crawford & Moses' Digest provides: "That the clerks of the circuit courts in the several counties shall be clerks of the chancery courts and ex-officio masters and commissioners thereof in each of said counties," etc.

Section 1365 provides: "The judge may appoint any other person master or commissioner in special causes in said court."

It will be seen that § 1365 of Crawford & Moses' Digest, cited *supra,* gives to chancery courts full power and authority to designate and appoint any qualified person in special causes as commissioner.

Appellant's second exception to the report of sale is likewise without merit. The chancery court's order confirming the sale finds: "That said sale was in all respects regular, and in conformity to law and the decree in said case, and same is hereby, in all things, approved and confirmed."

Since the trial court found that the sale was in all respects regular and in conformity with the decree in said cause, we must presume that his findings were supported by the facts. The mere fact that only one proof in publication appears in this record does not establish the alleged fact that it was the only one published. *Fid-*

dyment v. *Bateman,* 97 Ark. 76, 133 S. W. 192. *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247, L. R. A. 1915C, 158.

The contention that John F. Grammer, liquidating agent of the North Arkansas Bank, was an interested party is likewise without merit.

The Bank Commissioner and his agents hold property as trustees and not as owners. The possession thus acquired is analogous to that of a receiver, and it is common practice for receivers to conduct sales of property held by them as such.

The judgment is affirmed.

ARKANSAS RICE GROWERS' CO-OPERATIVE ASSOCIATION *v.* MINNEAPOLIS-MOLINE POWER IMPLEMENT COMPANY.

4-3201

Opinion delivered November 20, 1933.

W. A. Leach, for appellant.

J. F. Holtzendorff, for appellee.

SMITH, J. Appellee recovered judgment on the 15th of August, 1932, in the Prairie Circuit Court for the

Southern District against George Jensen for $755. On September 27, 1932, appellee filed with the clerk of that court its allegations and interrogatories, in which it was alleged that the appellant, the Arkansas Rice Growers' Co-Operative Association; Standard Rice Company, Inc.; Arkansas State Rice Milling Company, and the Walton Rice Mill, were each indebted to the judgment defendant, George Jensen, in the sum of $775. Upon this allegation interrogatories were filed requiring the parties named to answer "touching the goods, chattels, moneys, credits and effects of the said defendant, and the value thereof," in their hands and possession "at the time of the service of such writ, or at any time thereafter."

Upon filing these allegations and interrogatories as required by § 4910, Crawford & Moses' Digest, writs of garnishment issued as prayed. The return of the sheriff reads as follows: "I, C. C. McCallister, Sheriff of Ark. Co., hereby return this writ having served true copies of the within upon the Ark. Rice Growers' Coopr. Ass'n by serving H. K. Smith, their pres. and mgr.; Standard Rice Co., Inc., by serving Grant Cummings, their mgr.; Ark. State Rice Milling Co. (The lessees of McGill Mill) by Mr. McCrory, their stenographer, accepting service, and the Walton Rice Mill by serving C. R. Walton, their mgr., this 29th day of Sept. 1932. Ser. $3.00 Mil. .80 Ret. .10. $3.90 C. C. McCallister, Sheriff, Ed. Hughes, D. C."

All the garnishees except appellant filed the answer required by § 4911, Crawford & Moses' Digest. It was shown by the answering garnishees that they had no goods or chattels, moneys, credits or effects belonging to the judgment defendant, and they were discharged with their costs.

No answer having been filed by appellant, judgment was rendered against it for the full amount of the plaintiff's judgment against the original defendant, as authorized by § 4916, Crawford & Moses' Digest, at the ensuing March, 1933, term of the court.

This appeal has been prosecuted from that judgment, and the clerk, in preparing the transcript, has in-

serted the following notation: "Note. The writ of garnishment and allegations and interrogatories were bradded together and served as one paper."

It is argued for the reversal of the judgment that the writ of garnishment was not sufficient, in that there was a single writ, and not a separate writ, for each garnishee. The implication of the record is otherwise. The sheriff has charged, in his return, not for the service of a single writ, but for four writs. There were four garnishees, and the act fixing the fees of the sheriff of Arkansas County allows that officer a fee of 75 cents for serving each writ of garnishment. Act 220 of the Acts of 1925, page 649. The fee of $3 charged for service indicates that service was had upon four garnishees. The return of the officer also evidences that fact. It recites that four garnishees were served, and indicates the manner of service upon each. In other words, we interpret the sheriff's return, when read in conjunction with the clerk's note, to show that there were five sets of papers, each set containing the writ of garnishment and a copy of the allegations and of the interrogatories bradded together. A set of these papers was served on each garnishee named, in the manner recited on the sheriff's return, appearing on the fifth set of the papers, which was treated as being the original of each of the other sets, all being alike. We think this a substantial and sufficient compliance with the law.

It is next questioned whether the writ was actually served. It does not appear when the original writ was returned to and filed with the clerk who had issued it, as the law requires. But it does appear that it was served, not ten days merely, but more than five months before the judgment here appealed from was rendered, and it was on file with the clerk when that judgment was rendered. The recitals of the judgment itself are conclusive of that fact.

Now, the statute authorizing judgment against a garnishee upon failure to answer provides that: "If any garnishee, after having been served with a writ of garnishment ten days before the return day thereof, shall

neglect or refuse to answer the interrogatories exhibited against him on or before the return day of such writ," judgment shall be rendered against such garnishee for the full amount of the plaintiff's judgment against the original defendant. It thus appears that it is the *service* of the writ which must be had ten days before the return day, and the sheriff's return indicates a period much longer than ten days intervened between the service of the writ and the return day thereof. It was said, in the case of *Jones* v. *Goodbar,* 60 Ark. 185, 29 S. W. 462, that: "The bringing back of the writ by the officer, and filing it in the office of the justice or clerk from which it issued, together with this written certificate of his proceedings under it, indorsed on the writ or upon some paper attached thereto, constitute in law the return of the writ." The writ was returned within the requirements of the rule thus announced.

It is finally insisted that the writ was not directed against appellant. The contention in this respect is stated in appellant's brief as follows: "In the allegations and interrogatories the appellant is named as garnishee by its correct corporate name, to-wit: 'The Arkansas Rice Growers' Co-Operative Association.' In the second whereas attached to the writ appears the name 'The Arkansas Rice Growers' Co-Operative Association,' but the sheriff was commanded to summon the said 'Arkansas Rice Growers' Co-Operative Association.' In the officer's return appears the name 'The Ark. Rice Growers' Co-oppr. Ass'n', while the judgment is against 'The Arkansas Rice Growers' Co-Operative Association'."

It is settled, of course, that the garnishee must be correctly named in the writ of garnishment; but we think the appellant garnishee was certainly and sufficiently named. The return recites that the service was had on appellant "by serving H. K. Smith, their pres. and mgr.," which abbreviations mean, of course, president and manager. There was no attempt to show that H. K. Smith was not the president and manager of appellant corporation. The article "the" was employed at one place, and omitted in another, as stated in appellant's

brief, but counsel has been candid enough to cite 3 Thompson on Corporations, § 3185, where it is said: "The omission or the addition of the word 'the' is not such a variance as will justify the reversal of a case. So it has been held that the prefixing of the word 'the' to the name of a corporation where it was not a part of the corporate name was immaterial." We are of the opinion that the writ was properly directed against and served upon appellant. *C. A. Blanton Co.* v. *First Nat. Bank of Marked Tree,* 175 Ark. 1107, 1 S. W. (2d) 558,

Finding no error, the judgment must be affirmed. It is so ordered.

WESTERN COAL & MINING COMPANY *v.* YOUNG.

4-3202

Opinion delivered November 20, 1933.

J. P. Clayton and *Pryor & Pryor,* for appellant.
G. C. Carter and *Partain & Agee,* for appellee.

HUMPHREYS, J. Appellees sued appellant separately in the circuit court of Franklin County, Ozark District, for damages to the wells on the respective lands on which they resided at Denning, caused by the alleged negligence of appellant during the years 1929 and 1930 in mining and moving the underlying coal so as to cause the surface to crack and drain their wells, thereby depriving them of a water supply.

Defendant filed an answer denying the material allegations of the complaints and pleaded the three years statute of limitations in further defense.

The causes were consolidated for the purposes of trial and submitted to a jury upon the pleadings, testimony, and instructions of the court, which resulted in verdicts for each of the appellees in the sum of $300, upon which judgments were rendered, from which appeals were duly prosecuted to this court.

In the course of the trial, testimony was introduced by appellant tending to show that the mine owned by it was operated under a written lease to Consolidated Sales Company in the years 1929 and 1930. The lease was not recorded or produced in the evidence, and the contents thereof were not shown. The testimony tended to show that, if operated by the lessee during the years mentioned, the operation thereof was under supervision of appellant's employees and that it received the output of the mine.

The undisputed evidence shows that appellees owned the surface covered by their homes, and that appellant owned the minerals thereunder, including the coal, with the right to mine and remove same; and also shows that when the coal was mined by appellant under the lands owned and occupied by appellees, it left pillars of coal at intervals throughout the mine to support the surface. The coal was mined at a depth of about 180 feet. The testimony also shows that appellant or its lessee returned to the mine in the years 1929 and 1930 and pulled the pillars and that a short time thereafter the surface near

the homes of appellees subsided in one place and that two long cracks several inches wide appeared in the surface about 350 yards from their homes on the Mattus land. Cracks also appeared in the surface on two other sides of the property belonging to appellees. The testimony is in conflict as to whether the subsidence and cracks caused the wells in question to go dry.

Appellant contends for a reversal of the judgment because the evidence fails to show any subsidence or cracks in the surface in the immediate vicinity of the lands owned by appellees and that those that did appear were not shown to have any connection with the wells. The fact that all three wells were drained in a short time after the pillars were removed and that the surface subsided in one place and cracked in others on three sides of the properties and that theretofore the wells had furnished an abundance of water are substantial and potential circumstances which would warrant a jury in finding that the destruction of the pillars or supports under the lands damaged the wells. Then, too, if the jury believed the witnesses introduced by appellees to the effect that this was the cause, it certainly cannot be said that the verdicts are without substantial evidence to support them. Testimony to that effect appears in the record from witnesses who had had years of experience in mining coal.

Appellant also contends for a reversal of the judgments because, under the lease from Denning, it had the right to mine and remove the coal without reference to damage it might do to the surface of the lands above. It is true the lease placed no restrictions upon it with reference to damaging the surface in mining and moving the coal thereunder, and it is also true, as suggested by learned counsel for appellant, that there is no statute in this State requiring the owner of coal interests in lands to leave pillars to support the surface; but, notwithstanding, we are of opinion that the only true and sound rule is that "when the surface of land is owned by one person and the minerals beneath are owned by another, the owner of the minerals cannot remove them without

leaving sufficient natural or artificial support to sustain the surface." Such was the rule announced in the case of *Western Indiana Coal Co.* v. *Brown*, 36 Ind. App. 44, 74 N. E. 1027, 114 Am. St. Rep. 367. See also *Williams* v. *Hay*, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719; *Noonan* v. *Pardee*, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; *West Pratt Coal Co.* v. *Dorman*, 161 Ala. 289, 49 So. 849, 23 L. R. A. (N. S.) 805, 135 Am. St. Rep. 127, 18 Ann. Cas. 750, and cases therein cited; *Kistler* v. *Thompson*, 158 Pa. 139, 27 Atl. 874; *Earnest* v. *Corona Coal Company*, 212 Ala. 303, 102 So. 445; 1 R. C. L. 395.

The court submitted the cases at bar to the jury upon the theory that appellees could not recover unless they showed by a preponderance of the evidence that appellant mined and removed the coal in a careless or negligent manner. The instructions to this effect were more favorable than appellant was entitled to under the absolute support doctrine. However, this was the theory upon which the suits were brought, as shown by the allegations of the complaint, and the court did not err in submitting it upon that theory, as there was ample evidence to justify the jury in finding that the removal of the pillars or supports constituted negligent or careless mining, resulting in the destruction of the wells.

Appellant also contends for a reversal of the judgments because the actions were barred by the three years statute of limitations. This contention was upon the theory that appellant ceased to mine the coal in its mine at Denning in 1924 and that its lessee removed the supports in 1929, and was at the time an independent contractor and responsible for the alleged damage to the wells, if any. The court submitted the issue of whether the lessee was an independent contractor without sufficient evidence to support the instruction. The lease was not produced, and the terms thereof were not shown. It affirmatively appeared that the work was done under the supervision of appellant's employees, and that it (appellant) received the output of the mine during the time the

lessee operated it. The instruction on this issue was more favorable to appellant than it was entitled to.

No error appearing, the judgments are affirmed.

RANKIN *v.* NATIONAL LIBERTY INSURANCE COMPANY OF AMERICA.

4-3210

Opinion delivered November 20, 1933.

Jones & Wharton, for appellant.

Verne McMillen, for appellee.

HUMPHREYS, J. Appellant brought suit against appellee in the circuit court of Jackson County to recover $1,000, the statutory penalty, and an attorney's fee on an insurance policy issued by appellee to appellant to indemnify him against the loss of his business building on account of fire.

Appellee filed an answer to the complaint denying liability under the policy on the ground that appellant burned or caused said business house to be burned.

The cause was submitted to the jury, under a correct instruction, upon the issue of whether appellant burned the building in question, which resulted in an affirmative finding and a consequent judgment dismissing the complaint, from which is this appeal.

Appellant contends for a reversal of the judgment on the ground that there is no substantial evidence to support the verdict. Learned counsel for appellant argue

that the most the evidence did was to create a suspicion against him, and cite two cases to the effect that evidence which creates a suspicion only against one charged with a crime is not sufficient to support a verdict of guilty. *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604; *Jones* v. *State,* 85 Ark. 360, 108 S. W. 223.

There was no eyewitness in the instant case who saw appellant set fire to his building. The verdict, therefore, must be supported by circumstantial evidence sufficient for the jury to have drawn a reasonable inference that he did burn same.

The record reflects that appellant was seen about twelve o'clock Sunday night, March 13, coming from the back part of the building in which he conducted a fish market, and which burned at three o'clock Monday morning, March 14. A car was parked across the alley from the back end of his building, and he was going toward it when the night watchman, D. J. Nance, threw his flashlight on him and inquired, "What are you doing down here this time of night, Rankin?" Rankin replied that he had bought the place several weeks before and was waiting there for a load of fish. Pearl Miller, who kept a rooming house in Memphis, Tennessee, testified that appellant came to her rooming house at 7 or 7:30 o'clock Monday morning; that he seemed tired and nervous and remained fifteen or twenty minutes, long enough to have a cup of coffee; that he never spent the night in her apartment during the month of March. Appellant testified that he went to his place of business Sunday afternoon, the thirteenth of March, about 1 o'clock and stayed a while checking his accounts, etc., and that he then left and did not return; that he left Newport about 7:30 P. M., to go to Memphis to see a sick brother, and did not hear about the fire until the next day; that he did not see or talk to the night watchman Sunday night, the thirteenth, in the alley back of his store; that it was Saturday night he saw him there; that he arrived in Memphis about 10:30 o'clock Sunday night, the thirteenth, and after calling to see his sister, he went to the apartment of Pearl Miller and spent the night.

The verdict of the jury indicates that they accepted and believed the testimony of Nance and Pearl Miller in preference to that of appellant. Their testimony was in direct conflict with his and was sufficient to warrant the jury in drawing a reasonable inference that he was the author of the fire.

It is insisted that appellant's motion for a new trial grounded on newly-discovered evidence should have been granted by the trial court, and that the judgment should be reversed on account of the court's refusal to do so. The alleged newly-discovered evidence was that of Mrs. Mildred Nichols, appellant's sister, who resided in Memphis, and who would have testified, had she been present, that appellant was at her home in Memphis between eleven and twelve o'clock on Sunday night, March 13. Her excuse for not being present and testifying was that she got the impression from a Mr. Waldron, who was appellant's attorney, that she would not be permitted to testify in his behalf because she was his sister.

Her testimony was not newly-discovered because appellant must have known what he could prove by her before the trial, and her excuse for not being present is without merit.

No error appearing, the judgment is affirmed.

McCoy *v.* Lockridge.

4-3188

Opinion delivered November 20, 1933.

[redacted]

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

Joseph Morrison, for appellee.

KIRBY, J., (after stating the facts). No notice of the dissolution of the corporation or the distribution of its assets among its stockholders was published by the Stuttgart Rice Mill Company; and it was admitted that appellee had no actual notice thereof, the agreed

statement of facts containing the following stipulation: "No notice of the dissolution of the corporation nor of the distribution of its assets among its stockholders was published by the Stuttgart Rice Mill Company; that after the rendition of the original decree in favor of Lozier Lockridge and before the filing of this cause of action he caused an execution to be issued against the Stuttgart Rice Mill Company and that the same was by the sheriff of Arkansas County returned marked 'nothing found'."

Appellee's cause of action against appellants, stockholders, could not have arisen until the attempted dissolution of the corporation by the adoption of the stockholder's resolution on March 17, 1926, and its certification to the office of the Secretary of State on April 9, 1926. It is admitted that after the rendition of the original decree on May 11, 1931, and before this suit was filed on September 21, 1931, appellee caused an execution to be issued thereon against the Stuttgart Rice Mill Company and same was returned by the sheriff marked "nothing found."

It was also shown that appellee had no knowledge of any facts that would constitute actual notice of the attempted dissolution of the corporation before the return of the execution *"nulla bona"*; but a proper following up of that information would have disclosed the actual conditions and thus appellee was charged with notice from then on. The exact date of the execution is not shown in the record, but it is clear, from the agreed statement of fact quoted above, that this execution was issued and returned by the sheriff marked, "Nothing found" sometime between May 11, 1931, the date of the original decree, and September 21, 1931, the date this suit was filed.

Such fraudulent concealment would prevent the running of the statute of limitations until the fraud was discovered, and under the agreed statement of fact herein appellee cannot be said to have been charged with notice thereof until after the *nulla bona* return of the execution, which would have advised appellee of the

true condition had the information been followed up. In *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. (2d) 826, it was said: "It is well settled in this State that where there has been a fraudulent concealment of a cause of action, the statute of limitations does not begin to run until after the fraud is discovered." (Citing cases). The cause of action was not barred by the five-year statute of limitations, and the chancellor did not err in so holding.

Neither was error committed in overruling the motion to dismiss for want of jurisdiction, appellant Wilson being summoned in Pulaski County, where he resided. This court had held in the case of *Wilson* v. *Lucas, supra,* that the liability of stockholders to the payment of the corporation's debts after dissolution was joint and several, and the assets thereof received by them constitute a trust fund for payment primarily of the debts of the dissolved corporation. Moreover, after the court overruled the motion to dismiss for want of jurisdiction, appellant agreed in writing to a hearing by the chancellor of the suits in vacation and necessarily waived any further right to complain of the jurisdiction of the court. *Pacific Mutual Life Ins. Co.* v. *Toler,* 187 Ark. 1073, 63 S. W. (2d) 839.

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

McHaney, J., dissents.

Arkansas Power & Light Company *v.* Mart.

4-3166 and 4-3325

Opinion delivered November 20, 1933.

Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron,* for appellant.

J. H. Lookadoo, John B. Gulley and *Lewis Rhoton,* for appellee.

MEHAFFY, J. This action was begun by the appellee to recover damages for personal injuries alleged to have been caused by the negligence of the appellant. The appellee alleged that on December 15, 1932, she boarded one of appellant's inbound cars at Ninth and Barber Avenue, in Little Rock, Arkansas, and paid her fare; that, before she became seated, the car made a sudden and violent jerk forward, which threw her against the seats and then to the floor upon her head and back; that the motorman ran a block before he discovered her helpless condition, whereupon he assisted her from the floor; there were no other passengers in the car; as a result of the fall she alleged her nervous system was seriously and permanently shocked, and described her injuries; she alleged that they were permanent, and were caused by the careless, negligent and reckless manner in which the motorman started the car. She asked damages in the sum of $35,000.

Appellant answered denying all of the material allegations in the complaint. There was a trial and a verdict and judgment for the sum of $10,000. Appellant filed motion for a new trial, which was overruled, and this appeal is prosecuted to reverse the judgment of the circuit court.

Appellant's first contention is that there was no negligence shown, and that its requested peremptory instruction should have been given.

Ross Powell, a witness for appellee, testified that he saw the appellee on the street car, and saw her thrown down just as the car passed Barber Avenue; that the motorman stopped the car just after it crossed Rector, and he knew positively that it was appellee; she got off at Ninth and Main Streets. Witness was in an automobile and stopped his car and the appellee got off and, instead of going to the sidewalk, stood there; witness put her in his car and carried her to her home on Ninth

and Barber; that she appeared to be badly hurt; witness stated that he was in his cousin's, C. E. French's, car, and that he had been to the Biddle Shops; that he had an appointment with Willis Smith, and he had gone to the Biddle Shops to collect $5 from Smith; that at the time of the accident he was going home from the Biddle Shops; that it had been snowing, and there was snow on the windows, but the car was lighted, and he could see appellee through the windows. He testified that when he drove up to the car appellee got on, he could not pass the car, and stopped his car, and it seemed that the motorman had trouble getting the street car started. Appellee was the only person on the car.

The appellee testified that she was 38 years old, lived at 910 Barber, Little Rock, where she had lived for 10 years; that on December 15th she boarded a street car at 9th and Barber; that it was snowing and she stepped back into the car to take a seat; that the car started with a sudden and violent jerk, hard enough to throw her off her feet; there was no one else on the car except the motorman; that Powell picked her up at 9th and Main and took her home; that Mrs. Risher helped put her to bed, and gave her some medicine. She then describes at length her injuries. She was facing the rear of the car when she fell, and fell toward the motorman; she did not get the number of the car, but knows it was one of the old type; she did not recognize the operator, and does not know whether she could identify him. Suit was filed on December 30th. She works for the R. F. C. at the Pulaski County Court House.

The evidence that it was snowing; that there was no other passenger on the car; that the car was an old one, and that, without giving the appellee time to be seated, the car was started with a sudden and violent jerk sufficient to throw her down in the manner the evidence shows she was thrown, together with all the surrounding circumstances, is sufficient evidence to submit the question to the jury.

Appellant cites and relies on the case of *Oliver* v. *Ft. Smith Light & Traction Co.*, 89 Ark. 222, 116 S. W.

204, to show that starting the car suddenly or with a jerk is not sufficient to show negligence. In the case referred to and relied on, the court said: "A common carrier of passengers by street car is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons employed in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended.

"When the cars of street railway companies stop for passengers to alight, it is the duty of their servants to stop long enough for the passengers to alight, and to see that the car does not start again while any one is attempting to alight or exposed to danger. Stopping a reasonable time is not sufficient, but it is the duty of the conductor or those in charge to see and know that no passenger is in the act of alighting or in a dangerous position before putting the car in motion again."

In the instant case it was snowing, the appellee had got on the car and the motorman knew she was walking back to be seated, and with this knowledge starting the car suddenly with a violent jerk before she had reached her seat was sufficient for the jury to find that the motorman was guilty of negligence. His negligence under the evidence and circumstances in this case was a question for the jury.

The court in the case above referred to also stated: "As a general rule, a street railway company is not liable for injuries caused by the starting of its cars, nevertheless it may be liable where the method is unusual and dangerous to passengers."

It is not shown that there was any occasion or reason for starting the car suddenly and with a violent jerk before appellee reached her seat.

Appellant then refers to a number of cases decided by the Massachusetts court, and quotes at length from *Desautels* v. *Mass. N. E. St. Ry. Co.*, 276 Mass. 381, 177 N. E. 578. Quite a number of other cases from the same court are cited, and several of them, including the case of *Desautels* v. *Mass. N. E. St. Ry. Co., supra,* cite the case

of *Gollis* v. *Eastern Mass. St. Ry. Co.*, 254 Mass. 157, 149 N. E. 607. The cases cited by appellant cite this last-mentioned case as laying down the rule relied on by appellant here. The rule there stated is that a common carrier of passengers is not responsible for those sudden jolts or jerks which are the ordinary incidents of travel upon electric cars, and that starting a street car when a passenger is in the act of leaving is not negligence if the passenger is within the body of the car. In other words, the Massachusetts rule supports the contention of the appellant. The case however, relied on as laying down the rule, *Gollis* v. *Eastern Mass. St. Ry. Co., supra,* was by a divided court, the court stating: "In the opinion of a majority of the court there was no evidence to warrant a finding for the plaintiff."

But the rule in this court is wholly different from the rule in Massachusetts. The rule here is, as stated in *Oliver* v. *Ft. Smith Light & Traction Co., supra,* that whether a sudden start is necessary and consistent with the prudent and proper operation of the car will depend upon the circumstances, and whether the evidence and circumstances in the instant case justified a finding for the appellee, was a question for the jury.

We do not deem it necessary to discuss the Massachusetts cases cited by appellant, because the rule here is entirely different. Appellant calls attention to some other cases from other courts, but we will not discuss them for the reason that the rule adopted by those courts does not prevail here.

It is necessary in this State, in order to recover for personal injuries, for the plaintiff to allege and prove that the carrier was guilty of negligence. It is not necessary to allege anything else, and the appellant in this case treated the allegations of the complaint as sufficient, without alleging that the jerk was unnecessary. Moreover, the appellee would not know, and probably could not prove, whether the sudden and violent jerk was necessary or not, and the appellant might operate a car, in order to start which it would be necessary to start it with such a violent jerk as to injure the passengers, but

under the rule in this State, the question is whether the carrier was guilty of negligence which caused the injury to the appellee, while she was herself in the exercise of ordinary care. Of course, if the appellant was guilty of no negligence, there could be no recovery, and, as argued by appellant, every one knows there will be some jerks in the operation of street cars and trains of all kinds.

In the case of *Pasley* v. *St. Louis, I. M. & S. Ry. Co.*, 83 Ark. 22, 102 S. W. 387, where suit was brought by the appellant against the appellee for personal injuries while he was a passenger on a freight train, the court said, speaking through Judge RIDDICK: "Under these facts Mr. Justice BATTLE and myself were first of the opinion that the presiding judge was justified in directing a verdict, but, the other judges having taken a different view, we have reconsidered the matter, and concluded, with them, that, in view of the very short time the plaintiff remained on his feet, the question of whether he was guilty of negligence should have been submitted to a jury."

"But the railway company owes to the passenger on its freight train the duty to exercise the highest degree of care consistent with the practicable operation of such train to protect the passenger from injury. Failing in exercising that care, the railroad company is guilty of negligence; and, if that negligence is the proximate cause of the injury complained of, it is liable for the damages consequent on such injury. In the case at bar the plaintiff was riding in the caboose of a freight train as a passenger; he was thrown to the floor and severely injured by a sudden jar or jerk of unusual violence; from that testimony it became a question of fact for the jury to determine whether the railroad company did exercise that high degree of care which it owed to the plaintiff to protect him from injury, or whether it was guilty of negligence in causing the injury." *St. Louis S. W. Ry. Co.* v. *Jackson,* 93 Ark. 119, 124 S. W. 241; *St. Louis, I. M. & S. R. Co.* v. *Holmes,* 96 Ark. 339, 131 S. W. 692. The rule here is that if a passenger is injured by the

negligent sudden starting of a car, and a passenger is in the exercise of due care, the carrier is liable.

Appellant next urges a reversal on the ground that appellee's instruction No. 4 was erroneous and should not have been given. Its first specific objection is that the instruction exacts too high a degree of care from appellant's motorman. The instruction was to the effect that it was the duty to exercise for the safety of the passenger the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons employed in the operation of street cars for the purpose of carrying passengers in view of the instrumentalities employed and the dangers naturally to be apprehended. This was a correct statement of the law.

The second specific objection to the instruction is the phraseology "and that the operator, before the plaintiff, after being accepted as a passenger, had a reasonable opportunity in the exercise of usual and ordinary care to become seated, negligently started the car."

Certainly if the operator negligently started the car before she was seated, and by this negligence caused her injury, the company would be liable, and it was proper to tell the jury that if he negligently did this while she was free from fault herself, the verdict should be for the plaintiff.

Its third specific objection was that it assumes that the facts stated therein would constitute negligence, and therefore invades the province of the jury. We do not agree with appellant in this contention. It not only does not assume that the facts constitute negligence, but that question is by the instruction submitted to the jury.

It is also argued that the instruction assumes that merely because the car started with a sudden or violent jerk, the appellant's motorman failed to exercise the proper degree of care. It not only does not assume this, but also submits this question to the jury. Under the rule adopted by this court, instruction No. 4 was a correct statement of the law.

But it is contended by appellant that, under the doctrine laid down by this court, the instruction was in-

herently wrong, and it cites *Ark. P. & L. Co.* v. *Nuckols,* 182 Ark. 17, 31 S. W. (2d) 415. In that case the instruction which the court held erroneous told the jury that, if the defendant was negligent, the jury should find for the plaintiff without regard to whether the injured person was guilty of contributory negligence, and it was also held to be in conflict with another instruction. The court also in that case held that the appellee was not guilty of contributory negligence as matter of law, but it was a question for determination by the jury.

The next case referred to is *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676. The court said in that case that an instruction directing the jury to find a verdict for either party should be complete in itself, and that separate and disconnected instructions, each complete and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole. There is no such question in the instant case as discussed in the Temple Cotton Oil Company case.

The next case it refers to is the *Natural Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, 294 S. W. 395. In that case the court held an instruction erroneous when it told the jury to find a verdict for the employee, if they found the employer guilty of negligence. That instruction was held erroneous because it ignored the defenses of contributory negligence and assumed risk. We think it has no application here.

The next case cited by appellant is *Garrison Company* v. *Lawson,* 171 Ark. 1122, 287 S. W. 396. This case has no application and does not discuss an instruction like the one in the instant case.

The next case cited is *Newell Contracting Co.* v. *Lindahl,* 181 Ark. 272, 25 S. W. (2d) 1052, and it also cites the case of *Herring* v. *Bollinger,* 181 Ark. 925, 29 S. W. (2d) 696. In the case reported in 181 Ark. on page 272, the court held the instruction erroneous because it told the jury under what conditions they could find the defendant liable, because it did not include contributory negligence. In other words, it is error to tell the jury that if they find the defendant guilty of negligence, with-

out submitting the question of contributory negligence, they can find for the plaintiff. If the jury are instructed in effect to find for the plaintiff, without submitting the question of contributory negligence, the instruction would be erroneous.

In the case of *Herring* v. *Bollinger,* the holding was to the same effect, that ignoring one of the issues in the case and giving conflicting instructions made the instructions erroneous.

We have carefully examined all the instructions and the authorities cited by appellant, and have reached the conclusion that there is no conflict in the instructions, and, taken as a whole, they correctly state the law.

The rule is well established in this State that the carrier of passengers is held to the highest degree of care, prudence and foresight that a prudent man engaged in business as usually conducted would employ, that is, such care, prudence and foresight as can reasonably be exercised consistent with the practicable operation of the road or mode of conveyance used, and the exercise of its business as a carrier, taking into consideration the circumstances and conditions existing at the time and place in question. The degree of care required may vary according to the time and place and circumstances. The carrier is not an insurer of the safety of the passengers, but it is liable for any negligence causing injury to the passenger, while the passenger is himself in the exercise of ordinary care.

It is contended also that the verdict of the jury is excessive. The evidence is in conflict as to the extent of appellee's injuries. The jury may have believed the evidence of appellee's witnesses, and, if so, it was justified in returning the verdict it did. This was a question of fact which was the province of the jury to determine, and as we have many times said, although we might not agree with the jury, yet if there was any substantial evidence to sustain its verdict, we are not authorized to disturb it. In other words, the jury is the judge of the facts, and we cannot substitute our judgment of the facts for the judgment of the jury.

To discuss in detail all the questions raised by appellant and review the authorities cited by it would serve no useful purpose and would unnecessarily extend the opinion.

The original case was tried on May 3, 1933, and the motion for new trial on the ground of newly-discovered evidence was filed in July following. On July 24th the hearing on the motion for new trial on account of newly-discovered evidence was set for trial before the court. The motion for new trial was overruled on October 12, 1933, and an appeal is prosecuted from the order of the court in overruling the motion.

The motion for new trial on the ground of newly-discovered evidence alleged that Ross Powell, the only witness for the plaintiff as to the accident, had sworn falsely at said trial in that he had testified that he was present at the time of the accident and injury complained of by plaintiff, and saw her fall; that he lived about 12 miles from Little Rock, and had driven in an automobile borrowed from a cousin named French, for the purpose of going to Biddle Shops to collect $5 from one Willis Smith, to whom he had loaned said money, and upon his return passed the corner of Ninth and Barber in Little Rock, saw plaintiff board the street car, and saw her fall by reason of a sudden lurch or jerk of the car; that it had not known that Ross Powell would be a witness, because he was not subpoenaed to testify in the case: that after the trial the appellant began an investigation, locating French and his wife in Memphis, Tennessee, and inquired of them, and was informed that they had not loaned Powell a car on December 15th, and that Powell did not have their car at any time on said date; the statements in the motion for new trial were supported by the affidavits of French and his wife; that the defendant then interviewed Willis Smith and learned that he had never borrowed $5 or any other sum from Powell, and he had no appointment with Powell to come to Biddle Shops.

It was further alleged in the motion that Powell was confronted by French and Smith, and had con-

fessed that he had not used the car of French, and had not gone to Biddle Shops to see Smith; that he was present at the time of the accident and saw plaintiff board the street car, and saw her fall to the floor; that he was in an automobile with a lady whose name he declined to reveal; that this lady got out of the car, and he picked up Mrs. Mart and drove her to her home. It was further alleged that Powell admitted that he was interested in the result of the trial, and had been promised a division of the fee of the lawyer for bringing the case to him and testifying as a witness; that he made the arrangement with appellee's attorney, Lewis Rhoton; that his contract was with Mrs. Mart with the approval of Rhoton; he was to get half the lawyer's fee; that Powell further stated that one of the jurors approached him, but he did not know his name, and asked him if he could speak to Mrs. Mart; that Powell told him that she had gone to the hotel with Rhoton and Lookadoo; that this incident occurred after the jury had been instructed and heard the argument, and after it had been dismissed for the night until eight o'clock the next morning. A number of other statements were alleged in the motion to have been made by Powell about who the juror should see, but the motion further says that Powell stated that he saw the accident; that there was a sudden jerk or lurch of the car; that it was one of the old obsolete cars that started with a jump; that the motorman had trouble starting it. It is further alleged that Powell made these statements of his own free will, and had not been offered any money or other consideration, and had not been threatened or intimidated. The statement of Powell was attached to and filed with the motion, as was also the affidavits of other witnesses.

Appellant thereafter filed an amendment to its motion for new trial, alleging that it had used every effort within its power to investigate the accident and injuries, and used due diligence to discover all evidence material to the trial of said cause. The amendment to the motion further alleged that A. R. Bird, who was confined in the Pulaski County Hospital with tuberculosis in its last

stages, had had conversation with Mrs. Mart, and she discussed with him her intention to fall from a street car, and bring suit for damages. Numbers of other statements were made with reference to what appellee had said to Bird in their conversation. This motion was also supported by affidavits.

It is admitted in the amendment to the motion that on April 29th appellant's representatives, having learned about Bird's statement, went to the hospital to interview him, but his condition was such that they were not permitted to interview him on that day.

It is the well-settled rule of this court that a new trial on the ground of newly-discovered evidence will not be granted, unless the applicant has shown reasonable diligence, and whether he has shown such diligence is a question in the sound legal discretion of the trial court, and, unless there is manifestly an abuse of discretion, the finding of the trial court will not be disturbed. *Temple Cotton Oil Co.* v. *Holliday,* 186 Ark. 514, 54 S. W. (2d) 304.

The undisputed evidence in this case shows that appellant learned about what Bird knew on or before April 29th, preceding the trial on May 3rd. It is true they say they could not interview him because of his condition, but the appellant did have knowledge of the facts prior to the trial, and did not ask for any postponement, or to take the deposition of Bird, and we think the trial court was justified in overruling the motion so far as the evidence of Bird is concerned, on the ground that the appellant had not used reasonable diligence.

As to the other grounds for new trial on newly-discovered evidence, no question of diligence is involved, because under the evidence in this case the appellant did not know of the facts which it set up in its motion until after the trial. It did not know that Powell was going to testify and certainly could not have known what his testimony would be. It appears that Powell made a statement in which he said he was interested in the result of the lawsuit; that he was to get half the lawyer's fees, and that he did not go to Biddle Shops in French's car, and did not collect $5 from Willis Smith. Powell

contends that he was drunk when he made the statement. The preponderance of the evidence, however, shows that at the time he made the first statement, he was not drunk. But the statement that he was to get half of the lawyer's fees, together with the statement that he wanted to settle the case for $1,000, so that he could get $250, is not supported by the evidence. The evidence is overwhelming that his statement, which it is alleged he made, that there was a frameup, and that he was to get half the lawyer's fee, is untrue. He admitted in his evidence on the motion for new trial, that he did not go to Biddle Shops in French's car, and that Willis Smith was not the Smith that he collected the $5 from, but he insisted that he did collect $5 from another Smith, who worked at the Biddle Shops. He explained his statement about going in French's car by saying that at the time he testified it did not occur to him that it was material, and he had ridden in French's car many times. But, as a matter of truth, on the night of the accident, he was in a different car, a car belonging to the woman with whom he was driving, and he declined to say who the woman was.

The most that can be said about this newly-discovered evidence is that it discredited and impeached Powell. It is not claimed that he, at any time, made any statements about the accident in conflict with his testimony at the trial of the case.

The rule with reference to granting a new trial on newly-discovered evidence is stated in R. C. L. as follows: "In order to warrant the granting of a new trial on the ground of newly-discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; (5) that it is not merely cumulative or impeaching. Therefore it becomes necessary for the court to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former

trial, and even the credibility of the witnesses." 20 R. C. L. 290-291.

As to whether a new trial should be granted on the ground of newly-discovered evidence, is in the discretion of the trial court. "Newly-discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial is, in the discretion of the court, ground for a new trial, which has been granted in numerous cases. But a case where a showing made requires a new trial is unusual, and applications for new trials for this cause are not favored, especially where the alleged newly-discovered evidence consists largely of conclusions and hearsay. To warrant a new trial, it must appear that evidence is in fact newly-discovered, and not merely the importance of it; and a new trial will be denied if the court is not satisfied that the alleged newly-discovered evidence really exists. A new trial for newly-discovered evidence will be granted only where manifest injustice and wrong appear, and there is no other relief obtainable; in determining whether a new trial shall be granted on the ground of newly-discovered evidence, courts, while keeping within well established legal limits, endeavor to do what the interest of truth and justice requires." 46 C. J. 243.

"This court has many times held that motions for new trial on account of newly-discovered evidence are addressed to the sound discretion of the trial court, and that this court will not reverse for failure to grant unless an abuse of such discretion is shown." *Forsgren* v. *Massey,* 185 Ark. 90, 46 S. W. (2d) 20.

"Moreover, the testimony of Johnson and his wife on the matter set out in their affidavits was in the nature of impeaching testimony of the Smiths; and it has been held by this court that newly-discovered evidence which goes only to impeach or discredit a witness is not ground for a new trial." *Bradley Lbr. Co.* v. *Beasley,* 160 Ark. 622, 255 S. W. 18; *Freeo Valley Rd. Co.* v. *Rowland,* 164 Ark. 613, 262 S. W. 660.

The granting of new trials on the ground of newly-discovered evidence is always within the discretion of the trial court. *Banks* v. *State,* 133 Ark. 169, 202 S. W. 43; *Hinkle* v. *Laseter,* 142 Ark. 223, 218 S. W. 825. We are of opinion that the trial court did not abuse its discretion in overruling the motion for new trial, and the judgments of the circuit court are affirmed.

SMITH and BUTLER, JJ., dissent.

BUTLER, J., (dissenting). I base my dissent principally upon what I conceive to be error committed in overruling the appellant's objection to appellee's instruction No. 4 and in giving said instruction. That instruction, after telling the jury that it was the duty of the appellant to exercise for the safety of the passenger the highest degree of skill and care, continuing, was couched in the following language: "Therefore, if you find from the preponderance of the testimony in this case, that the plaintiff was a passenger upon one of the defendant's cars and, was herself free from fault or negligence, and that she was injured by reason of the failure of the defendant's operator of the car to exercise for her safety that degree of care above stated, and that the operator, before the plaintiff, after being accepted as a passenger had a reasonable opportunity, in the exercise of usual and ordinary care, to become seated, negligently started the car with such a sudden and violent jerk as to throw, and did throw her to and upon the floor of the car, and that she was thereby injured, she at the time being free from fault or negligence, upon her part, your verdict should be for the plaintiff."

A number of objections are raised to this instruction which perhaps might have been cured by instructions given at appellant's request, but that part of the instruction, *i. e.,* "and that the operator before the plaintiff, after being accepted as a passenger had a reasonable opportunity in the exercise of usual and ordinary care to become seated, etc.," was not cured by any subsequent instruction and, in my opinion, was a clear intimation to the jury that the sudden and violent starting of the car

before the appellee had an opportunity to take her seat was negligence.

The authorities relied upon by the appellee to sustain the instruction go no further than to hold that it is the duty of the operator of a car not to start the same until the passenger has taken a safe position. The instruction goes further and would require the motorman not to suddenly start his car as long as a passenger had not had an opportunity to be seated after having entered the car. This certainly is not the law. The most that could be said of the fact that the car was started before the passenger had time to be seated is that this would be a proper matter of argument on the question of whether it was negligence to suddenly start the car.

The appellant made a specific objection to the language singled out in the instruction and quoted above. If there was no other vice in the instruction, it was erroneous in singling out a particular class of testimony and in directing the jury to consider it and calling it especially to their attention. We have frequently held that it was not error to refuse such an instruction. *Western Coal & Mining Co.* v. *Jones,* 75 Ark. 76, 87 S. W. 440; *Jenkins* v. *Quick,* 105 Ark. 467, 151 S. W. 1021; *Scott* v. *State,* 109 Ark. 391, 159 S. W. 1095. So, where such an instruction is given, the error whereof is pointed out in a particular way, it is error to give the same with the objectionable language retained.

MISSOURI PACIFIC RAILROAD COMPANY *v.* SELLERS.

4-3204

Opinion delivered November 20, 1933.

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

Richardson & Richardson, for appellee.

MEHAFFY, J. The appellee, Ralph Sellers, while unloading a car of gravel at Swifton, Arkansas, received personal injuries on account of an alleged defect in the car, and sues the appellant, the Missouri Pacific Railroad Company, which was the delivering carrier, to recover damages for his injuries. The car of gravel was shipped from Black Rock to Swifton, consigned to D. H. Dalton & Company, a partnership composed of D. H. Dalton and T. B. Sarles. The car went over the St. Louis-San Francisco Railroad Company from Black Rock to Hoxie, and was at Hoxie turned over to the appellant, and transported over its line to Swifton, and placed on a sidetrack to be unloaded. The appellant is the delivering carrier.

There was a hole in the bottom of the car, and, according to the testimony of appellee, was four or five feet long and eight or ten inches wide. One witness for appellant testified that the hole was approximately six inches wide and eighteen inches long. The hole was covered with a board or plank, and in unloading the car this board was removed by the clam bucket, which was used to unload the gravel. The appellee was unloading the car for Dalton & Company, by whom he was employed at the time. The car was being unloaded in the usual manner, and appellee did not discover the hole in the bottom of the car until he stepped into the hole and was injured. His left shoulder and arm were wrenched, twisted and sprained, the ligaments and muscles were torn, lacerated and pulled loose, and the bones of his left shoulder fractured and dislocated.

There is no conflict in the evidence about the hole in the car, nor about how the accident occurred. No one saw the clam bucket pick up the board, but the evidence showed that it was bound to have been over the hole, otherwise the gravel would have been lost through it.

An employee of the Lutesville Sand & Gravel Company testified that when cars were delivered to them in which to ship gravel, they had to clean the cars out and patch them if they needed it, and make them in a safe condition, and that they never let a car go out that needed repairs, but witness did not remember about this particular car. They repaired cars like this by putting a plank over the hole and spiking it down.

The Frisco agent at Hoxie testified that there was no car inspector there, but they looked them over for any defect which they could see; that if a car came after he left, which was 4:30 in the afternoon, it would not be inspected at all.

It is contended by the appellant that the court erred in refusing to direct a verdict for it, and it is argued that the verdict of the jury was clearly contrary to the preponderance of the evidence under the rule of law that the only obligation resting on a carrier is to exercise ordinary care to furnish cars in such repair that they can be unloaded in reasonable safety to those engaged in that work.

The court gave instruction No. 1. By this instruction the court told the jury that it was the duty of the carrier to exercise ordinary care to furnish cars in such repair that they could be unloaded with reasonable safety to those engaged in that work. This instruction was not only not objected to by appellant, but it is a correct statement of the law as contended for by appellant.

The question of appellant's negligence was therefore submitted to the jury under proper instructions, and, if there is any substantial evidence to support the finding of the jury, its verdict cannot be disturbed by this court. The car was loaded with gravel, and it would therefore have been impossible for the appellant or any one else to inspect the floor from the inside of the car without removing the gravel. This fact, however, did not relieve the carrier from exercising ordinary care to make the car reasonably safe for the persons who unloaded it. The evidence does not show who repaired the car, nor where it was repaired, and the jury were justified

in finding that there was no proper inspection made to discover the defect in the floor of the car, and that no proper inspection was made. As we have said, there is practically no conflict in the evidence, and we deem it unnecessary to set out the evidence at length.

It was the duty of the appellant to make delivery of freight to the consignees, and when, in accordance with the custom or for the convenience of both parties, the delivery was made by placing the car on a side track to be unloaded by the consignee, an obligation rested on the carrier to exercise ordinary care to furnish cars in such repair that they could be unloaded with reasonable safety to those engaged in the work. *C., R. I. & P. Ry. Co.* v. *Lewis,* 103 Ark. 99, 145 S. W. 898; 3 Elliott on Railroads, § 1265 C; *Griffin* v. *Payne,* 95 N. J. Law 490, 113 Atl. 247; *Ladd* v. *N. Y., N. H. & Hartford Rd. Co.,* 193 Mass. 359, 79 N. E. 742, 9 L. R. A. (N. S.) 874, 9 Ann. Cas. 988.

We think the jury were justified in finding that the car was unsafe, and had not been properly repaired.

We find no error, and the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HARDING.

4-3216

Opinion delivered November 27, 1933.

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

John R. Thompson and *Trimble, Trimble & McCrary,* for appellee.

JOHNSON, C. J. In briefs but one ground is argued and insisted upon by appellant for reversal. Under settled rules of this court all other alleged errors are abandoned. *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. (2d) 1018.

The ground insisted upon and argued in briefs is that the trial court erred in refusing to direct the jury to return a verdict in favor of appellant; or that the testimony is insufficient to support the verdict.

In testing the legal sufficiency of the testimony, we must view it in the light most favorable to appellee. *McGehee & Co.* v. *Fuller,* 169 Ark. 920, 277 S. W. 39; *Missouri Pacific Rd. Co.* v. *Nichols,* 170 Ark. 1193, 278 S. W. 648; *Wisconsin & Arkansas Lbr. Co.* v. *Hall,* 170 Ark. 576, 280 S. W. 363.

The testimony, when viewed in the light most favorable to appellee in the instant case, is to the following effect:

Appellee, R. H. Harding, is the father, administrator and next of kin of Willard Harding, deceased. On November 25, 1931, Willard Harding, deceased, a boy about 17 years of age, was riding upon one of appellant's freight trains, which he had boarded at Hoxie in this State. On the train with the deceased was one Oliver Jobe. The freight train was going from Hoxie to North Little Rock and passed through Austin, a station on appellant's line of railroad, about 9. P. M. When the train begun pulling out of Austin, a brakeman approached deceased and Oliver Jobe and demanded that they get off the train. At this time the train was running about 15 miles per hour. Oliver Jobe, instead of obeying the demand of the brakeman, proceeded down the moving train of cars toward the engine, but the deceased, when last

seen by Jobe, remained at the place where he was when first approached by the brakeman. Oliver Jobe testified that Willard Harding stated to the brakeman that he did not want to get off the train because it was running too fast. Just before 11 P. M. of the same night, appellant operated a passenger train over and upon its tracks upon which deceased was found a few minutes later. Deceased was found immediately after 11 P. M., having attracted the attention of people who resided in the vicinity by his cries, lying upon the south track of appellant's railroad; both his legs and one arm were severed. In response to questions asked by attendants, deceased stated that he was knocked off the train. This declaration of deceased was elicited by attorneys for appellant on cross-examination of witnesses. One witness testified, upon examination, he found imprints, made by one's feet, knees or his head, at or near the ends of the cross ties and near the point where deceased was found.

This testimony was amply sufficient to make out a *prima facie* case in behalf of appellee, and against appellant. *St. Louis, Iron Mountain Railroad Co.* v. *Gibson,* 107 Ark. 431, 155 S. W. 510.

In addition to what has been said, the jury was fully warranted in finding that the deceased was knocked off the freight train by an employee of appellant, or that he was forced by such employee to disembark from the freight train while it was moving at a dangerous rate of speed. Either of these conclusions would be amply sufficient to support a finding of negligence.

The declarations of deceased as to the cause of his injury were elicited by attorneys for appellant, therefore such declarations became competent and relevant testimony, notwithstanding such declarations were neither dying declarations nor a part of the *res gestae.* The rule is stated thus in 64 C. J., § 242 (2d), page 230: "Hearsay evidence, admitted without objection, should be considered and given its natural probative effect, subject to any infirmative suggestion due to its inherent weakness, and may establish a material fact in issue, and sustain a verdict or judgment."

No reversible error appearing, the judgment is affirmed.

FAIRBANK *v.* DOUGLAS.

4-3190

Opinion delivered November 27, 1933.

Reid, Evrard & Henderson, for appellant.

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

JOHNSON, C. J., (after stating the facts). Appellants' first contention is that the sale to Sewer Improvement District No. 1 on September 17, 1928, was void, because, on the date of the sale to the sewer district, title to the property was in the State, because of the forfeiture and sale to the State on June 12, 1927, for nonpayment of taxes for 1926. It is stipulated between counsel for appellant and counsel for appellee that the county clerk of the Chickasawba District of Mississippi County, wherein the lands are situated, has kept no record of the list of delinquent lands and notice of payment of taxes of delinquent lands in said district since 1924. Section 10,085 of Crawford & Moses' Digest, after providing for the form of notice to be attached to the delinquent land list to be sold by the county clerk, provides:

"The clerk of the county court shall record said list and notice in a book to be by him kept for the purpose," etc.

The requirements provided for in § 10,085 of Crawford & Moses' Digest have been held to be mandatory. *Hunter* v. *Gardner,* 74 Ark. 583, 86 S. W. 426; *Earle* v. *Harris,* 121 Ark. 621, 182 S. W. 283; *Osceola Land Co.* v. *Chicago Mill & Lumber Co.,* 184 Ark. 1, 41 S. W. (2d) 759.

It will thus be seen that the failure of the county clerk of the Chickasawba district of Mississippi County to record the list of delinquent lands voided the collector's sale, which occurred on June 12, 1927.

We held in *Tallman* v. *Board of Commissioners of Northern Road Improvement District of Arkansas County,* 185 Ark. 851, 49 S. W. (2d) 1039: "We have heretofore held that, when lands have been sold to the State, the lien for assessments was suspended, and could

be enforced after the lands went back to private ownership. Of course, this meant a valid sale. A void sale would not suspend the statute, because, if void, it is a nullity, binding on no one."

Since the forfeiture and sale of the lands in this controversy to the State in June, 1927, for nonpayment of taxes for 1926 is determined to be void for noncompliance with § 10,085 of Crawford & Moses Digest, and, since this court has decided that a void tax sale does not suspend improvement district taxes and the enforcement thereof, it naturally follows that the sale in the instant case to the sewer district in September, 1929, was, and is, a valid sale.

It is insisted on behalf of appellant that the doctrine as announced in the Tallman case has no application to the facts of this case. The contention is that the assessment of benefits upon which the sale was effected to the sewer district was not due or payable in June, 1927, at the time of the forfeit to the State, therefore it is said that the sewer district was not such interested party as could bring in question the invalidity of the sale to the State. The case of *Hopper* v. *Chandler,* 183 Ark. 469, 36 S. W. (2d) 398, is called to our attention. It is true that we used the following language in reasoning out the conclusion reached in that case:

"In order to question the validity of the tax title, the plaintiff must show that those under whom it holds were the owners of the land or had some interest in it at the time it was sold for taxes. (Citing cases.)

"At the time of the sale for taxes, the appellant had no interest and claimed no interest, and, so far as the record shows, there were no assessments due to improvement District No. 4 at the time this land was certified to the State. It therefore appears that, at the time of the forfeiture and sale for taxes, neither the appellant nor the improvement district had any claim against this land, and, as the title was apparently in the State at the time of the sale under the decree of the chancery court, the chancery sale was void, and the court below was correct in so holding, and the decree must therefore be affirmed."

The language used to the effect; "There were no assessments due to Improvement District No. 4 at the time this land was certified to the State. It therefore appears that, at the time of the forfeiture and sale for taxes, neither the appellant nor the improvement district had any claim against this land," after a careful analysis, is merely dictum, and was not necessary to the conclusion reached. On the contrary, we understand the law to be that an improvement district, holding assessments of benefits against lands within the boundaries of its district, is an interested party in contemplation of law, which can bring in question the invalidity of any tax sale or forfeiture, and this is true, even though the yearly assessment of benefits is not due. The position of an improvement district is analogous to that of a mortgagee of real property. It is uniformly held that a mortgagee of real property may do any act or perform any duty in reference to the protection of title or redemption from sales that can be done or performed by the owner. For this rule to have full application, it is not necessary that the debt secured by the mortgagee be due, or any part thereof, because the status of the parties is established by the execution and delivery of the mortgage. Since we have reached the conclusion that the judicial sale of the property in controversy to Sewer Improvement District No. 1 is a valid sale, it necessarily follows that the decree of the trial court dismissing appellant mortgagees' complaint for want of equity must be affirmed.

Regardless of this result, however, it is insisted that the sale by the sewer district of the lands in controversy to Mrs. Douglas is against public policy and void. It is practically admitted that Robinson's mortgagee cannot raise or insist upon this question. The question can be and is raised, however, by a citizen and taxpayer of the district, who intervened in said cause, and we now proceed to determine it. The first insistence on this question is that the sale to Mrs. Douglas was for an insufficient and inadequate consideration. Improvement districts are not engaged in the real estate business. Their

paramount duty is to collect assessments of benefits and remit the proceeds to the bondholders. It is not contemplated in law that improvement districts will purchase lands with the view of making profits thereon. When the district disposes of lands acquired by it for an amount aggregating all past-due assessments, *prima facie* the law has been satisfied. We know of, and have been cited to, no case holding to the contrary. In *Arkansas-Louisiana Highway Improvement District* v. *Pickens,* 169 Ark. 603, 276 S. W. 355, we stated the rule as follows:

"The theory is, and the practice should be, in order to comply with the spirit of the scheme, for the commissioners in selling the land to secure a sufficient price at least to cover the expenses and all of the delinquent assessments up to the time of the resale, so that the lands will bear their full share of the burden of the expense of the improvement."

The fact is, in the more recent case of *Oliver* v. *Gann,* 183 Ark. 959, 39 S. W. (2d) 521, quoting from the first headnote, we held: "Drainage districts may sell land forfeited for nonpayment of assessments for an amount less than would have been required to redeem the land."

When an improvement district disposes of lands held by it for an amount equal to, or in excess of the accrued taxes, we are unwilling to say that such sale is improvident or fraudulent.

It is next said that Mrs. Douglas could not become the purchaser of the lands from the sewer district. This contention is grounded upon the fact that her husband was the attorney for the district. We know of no rule of law, and none has been cited by counsel, to this effect.

It follows from what we have said that the decree of the chancery court should in all things be affirmed.

SMITH, J., (dissenting). The net result of the majority opinion is that for a consideration of $58.66 the wife of the attorney for the improvement district has acquired property which the undisputed testimony shows has—even now—notwithstanding the depression, a market value of not less than $6,000 cash. No witness placed the cash market value at a smaller figure, and some

placed it much higher. The Bankers' Mortgage Company made a cash loan of $5,000, and the appellants, who are the trustees of the Missouri Congregational Conference, thought the property safe security for a loan of that amount, and upon that assumption took an assignment of the mortgage as an investment for $5,000 of the fund held in trust for the support of indigent preachers of that denomination. This result has been reached because, forsooth, the commissioners of the improvement district had the power to sell the property for the price paid.

The sale was for less than one per cent. of the value of the property, and was made to the wife of the attorney for the district.

W. H. Stovall, who is a member of the board of commissioners of the improvement district and the secretary thereof, testified that it was the custom of the board to make deeds to the original owners, in consideration of the taxes, penalty, interest and costs for which property had been sold to the improvement district, and that such deeds were executed to effect redemptions, and that he executed the deed here sought to be canceled upon its presentation to him for that purpose without knowing who the grantee was and upon the assumption that a redemption was being effected by the owner. This result was accomplished because of the confidential relation existing between the secretary of the board of commissioners and its attorney, and the secretary testified that he would not have executed the deed for the consideration received had he known that the deed was being executed to a stranger to the title.

Because such transactions might occur, either inadvertently or through design, public policy should prevent their occurrence.

It may be conceded—and I make the concession—that payment of the taxes, penalty, interest and costs for which the land sold to the district, or even a smaller sum if a larger amount could not be obtained, is a consideration sufficient in law to support a deed conveying such property. On the other hand, it is certain that a

much larger amount could have been obtained, had any effort in that behalf been made, and, in my opinion, the good faith which should exist between attorney and client required that such effort be made before the attorney for the improvement district should be permitted to acquire title to valuable property for less than one per cent. of its value, even though the title was taken in the name of the attorney's wife, if, indeed, such a conveyance could be made at all.

The case of *Arkansas-Louisiana Highway Imp. Dist.* v. *Pickens,* 169 Ark. 603, 276 S. W. 355, from which the majority quote as holding that the district had the *power and authority* to sell the land for the amount of taxes, etc., for which it had been sold to the district, states the duty of commissioners acting for the public in such matters. The facts in that case were that, through the failure of certain landowners in an improvement district to pay their annual assessments of benefits, the district had made default in the payment of its maturing obligations, and it became necessary to levy an increased per cent. of the betterments assessed against all the property, including that of lands owned by persons who were not in default. The owners who had paid their assessments complained that, had other owners paid theirs, no increase would have been required in the assessments; and it was complained also that is was unfair to increase the burdens of persons who had paid their assessments because of the delinquency of others who had made default in that respect. This objection was answered in a statement declaring the duty of the commissioners of the district. This statement, from which the majority have quoted only a single sentence, reads as follows:

"When the lands are bought in by the commissioners at the foreclosure sales, they become the property of the district, to be used for the purpose of raising revenues to pay the bonds. The lands do not belong to the bondholders, and the district is not entitled to take credit, as contended by counsel for appellees, to any extent until revenues are raised by the sale thereof.

The lands thus purchased become the absolute property of the district, and express authority is conferred by the statute to sell the lands at prices fixed by the commissioners. The theory is, and the practice should be, in order to comply with the spirit of the scheme, for the commissioners in selling the land to secure a sufficient price at least to cover the expenses and all of the delinquent assessments up to the time of the resale, so that the lands will bear their full share of the burden of the expense of the improvement. Nor is there any dislocation or destruction of the scheme of uniformity by reason of the purchase by the district of delinquent lands. By the purchase of lands at foreclosure sale, when the sales are confirmed, the district becomes the absolute owner of the lands, which renders, not only the estimated benefits, but the total value of the lands subject to sale to raise revenues. It would be a contradiction in terms to say that the foreclosed lands escape their just proportion of the burden by becoming the property of the district, when, as a matter of fact, by this change in the title the lands become wholly subject to these burdens.

"The requirement of uniformity is fully met in the assessment of benefits and the methods of enforcing the same, and the fact that some of the lands, by delinquency of the owners, may become the property of the district under foreclosure proceedings does not, as we have already seen, disturb the uniformity of the scheme. If it were otherwise, it would be impossible to comply with the requirement of uniformity, for foreclosure of the tax lien and purchase by the district in the absence of other purchasers is the only method whereby the burden of taxation can be successfully enforced."

It appears to me to be apparent that the requirement of uniformity is not only not met but is wholly destroyed if a district having acquired title to delinquent property, as the district here did, may sell a choice piece thereof to the wife of the attorney of the district whose duty it is to protect the public interest.

A similar question arose in the case of *Chicago Mill & Lbr. Co.* v. *Drainage Dist. No. 17,* 172 Ark. 1064, 291 S. W. 810, where the duty of the commissioners of an improvement district as declared in the Pickens case, *supra,* was reaffirmed. To make that duty plainer and so certain that no doubt about it could exist, it was said, after reaffirming the Pickens case: "It was pointed out in those cases that the lien of the district continued until the taxes were paid or until the lands themselves were acquired by the district through sales for the nonpayment of the taxes, and that, when the delinquent taxes were paid, they became available and should be used in paying the obligations of the district, and further, that, if the lands were sold to the district and not redeemed, then the entire value of the lands to be realized by a sale thereof would be available for this purpose. So that, while a delay would be entailed in obtaining and applying revenues from the delinquent lands, these revenues would finally be obtained and applied, and thus no unequal burden would be imposed."

There is no question about the power of the commissioners to sell delinquent property which has forfeited to it because of the delinquency. But the power to sell is not limited to a sale merely for the taxes, etc., for which the land sold. On the contrary, the power exists, and the duty is by law imposed, if the property must be sold by the district, to realize its revenues and to place the property back on the tax books, to sell it as advantageously as possible.

The benign policy which the secretary of the district testified he thought he was following, when he signed the deed here attacked,. of executing deeds to original owners as a method of perfecting redemption, is one thing. The policy of permitting a stranger to the title, whose husband occupies the most confidential of all relations, to take advantage of information acquired in the course of that relation to purchase property acquired by the district through the professional services of its attorney is a wholly different proposition.

It must be remembered that this question is not raised by one who has no interest in the subject-matter. The trustees of a fund from which a loan of $5,000 was made upon the security of the land sold, have made themselves parties to this proceeding to protect their security evidenced by the mortgage which they own by the assignment thereof to them. The majority opinion furnishes full authority for this intervention on their part. In arguing that the improvement district itself had the right, as an interested party, to question the forfeiture to the State for the nonpayment of the general taxes, the majority say: "The position of an improvement district is analogous to that of a mortgagee of real property. It is uniformly held that a mortgagee of real property may do any act or perform any duty in reference to the protection of title or redemption from sales that can be done or performed by the owner. For this rule to have full application, it is not necessary that the debt secured by the mortgage be due, or any part thereof, because the status of the parties is established by the execution and delivery of the mortgage."

However, an owner of property within the district has intervened in that capacity to protect the interest of the district. It cannot therefore be said that the question of the validity of the deed here attacked has not been raised by one having the right to question its validity. If it be said that the property owner does not propose to pay the improvement district its due, it may be answered that the assignees of the mortgage debt make that offer, and their entire good faith is shown not only by their tender but by their prosecution of expensive litigation to be accorded that right.

In my opinion, this deed should be set aside as violative of public policy and positive law, and the right of redemption should be accorded as prayed. The case of *Cabell* v. *Board of Improvement,* 124 Ark. 278, 187 S. W. 666, appears to me to require that action.

I am authorized to say that Justices MEHAFFY and McHANEY concur in the views here expressed.

HEARD *v.* GRIFFIN.

4-3213

Opinion delivered November 27, 1933.

B. H. Heard, pro se, for appellant.

Longstreth & Longstreth, for appellee.

SMITH, J. Appellant brought unlawful detainer to recover possession of a farm from appellee, who was in possession of the land under an unexpired lease at the time appellant bought it. Appellee was evicted, and filed an answer asserting his right to the possession, and, in a cross-complaint, he prayed damages for his alleged wrongful eviction.

The principal issue in the case, except that of the damages, is presented in an instruction requested by appellant, which reads as follows: "No. 2. If you find from the evidence that the defendant had a rental contract for the rent of the land in question for the year 1932, and that, when plaintiff Heard learned that he claimed to have such a contract, he offered and proposed permitting him to proceed under such contract, and if you further find that defendant Griffin declined to accept such proposition and by word and acts led the plaintiff to believe that he did not desire to retain possession and remain on the land for the year 1932, and that, acting on such impression, plaintiff Heard rented said lands to another, you are instructed that defendant Griffin would be

estopped to set up his rental contract for the year 1932, if any, and you will find for the plaintiff."

There was a conflict in the testimony touching the questions of fact referred to in the instruction, which have been settled by the verdict of the jury in appellee's favor, the testimony being sufficient to support the verdict.

The verdict of the jury in appellee's favor is conclusive of the issue of fact that the eviction was unauthorized. Damages were assessed by the jury in appellee's favor in the sum of $500, and judgment was rendered accordingly.

It is insisted that the instructions on the question of damages were erroneous, and that there was no testimony showing appellee had been damaged by his eviction.

We are of the opinion, however, that there was sufficient competent testimony to support the verdict of the jury. There was testimony that the rental value of the farm was much more than the amount of rent which appellee had agreed to pay. There was testimony also to the effect that appellee had sustained certain special damages, these consisting in the value of work which had been done by appellee to prepare the land for cultivation and the expenses of his removal from the farm. The testimony as to the difference between the rent reserved and the actual rental value, and that as to the special damages, was legally sufficient to support an even larger judgment. The truth of this testimony was, of course, a question for the jury.

The instruction which submitted these issues reads as follows: "No. 9. You are instructed that, if you find from the evidence that W. H. Griffin was caused to be wrongfully evicted in this case by the plaintiff, you will take into consideration as elements of damage the difference in the rental value of the property and the amount of rent which Griffin was to pay, the value of the work and improvements he had made up to the time of his eviction, the expense of moving for himself which you find from the evidence, if any, he has caused to suffer as a direct and natural consequence of the wrongful act of the plaintiff, if you find there was any wrongful act of plaintiff."

There is no error in this instruction. *McElvaney* v. *Smith,* 76 Ark. 468, 88 S. W. 981.

As there appears to be no prejudicial error in the record, the judgment must be affirmed It is so ordered.

KING *v.* SOLMSON.

4-3207

Opinion delivered November 27, 1933.

Streett & Streett, for appellant.

Powell, Smead & Knox, for appellee.

SMITH, J. On August 20, 1928, H. B. Solmson leased a building in the city of Camden to Stephens & Wallin for a period of two years beginning April 1, 1929, at a stipulated rental of $175 per month. The lessees occupied the premises until December, 1929, when they made a sublease of the building to Ben King. This sublease was evidenced by a writing dated December 10, 1929, and provided for the payment by King to Stephens & Wallin of $175 per month from January 1, 1930, to March 31, 1931, the date of the expiration of the original lease.

King occupied the building under this sublease until in June, 1930, at which time, according to his testimony, he surrendered the sublease to Stephens & Wallin, and he thereafter entered into negotiations with Solmson for a new lease agreement, which negotiations terminated in an oral agreement whereby King would continue to occupy the premises for an undetermined time, paying $150 a month for each month he remained in possession. In the meantime, and on June 7, 1930, Stephens & Wallin indorsed a written assignment of its interest in the sublease contract to Solmson.

King continued to occupy and use the premises until January 15, 1931, when he vacated the building and delivered the keys thereto to Solmson, and he then paid a half month's rent in January, and now denies liability for any sum in addition.

Suit was brought by Solmson against King to recover rent up to the date of the expiration of his sublease, which was two and one-half months, and which, at $150 a month, would amount to $375, and judgment was prayed for that sum.

The question of fact was submitted to the jury whether the sublease had been annulled by an agreement that King should remain in possession as a tenant from month to month for an indefinite period, with the privilege of vacating the property when he pleased. This issue of fact was determined in King's favor, as is evidenced by the verdict of the jury against him for only $225, which was the rent unpaid for the month of January and for the entire month of February. There was a judgment accordingly, from which King has appealed.

The court charged the jury that King was liable in any view of the case for the half month's rent for January, which King had not paid, amounting to $75. This instruction was correct. According to King's own testimony, he had changed the lease for a definite time, expiring March 31, 1931, into a lease from month to month for an indefinite time, with the privilege of terminating it at his pleasure. But, as there was no agreement made or custom proved dispensing with notice, King should have given the month's notice which the law requires of the landlord and the tenant alike to terminate a lease from month to month.

King insists that in no event should he be held liable for more than one month's rent. But we do not concur in that view. It is an undisputed fact that King gave notice on January 14, 1931, of his intention to vacate, and, pursuant to this notice, he vacated on January 15, 1931. It is argued that previous notice had been given to Solmson by King in December, 1930; but we do not so interpret the testimony. There is no question but that in December, and prior thereto, King had complained to

Solmson about the rent charged, and had demanded a reduction, and had stated to Solmson that he would have to get another tenant unless a reduction was made; but we find no evidence of a formal notice of a definite intention to vacate—which the law requires—prior to January 14.

This being true, the question of law for decision is whether King is liable for only one month's rent, or whether he is liable for the remainder of the month of January, on the 14th of which month he gave notice of his intention to vacate, and for the ensuing month of February. The original lease began on the 1st day of the month, and there is no testimony that the rent-paying date was changed, or that time was to be computed otherwise than from the 1st day of each month.

The common-law rule is that, in order to terminate a tenancy from month to month, notice to quit by the landlord, or notice of an intention to vacate on the part of the tenant, is necessary, and this notice must be served before the beginning of the succeeding rental month. 1 Underhill on Landlord and Tenant, § 115.

The authorities are reviewed by Mr. Justice HUGHES in the case of *Stewart* v. *Murrell,* 65 Ark. 471, 47 S. W. 130, where he quoted from Gear on Landlord and Tenant, page 85, § 32, as follows: " 'The right to notice to quit is mutual between landlord and tenant. * * * A tenant from month to month is entitled to thirty days' notice to quit, unless the statute allows a shorter period of notice. The notice must be for a full month before the day on which a new holding would begin, and terminate at the expiration of a monthly period.' See cases cited to § 32 in note 15, p. 89." Following this quotation Mr. Justice HUGHES proceeded to say that, "We have no statute regulating the length of notice required in such case, and we are therefore governed by the common-law rule."

Our adherence to the common-law rule was reaffirmed in the case of *Reece* v. *Leslie,* 105 Ark. 129, 150 S. W. 579, where it was said that, in case of a tenancy by the month, it is necessary, in the absence of an agreement between the parties for a different time, that either party give the

other thirty days' notice to terminate the tenancy, the notice ending with a monthly period.

There appears to be no error, and the judgment must therefore be affirmed. It is so ordered.

WHITNER *v.* THOMPSON.

4-3211

Opinion delivered November 27, 1933.

Bruce Ivy and *Harrison, Smith & Taylor,* for appellant.

Frank C. Douglas, for appellee.

HUMPHREYS, J. This is a suit by appellee against appellant for unlawful detainer of a part of the Glen Hotel building on lots 8 and 9 in block 20 of Blythe Addition to the city of Blytheville, Arkansas, and for accrued rents thereon.

Appellant filed a demurrer to the complaint on the ground that three days' notice to vacate was not given him as required by statute, which demurrer was overruled over his objection and exception.

He also filed an answer, denying the allegations of the complaint and a cross-complaint, claiming damages in excess of accrued rents on account of appellee's failure to repair the roof and pipes to the heating plant as required by the original lease, and contractual assignment thereof, which was signed by appellee.

Upon a hearing of the cause, the trial court directed the jury to return a verdict against appellant for the possession of the leased property and the accrued rent thereon, less damages in the sum of $125, on account of a failure of appellee to repair the roof.

There was a conflict in the evidence as to whether appellant sustained any damages on account of appellee's failure to repair the return water pipes of the heating plant underlying the cement and tile floor in the basement of the building. The testimony introduced by appellant tended to show that the pipes leaked on account of age and long usage and that, in order to run the heating plant, it took more water and coal than it would have taken had the pipes been replaced with new ones.

The trial court excluded this testimony, over appellant's objection and exception, on the ground that, under the terms of the lease, appellee was only required to keep the outside of the building in repair, and that appellant was required by its terms to make all repairs inside the building, holding that the heating pipes were inside the building. The clause in the original lease relative to the repairs is as follows:

"It is understood and agreed that the lessor shall make all necessary repairs to the roof and outside of the building in order to maintain the building in a habitable condition and fit for its occupancy by the lessee in the conduct of his business. But that the lessee shall make all repairs or necessary alterations on the inside of the building, including windows in the rooms occupied as a part of the hotel business, at his own expense, and he agrees and binds himself to keep the building so occupied and used in as good state of repairs as he received same."

The construction of this clause by the learned trial court was correct. The heating pipes were inside and not outside the building, so it was the duty of appellant to keep them in repair. All testimony as to damages resulting from the condition of the pipes was properly excluded, as no duty under the lease rested upon appellee to repair or replace them.

Appellant contends that the contract for the assignment of the lease to him by the prior lessee, which was approved and signed by appellee, contained a clause which imposed the duty upon appellee to repair and replace the heating pipes. The clause is as follows: "It is further understood and agreed that the owner of said property shall make all necessary repairs to all of said buildings, in order to maintain said buildings in a good and habitable condition. And the said buildings and premises shall be kept in such condition by the owner as to make them fit for their use in the conduct of the business for which they are leased. The lessee agreed that he will use and keep said buildings in a good and husbandlike manner, and that he will not destroy, tear down or impair the use of any of said buildings through any misuse or bad conduct on his part. That he will use his best efforts in seeing that the buildings and premises are maintained and kept in as good condition as possible."

The clause quoted would have the effect contended for if it stood in the contract of assignment alone. It was in the contract of assignment which appellant prepared and presented to the appellee for his approval and signature, but appellee refused to approve and sign it until the following paragraph was inserted, to-wit:

"Regardless of the terms hereinbefore expressed, it is understood and agreed that the said F. W. Whitner accepts said hotel and cafe rooms under the terms of the original lease of May 10, 1928, and supplemental thereto under date of February 13, 1930, and agrees to pay rents in accordance to the terms of said contracts; that in consideration of the substitution of said F. W. Whitner in lieu of said R. J. Alston, the present owner of said property, the said John Thompson, does not agree to do anything not specifically set out in said contract of May 10, 1928, and supplemental contract of February 13, 1930, even though this contract has undertaken to state such terms and conditions."

It is apparent that the paragraph was added so that, as between appellant and appellee, the clause relative to repairs contained in the original lease should govern in case any dispute should arise between them.

Appellant also contends for a reversal of the judgment on the ground that the suit was prematurely brought. It is argued that three full days' notice was not given to vacate the property before the suit was brought; and, in support of his contention, he cites the case of *Jones* v. *State,* 42 Ark. 93. The statute under which Jones was indicted provided for "at least three days' actual notice" before being required to work on the roads. This statute was properly construed to mean that he was entitled to three full days' notice.

The statute applicable in the instant case is § 4838 of Crawford & Moses' Digest, which provides that suits may be brought in unlawful detainer after three days' notice to quit. Under the language used, the day of serving the notice may be counted. The notice was served on appellant to vacate on September 2, and suit was not brought until September 5, which was after three days' notice had expired, counting the day of service.

No error appearing, the judgment is affirmed.

MERRITT *v.* DERMOTT SPECIAL SCHOOL DISTRICT.

4-3319

Opinion delivered November 27, 1933.

Ohmer C. Burnside, for appellant.

John Baxter, for appellee.

KIRBY, J., (after stating the facts). Neither the bondholders nor the trustee named in the pledges securing the bonds of the district, nor the holders of the $40,000 in outstanding warrants issued by the district, were made parties to the suit.

Counsel for appellee alleges in the complaint: "It is contended by the bondholders that the county treasurer should set aside funds to pay certain maturing interest on bonds outstanding of the district, and the registered warrant holders contend that the money now in the hands of the treasurer should be paid on warrants."

Act 169 of 1931 is a very comprehensive school law, but does not seem to enter into this controversy, except as to the amount to be set aside to be used for school purposes from the taxes of 1934 for 1933, and the amount to be used for bond purposes.

The effect of the decree herein is to impound the $7,500 now on hand to the credit of appellee district, except as to the payment of the two interest items approximating $2,600, and the money to be derived from redemptions for the purpose of enabling appellee to operate the school in 1933-34, notwithstanding the fact that the holders of the $40,000 of outstanding warrants, some registered under the law, then existing at the time and pressing for payment, and in the face of the fact that there is interest due on the bonds of the district. The teachers and other employees holding the past-due warrants of the district are deprived of their money, because, under the decree herein, there can be no money used to pay same. The fact that the court ordered the moneys impounded indicated that there are holders of warrants pressing for payment out of the little money on hand in the treasury, and what little is to be collected.

The law provides for boards of directors for managing the affairs of the school, protecting the property of the school district and carrying on and operating the schools. It also provides for the issuance of warrants, how they should be issued, and by whom, and the liability thereunder. These boards are given plenary power, and have ample discretion in the conduct and management of the business of the district, the operation of the schools and the allowance and payment of claims for which the district may be liable.

(1). The directors of this school district made an investigation of its assets and liabilities, and allotted a

certain part of the revenues on hand and arising for expenses of conducting the school, and this without regard to some of the other debts and liabilities. They determined the amount for which the school could be operated, how the accounts should be kept, and that a certain amount of the school funds should be allocated to the payment of operating expenses of the school, without regard to whether other obligations of the district could be paid in accordance with their terms. They, then, without notice to other warrant holders and creditors, went into chancery court and had it approve the budget as estimated, and the treasurer enjoined from paying other outstanding warrants or moneys, except such as were included in the budget. It made no difference to them that the operation of the school with the expense incident thereto, would cost and require the expenditure of so much of all the school revenues, present and future, that it would not leave enough in the treasury to take care of the registered warrants, fixed expenses, etc. The effect of such an order is to deprive other warrant holders of the opportunity to collect, or be paid some of their warrants, and must, of necessity, result in long delay in the collection thereof. The boards of directors are provided for by law, and selected to manage and conduct the affairs of the district in accordance with law and the best interests of the district. It was never contemplated that the chancery court should supervise or direct the conduct of the school and board of directors in the operation of the school and the creating of indebtedness and payment thereof. The chancery court has no such power or jurisdiction in fact.

(2). The intervener had the right to notice of the hearing of the court for approval of the budget, or schedule of expenses submitted by the directors, since the claims of other creditors were to be affected, and the payment of them necessarily delayed by the action taken by the court, and it is undisputed that no notice of such hearing was given to the intervening creditors, and interveners had the right to come in and present the matter of their claims before such liability was fixed about the

expenses necessarily delaying and preventing the payment of their claims, if they otherwise could have been paid.

If the chancery court had such jurisdiction, they would doubtless be in charge, directing, supervising and controlling the expenses of operation of the schools in half the districts in the State of Arkansas. This would produce an intolerable condition, and impose on the courts as well as the districts, notwithstanding the exercise of such jurisdiction might result beneficially to many of the schools.

Intervener's petition should have been heard and granted, that the parties interested might have had an opportunity to protect their rights, which were materially affected by the unwarranted order of the chancery court of which they had no notice. The chancellor erred in not granting the motion for setting aside the decree that the rights of the intervener might be determined; and, not having authority to exercise this supervising and controlling power over the district's directors and affairs, and against the interest of all others of those to whom the district was indebted, the decree is reversed and the cause dismissed.

W. B. WORTHEN COMPANY *v.* THOMAS.

4-3192

Opinion delivered November 27, 1933.

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[redacted]

[redacted]

[redacted]

Francis T. Murphy and *Eugene H. Murphy,* for appellant.

Fred A. Isgrig and *Harry Robinson,* for appellee.

KIRBY, J., (after stating the facts). The only question for determination here is the constitutionality of act 102 of 1933, approved March 16, 1933.

It is insisted that said act is violative of § 10, article 1, of the Constitution of the United States, as impairing the obligations of a contract, and § 17 of article 2 of the Constitution of Arkansas.

In *Acree* v. *Whitley,* 136 Ark. 149, 206 S. W. 137, it was said: "It may be stated at the outset that § 21 does not relate to the absolute exemption of personal property allowed a resident of this State, as exempt from certain

debts and liabilities under §§ 1 and 2 of article 9 of our Constitution. The reason is beneficiaries in insurance policies, as well as other persons, are obliged to pay judgments against them in favor of third persons and exemptions from execution and other process of the court are fixed by the sections of the Constitution above referred to. The statute in question was not enacted for the purpose of allowing beneficiaries exemptions which they are not entitled to under the Constitution and laws of this State, but the act was passed for the purpose of exempting these funds from the operation of our general statutes regulating issuance of garnishments and proceedings thereunder."

It is true this act is broader in its terms than the one construed in the above case, since it exempts all moneys payable to any resident of the State "as the insured or beneficiary designated under any insurance policy or policies providing for the payment of life, etc., * * * from liability or seizure under judicial process of any court, and shall not be subject to the payment of any debt by contract or otherwise by any writ, order, judgment or decree of any court, * * * provided that the validity of any sale, mortgage, or hypothecation of any policy of insurance, etc., shall in no way be affected by the provisions of this act."

As said by this court of the other statute, it can well be said of this statute, act 102 of 1933, that it "does not relate to the absolute exemption of personal property allowed a resident of this State as exempt from certain debts and liabilities under §§ 1 and 2 of article 9 of our Constitution. * * * was not enacted for the purpose of allowing beneficiaries exemptions which they are not entitled to under the Constitution and laws of this State, but the act was passed for the purpose of exempting these funds from the operation of our general statutes regulating issuance of garnishments and proceedings thereunder."

This could be done without violation of our Constitution. No creditor has the right to any particular remedy, and such statutes prohibit only the issuance of garnishments against such funds, as already held by our

court; and neither does it violate the Constitution of the United States in impairing the obligations of a contract by prohibiting the use of certain procedure in subjecting certain insurance funds to the payment of a judgment against the beneficiary in an insurance policy—funds that were not in existence when the judgment was obtained and were allowed to be provided for by the insured whom the law allows to expend a certain amount of money to provide insurance for the benefit of his wife.

The law allows the equities in cases to be considered in the construction of the statutes relating to the subject in question. *Evans-Snider-Buel Co.* v. *McFadden,* 105 Fed. 293, 58 L. R. A. 900.

The judgment is affirmed.

MEHAFFY, J., dissents.

ARKANSAS POWER & LIGHT COMPANY *v.* BOYD.

4-3203

Opinion delivered November 27, 1933.

W. H. Glover, Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron,* for appellant.

John L. McClellan, Kenneth C. Coffelt and *Wm. J. Kirby,* for appellee.

MEHAFFY, J. This action was brought by Zelma Boyd, appellee, against the appellant, Arkansas Power & Light Company, to recover damages for personal injuries alleged to have been caused by the negligence and carelessness of the appellant, its motorman, agent, servant and employee, in charge of and operating the street car, in negligently and carelessly advancing said street car from a full stop at the approach to the street intersection with State Highway No. 10, directly into the path of a large speeding motor truck which was proceeding in a westerly direction on State Highway No. 10, causing the front end of said street car, which was traveling in a northerly direction, to collide violently with said motor truck. Appellee alleged that, as a result of said collision, the street car was derailed, she was thereby thrown from her seat violently and with great force against the side and wall of said street car, causing her to rebound and fall and strike the floor, seriously and permanently injuring her. She then describes her injuries, and prays for damages in the sum of $20,000.

The appellant answered, denying all the material allegations of the complaint, and alleging that, if appellee was injured or damaged by riding on the street car at the time and place described in the complaint, neither the injury nor damages were caused by any negligence on the part of appellant, but were caused by the negligence and carelessness of the driver of said truck in striking said street car, in that, at and before the time of the collision, the driver of the truck was not keeping any lookout for the street car, and was driving at a rapid, danger-

ous and negligent rate of speed, and failed to yield the right-of-way to said street car, and failed to stop in obedience to the stop buttons or signs, which were then and there placed at said intersections under the authority of the city of Little Rock, Arkansas, pursuant to an ordinance or resolution duly passed by the city council of Little Rock, by which it is required that all vehicles entering Prospect Avenue from State Highway No. 10, either east or west bound, shall come to a full and complete stop. Appellant further alleged that appellee herself was negligent, and contributorily negligent, in that at and before the time of the collision she was not keeping any lookout for her own safety, and did not take any steps or measures or do anything to protect herself from injury, and that such negligence, and contributory negligence on her part, proximately and directly, contributed to her damages, which negligence and contributory negligence appellant pleaded in bar of the suit.

Appellee filed an amendment to her complaint, alleging that she had suffered other injuries than those mentioned in the original complaint. Thereupon the appellant objected to the court's permitting appellee to file the amendment to her complaint, and appellant filed motion for continuance, which was overruled, and exceptions saved.

There was a trial by jury, and a verdict and judgment for $4,000 against appellant. Motion for new trial was filed and overruled, and the case is here on appeal.

Appellant contends that the motorman was guilty of no negligence, because he had a right to assume that the driver of the truck would observe the law, and stop his truck before reaching the car line, and attention is called to a great many authorities. It is true that one may assume ordinarily that others will not violate the law, but no one can assume that a person is not going to violate the law or the traffic rules, when every indication is to the contrary. This is not a controversy between the driver of the truck and the street car company. The undisputed evidence shows that the truck driver was guilty of negligence; still, if the motorman was guilty of negligence

which was the proximate cause of the injury to a passenger, the carrier is liable, no matter how negligent some one else may be, nor does it matter about the comparative degree of negligence.

The motorman himself testified that, at the place of the accident, there was a stop sign, and that people were supposed to stop before they entered Prospect Avenue. He testified that he started the street car when he saw the truck coming a half a block away, because the driver of the truck had plenty of time to stop, and the motorman assumed that he would see the street car or the sign, or both. After seeing the truck coming down the street at a rapid rate of speed, the motorman testified that he kept his eyes in front thereafter. There is some confusion about his testimony as to when he looked at the truck again, but it is undisputed that the truck was about a half block away, coming at a rapid rate of speed down a slight grade, and that the motorman then looked in front, and exercised no care at all to see whether the truck was going to stop, or whether there was danger of a collision. The motorman said that the truck hit the street car after he had gone a little past the corner of the intersection; that he saw him again just before he struck the street car. The motorman said he thought he was going about ten miles an hour. He had stopped to let passengers alight, immediately before entering the street, and it was as he started up after letting the passengers off that he saw this truck a half block away, and testified that he did not know whether the truck driver was slowing down or not.

The evidence of all the witnesses that saw the accident is to the effect that the street car stopped before entering the street, to permit passengers to alight, starting up again when the truck, which hit the street car, was about a half block away, coming at a rapid rate of speed, and, notwithstanding that numbers of passengers were on the car, no precaution was taken to protect them, but the motorman simply assumed that the truck driver would stop, although the evidence shows that there was no indication that the truck driver was going to stop or that he could stop. The truck was heavily loaded, and no

effort was made to check its speed until about the time it struck the street car.

The street railway company owes to its passengers the duty to exercise the highest degree of care, consistent with the practicable operation of its cars, to protect the passengers from injury. Failing in the exercise of that care, the company is guilty of negligence, and, if the negligence is the proximate cause of the injury complained of, it is liable for the damages caused by such negligence.

In this case it was a question of fact for the jury to determine whether the street car company did exercise that high degree of care which it owed the appellant to protect her from injury, or whether it was guilty of negligence in causing the injury. *St. L. S. W. Ry. Co.* v. *Jackson,* 93 Ark. 119, 124 S. W. 241; Booth on Street Railways, §§ 327-328.

The fact that the driver of the truck was guilty of negligence which contributed to the injury does not relieve the appellant if it was guilty of negligence, because, where the negligent acts of two persons concur to produce an injury, either will be liable for damages. *Mo. Pac. Rd. Co.* v. *Riley,* 185 Ark. 699, 49 S. W. (2d) 397; *Johnson* v. *Mo. Pac. Rd. Co.,* 167 Ark. 660, 269 S. W. 67; *Jonesboro, L. C. & E. R. Co.* v. *Wright,* 170 Ark. 815, 281 S. W. 374; *Bennett* v. *Bell,* 176 Ark. 690, 3 S. W. (2d) 996.

The driver of a street car, notwithstanding his car has a superior right-of-way, should stop or slacken his speed to avoid imminent danger from collision with vehicles upon the street, and, notwithstanding the negligence of the driver of the private vehicle, the carrier will be liable to a passenger where, under such circumstances, its driver failed to exercise proper care. So it will be if a passenger, without his fault is injured by the collision between cars, whether both are owned by the defendant or not, if the accident be proximately due, in part at least, to the negligence of its servants. Booth on Street Railways, § 360.

It is contended, however, that the appellee is not entitled to recover because of her contributory negligence. It is argued that she saw the truck approaching, and should have warned the motorman. It was not her

duty to warn the motorman of a thing he saw himself. Besides, even if she thought the truck was not going to stop, she had no right to interfere with the motorman, but had the right to assume that he would take whatever precaution was necessary, and, if necessary to avoid the collision, stop his car.

"In the present case the duty rested on the defendant to be alert and watchful at all times, and to exercise all the care necessary to carry its passengers safely. Plaintiff owed it no duty to supervise the conduct of the driver, or to make suggestions or give warnings to him." *McKeller* v. *Yellow Cab Co.,* 148 Minn. 247, 181 N. W. 348; *Grand Rapids & I. R. Co.* v. *Ellison,* 117 Ind. 234, 20 N. W. 135; *Scales* v. *Boynton Cab Co.,* 198 Wis. 293, 223 N. W. 836, 60 A. L. R. 978; *Diffenderfer* v. *Pa. Rd. Co.,* 67 Pa. Superior Court, 187; *Reitz* v. *Yellow Cab Co.,* 248 Ill. Appeals 287; *So. Pac. Co.* v. *Wright,* 248 Fed. 261.

The appellant next urges a reversal of the judgment because the court gave erroneous instructions. The instructions are numerous, but we think that, when considered as a whole, they fairly submit the issues to the jury, and that there was no error either in giving, modifying or refusing to give instructions.

Appellant contends for a reversal of the judgment also on the ground that certain incompetent testimony was admitted. There was no prejudicial error in the ruling of the court, because the same evidence had already been admitted without objection, and was already before the jury.

The important question in this case is whether the motorman was guilty of negligence. While carriers of passengers are held to a high degree of care, they are not insurers of the safety of the passengers, but are only liable for negligence. As to whether or not the motorman was guilty of negligence causing the injury, was a question of fact for the jury to determine, and, there being substantial evidence to sustain the verdict of the jury, we are not authorized to disturb it.

Finding no error, the judgment is affirmed.

Mr. Justice KIRBY disqualified and not participating.

SMITH, J., (dissenting). The defense interposed in this case is reflected in an instruction numbered 7, which the defendant asked and which reads as follows: "You are instructed that the motorman in operating the street car, seeing the truck approaching the intersection, had the right to assume that the driver of the truck would recognize the paramount right-of-way of the street car and would operate his truck with ordinary care to protect himself, and would not attempt to cross the track at said intersection immediately in front of the approaching street car; and the motorman had the right to go on with his street car with that presumption in his mind until he saw, or, in the exercise of ordinary care, could have seen the driver of the truck do something or his failure to do something which would indicate a contrary intention upon his part, and it then became his duty to stop his street car if he could do so in time to avoid the accident, (or to remain stopped if he had not yet started to cross said street intersection)." The instruction was modified by the addition of the phrase appearing within the parentheses reading as follows: "Or to remain stopped if he had not yet started to cross said street intersection."

I think instruction numbered 7, as asked, was a correct declaration of the law, as applied to the issues of this case, and that it was error to modify it, as was done.

The plaintiff herself testified that when the street car started to move the truck was from 150 to 200 feet away from the street car tracks. The motorman did nothing to stop his car "after he had pulled out in the intersection. The motorman was going about five miles an hour, and he kept pulling out in the middle of the street, and the truck coming down, and it did not slacken either, and the motorman tapped his bell, and the truck driver was honking his horn." The truck was traveling 35 to 40 miles an hour and was coming down a slight grade.

It must be remembered, however, that the street car was moving along a boulevard street, which means that

traffic crossing that street was required to come to a full stop before crossing it. A stop signal in the center of the street upon which the truck was moving evidenced the fact that the street car was moving on a boulevard street. Now, the street car started moving across the intersecting street while the truck was 150 to 200 feet away. As a matter of law, and as a matter of fact, the street car company had the right-of-way over the truck. This being true, the court should have charged the jury, as the requested instruction declared the law to be, that the motorman had the right to assume that the driver of the truck would not attempt to cross the street car track immediately in front of the approaching street car, and that the motorman had the right to go on with his street car with that presumption in his mind *until* he saw, or, in the exercise of ordinary care, could have seen, the driver of the truck do something, or his failure to do something which would indicate a contrary intention upon his part, in which event and at which time it then became the motorman's duty to stop the street car if he could do so in time to avoid the accident.

The essence of this instruction is that one obeying the traffic rules has the right to assume that others will also obey them, and to proceed upon that assumption until he knows, or, in the exercise of ordinary care, should know, that the other party will not observe the traffic regulations. The traffic in cities cannot be moved in a practical manner on any other assumption. However, the legal principle announced in the instruction as requested applies in rural sections as well.

The court modified the instruction by adding the phrase, "or to remain stopped if he had not yet started to cross said street intersection." This modification is open to the objection that it rendered the instruction ambiguous, if not contradictory, and was erroneous for this reason. It is open, however, to the more serious objection that it gives the street car only a qualified right to move along the streets. According to the plaintiff herself, the street car moved into the intersecting street while the truck was 150 to 200 feet away, and

although the truck was approaching rapidly the motorman had the right to assume the truck would stop at the boulevard street as required by the stop signal, and to proceed on that assumption until he knew, or, in the exercise of ordinary care, should have known, that the truck driver would not obey the traffic regulations. Whether the motorman knew, or should have known, that the truck driver intended to disobey the traffic regulations was a question which the instruction, as requested, would have submitted to the jury.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* HENRY.

4-3311

Opinion delivered November 27, 1933.

Powell, Smead & Knox and *Owens & Ehrman,* for petitioner.

U. J. Cone, for respondent.

MCHANEY, J. A resident of Ashley County brought suit in the Ashley Circuit Court against petitioner to recover damages for injuries alleged to have been sustained by its negligence in an automobile accident in Pulaski County while being transported to the latter county by it as a witness. Service of summons was had upon petitioner's designated agent for service in Pulaski County, who was also its general State agent.

Petitioner specially appeared in the Ashley Circuit Court, and moved to quash the service on the ground that it is a foreign corporation authorized to do business in Arkansas; that it maintained no office or agent in Ashley County upon whom service of summons could be had; and that the attempted service upon its designated agent

in Pulaski County was unreasonable, discriminatory, arbitrary and in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

A hearing was had on the motion to quash, and it was developed that petitioner does have an agent in Ashley County, appointed by the general agent in Little Rock, with authority to solicit applications for life insurance policies to be issued by petitioner, and that it is doing business in Ashley County by writing insurance on residents of that county on applications taken by such agency. The motion to quash was overruled, and this petition for prohibition challenges the jurisdiction of the respondent's court to hear and determine the matter.

We think the court correctly overruled the motion to quash, and that the Ashley Circuit Court has acquired jurisdiction by the service had under either §§ 1150, 1151 or 1152, Crawford & Moses' Digest. Under § 1150 the service might have been had "upon the chief officer of such agency," petitioner being an incorporated insurance company. Under § 1151 service is authorized on the designated agent, as was done in this case, petitioner being a foreign corporation with an agent in this State. Under § 1152, both foreign and domestic corporations may be sued in any county where they keep or maintain "a branch office or other place of business," and service "upon the agent, servant or employee shall be deemed good and sufficient service upon said corporations," etc. Petitioner contends that it had no branch office or other place of business in Ashley County; that the office kept and maintained in said county was that of its soliciting agent over which it had no control. But the fact remains that it did have an agency in said county and that such agency had an office or place of business where business for petitioner was transacted, applications for insurance solicited, collections made, notes taken, etc., and that it was doing business in said office through said agent. Service might have been had on such agent. The fact that service was had on the agent in Little Rock can therefore make no difference and no contention is

made that service should have been had upon the local agent instead of the State agent.

We therefore hold that the Ashley Circuit Court had jurisdiction of petitioner and that the rule announced in *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, has no application, because the statute makes no discrimination as between foreign and domestic corporations.

Writ denied.

KYLE *v.* RIBELIN.

4-3215

Opinion delivered November 27, 1933.

W. L. Kincannon, Hays & Smallwood and *Carmichael & Hendricks,* for appellant.

Evans & Evans, for appellee.

BUTLER, J. P. C. Bradford died January 28, 1924, and Claude H. Kyle was appointed administrator of his estate on February 2, 1924, and filed various "accounts current," reflecting the conduct of the administration. The final account was filed on July 27, 1927, from which it appeared that the administrator had expended all of the moneys received by him as administrator, having paid only two small claims probated against the estate amounting to $143.12, and leaving unpaid probated claims in the sum of $1,133.96, among which are the claims of the appellees.

This action was instituted in the southern district of the Logan Chancery Court to surcharge and falsify the "accounts current" filed by the administrator. It was alleged that the administrator assured the owners of the probated claims that there would be sufficient funds coming into his hands to pay all the debts of the estate in full; that the claimants relied on said statements until the fall of 1927, when they learned from the administrator that there were no funds with which to pay their debts or the debts of the estate; that an examination of the "accounts current" filed disclosed that the administrator had wasted the assets of the estate in the payment of unauthorized and unwarranted expenses, particularly expenses incurred in, and regarding certain lands in Mazie County, Oklahoma, and that the funds so expended should have been used to pay the probated claims against the estate. It was also alleged that the administrator had in his possession a note due the estate, signed by the appellee, Ribelin; that the estate was indebted to the said Ribelin in a sum in excess of the note, and that the said Ribelin was entitled to have the note offset, and to a judgment for the balance of his claim.

A demurrer was filed by the appellants, challenging the jurisdiction of the court to hear and determine the cause, and on the ground that the complaint did not set forth facts sufficient to constitute a cause of action. This demurrer was overruled, and the appellants answered, putting in issue the allegations of the complaint.

On the evidence adduced, the court held that the pleadings and evidence were sufficient to entitle the appellees to the relief prayed; that numerous items appearing in the accounts current were unauthorized and illegal charges against the estate, and entered a decree holding that the acts, omissions and irregularities are sufficient to cause the court to believe that it is necessary for the purpose of justice to hold that there were such acts, omissions, irregularities and errors as to amount to a legal fraud on the rights of plaintiffs, and that appellee, Ribelin, had probated claims against the estate in the amount of $707.90, and that they were entitled to offset the note due the estate and to have judgment for the

remainder. The court then proceeded to point out the various improper charges found to have been made, and adjudged that the "accounts current" be vacated and that the same be restated in accordance with the finding so as to show the correct amount of the balance due the estate, and that appellees have judgment in the amount of their respective claims.

On the allegation that the administrator lulled the claimants into a sense of security by repeated statements to the effect that the estate was solvent and would be able to pay all claims in full, but that it was necessary for the administration to proceed in due course before such claims could be paid, the evidence is in conflict. It becomes unnecessary, however, for us to pass upon the weight of the testimony, or to determine where the truth lies in these particulars, as we are of the opinion that the undisputed facts are sufficient for a determination of the questions raised by the appeal.

The deceased, P. C. Bradford, in his lifetime, was engaged, among other things, in operating a sawmill, and a part of the assets of the estate were various accounts due him in his lifetime, payment of which had not been made. In the first "account current" filed, the administrator did not charge himself with the inventory, nor is it abstracted. He merely charged himself with actual cash which he had collected up to the time of the filing of the account on January 28, 1925. He charged himself with certain cash on hand, numerous accounts collected, the sale of the planer and mill of the deceased, the sale of his residence, mules, horses, lumber and other personal property sold in the total sum of $4,500.25. There was a claim by the Bank of Magazine as due from the estate for debts with accrued interest amounting to about $2,800, and there had been probated claims against the estate in the approximate total sum of $1,256.96. The administrator therefore had collected enough money on the date he filed his account to pay the claim of the bank in full and the probated claims against the estate, leaving about three or four hundred dollars to pay the necessary expenses which had been incurred. It is shown by this account that he paid none of the probated claims, except one for a

burial casket, in the sum of $122.50, and one for insurance, amounting to $20.62. However, he paid to the bank $1,930. He credited himself with certain sums paid for labor amounting to about $65, but what this labor was, or how used, is not shown. He appears to have had no authority for expending any of these sums.

At the time of the death of Bradford, besides the land and personal property he owned in Yell and Logan counties, Arkansas, he owned an equity in a farm of 120 acres in Oklahoma, upon which the Federal Land Bank had a first mortgage for $3,200, and the Bank of Magazine held a second mortgage thereon to secure an indebtedness due it by the deceased. The administrator was the cashier of the Bank of Magazine, and his sureties were its directors. It appears from the first "account current" that a considerable amount of expenses incurred were payments made to the Federal Land Bank on its debt secured by mortgage on the Oklahoma land and other expenses in relation thereto. When a balance was struck, the first account current showed cash in the hands of the administrator of $1,518.94, and in this settlement he represented to the court that he had a number of accounts not collected, asking further time on said administration. On the 27th day of January, 1926, the administrator filed a second "account current," in which he charged himself with the balance shown in the first account and certain items of rent and dividends which, together with the balance brought forward, amounted to $1,745.45. Against this balance he credited himself with the sum of $517.50, all of which, except possibly two items of court fees in the sum of $51.35, were expenses incurred in relation to the Oklahoma lands. Again he asked for further time, which was apparently granted, for on the 26th day of January, 1927, he filed a third account current, charging himself with a balance brought forward of $1,227.95, receipts from the Oklahoma farm, which, together with the balance, amounted to $1,415.85. He credited himself with expenses amounting to $441.09, all of which, except one item of $50, was for expenses relative to the Oklahoma property. On July 26, 1927, he appears to have restated the account current filed in January increasing the

amount he stood charged with in the sum of $75, rent from the Oklahoma farm, making a total of $490.85, and credited himself with $1,049.94 paid to the Bank of Magazine and other items paid out relative to the Oklahoma property in a sufficient sum to balance his account, thus leaving the appellees and others having probated claims high and dry, and the bank paid in full.

In passing, it is to be noted that all of the settlements except the first seem to have been approved by the court on the day of their filing. An examination of the accounts show that the last account, representing debts due the deceased in his lifetime, was collected on October 27, 1924, and that thereafter no other such accounts were collected, nor does the record disclose any effort made to collect the same, or any request made to the court to sell the unpaid accounts. It therefore appears that there was no reason why the administration should not have been closed within one year, the time prescribed by law.

It appears from the sums for which the administrator has taken credit that the principal amounts of expense incurred related to the Oklahoma lands, which, after deducting income from that property, amounted to $753.83. It will be remembered that the Bank of Magazine was the holder of the second mortgage and that the administrator was its cashier, and his sureties its directors. It would therefore appear that the expenses incurred in Oklahoma was more for the benefit of the bank than for the estate. But whatever the purpose and intention of these expenses, they were wholly unauthorized, and could not be validated by the order of the probate court of Logan County. The Oklahoma farm was not an asset of the estate in the hands of the administrator for any purpose. "Since an executor or administrator has no right to the possession of lands in another State and under another jurisdiction, and since such lands do not become assets in his hands for the purposes of administration, it has been held that, as to such lands, the personal representative has no right of redemption, for it is said that the administrator can maintain an action to redeem only as to such lands as are assets in his hands for the purpose

of administration or of which he is entitled to possession." 11 R. C. L., p. 161, § 170.

In *Miller* v. *Oil City Iron Works,* 184 Ark. 905, 45 S. W. (2d) 36, the administratrix had credited herself with the sum paid in defending title to oil leases in the State of Texas, which she claimed belonged to the estate of the decedent, and, among other things, attempted to justify the expenditure on the order of the probate court of the county of the administration. This court there said: "It is true that she secured an order of the probate court allowing her to employ counsel and to make expenditures of money, but the court had no jurisdiction to make such order. In the first place, letters of administration have no legal force or effect beyond the territorial limits of the State granting them. Woerner on Administration, (3d ed.) vol. 1, p. 558-559, 23 C. J. 1014, 24 C. J. 1120, 11 R. C. L., § 532, p. 432, and § 531, page 447."

The rule there laid down was reiterated in the recent case of *Smith* v. *Walker,* 187 Ark. 161, 58 S. W. (2d) 946, where a claim was disallowed for fees paid an attorney to investigate title of the decedent to certain property in Texas.

Since the administrator had no authority, and could have had none, with reference to the lands in Oklahoma the attempted ratification of his act by the probate court of Logan County was void; the items of expense constituted legal frauds upon the rights of appellees, and, having worked an injury to the estate and to their rights, of itself was sufficient to give the court jurisdiction of the cause and to warrant its decree surcharging and falsifying the settlements made by him. *Dyer* v. *Jacoway,* 42 Ark. 186; *Miller* v. *Oil City Iron Works, supra; Smith* v. *Walker, supra.*

The trial court disapproved these and various other items for which the administrator has taken credit, all of which we have examined and deem it unnecessary to set out in detail and discuss the reason for the court's action. We are of the opinion that the decision of the trial court on these questions is justified, that its decree is correct, and it is hereby affirmed.

ARRINGTON *v.* UNITED ROYALTY COMPANY.

4-3170

Opinion delivered November 27, 1933.

[redacted]

Patterson & Patterson, for appellant.

Reynolds & Maze and *Max G. Cohen,* for appellee.

BUTLER, J. This cause was submitted to the court below on an agreed statement of facts, which, necessary for an understanding of the issue presented, may be thus stated:

On the 26th day of February, 1920, J. R. Hudson, being then the owner of the southeast, northeast, section 14, township 10 south, range 24 west, in Johnson County, to secure a note of $1,000 of that date, due one year thereafter, executed, acknowledged and delivered to the Bank of Clarksville his mortgage (his wife joining therein) covering said lands, which mortgage was duly recorded.

On June 26, 1925, the said Hudson and wife, by their deed of that date, duly acknowledged, conveyed to Dan W. Johnson an undivided one-half interest in all the mineral in and under said lands. Three days later all of the parties to the above deed executed and delivered to the Empire Gas & Fuel Company a certain instrument in writing, called an "oil and gas lease," by which the parties do "grant, lease and let unto the lessee the land

hereinafter described, for the purpose of drilling, operating for and producing oil and gas." This lease was to remain in force for ten years or as long thereafter as oil and gas was produced in paying quantities. By § 3 of the lease it was provided that "the lessee shall deliver to the credit of the lessor, free of cost, on the lease or into the pipe line with which it may connect its wells one-eighth part of the oil produced and saved," and by § 4, that the lessee shall pay to the lessor as royalty $200 per year for gas from each well," when gas is produced in paying quantities, while same is being sold and used off of the premises, and $75 as royalty per annum while gas is not sold or used off of the premises; and, by § 4, it was provided that the lessors were to be paid as royalty one-eighth of the market value of gas and vapors produced from any oil well and used in the manufacture of gasoline.

In July, 1925, Dan W. Johnson and wife executed a written instrument, called "royalty conveyance," duly acknowledged to the United Royalty Company, for which they, for the express consideration of $1 and other valuable consideration, "do hereby bargain, sell, grant, convey, transfer, assign and set over to second party (United Royalty Company), his heirs and assigns, an undivided one-half interest in and to the oil and gas royalty which is, or may hereafter be, reserved by said party of the first part (Johnson, or his assigns), exclusive of the oil and gas bonus and oil and gas rental money in and under the following described property." It was further stipulated that the grantee should not be a necessary party in the leasing of said land, and that it authorized the grantor, his heirs and assigns, to lease the land for oil and gas purposes.

On January 21, 1928, the Bank of Clarksville brought suit to foreclose its mortgage, naming J. R. Hudson and wife, Bessie, and Dan W. Johnson, L. H. King and Frank May (interest of the two last named is not set out) as the only defendants. The United Royalty Company was never a party to the suit, and was not represented. Judgment was duly obtained in said suit, the lands ordered sold, sale was made by virtue of said order under which appellee, Arrington, derived his claim of title.

No notations had been made of any payments on the debt due the Bank of Clarksville on the margin of the record of the mortgage securing same, as provided in Crawford & Moses' Digest, § 7382, and the debt and mortgage was barred by limitation.

Suit was filed by Carl Arrington in the Johnson Chancery Court to quiet his title and to cancel and remove as a cloud thereon the conveyance by Johnson and wife to the United Royalty Company. The United Royalty Company answered, first pleading the right to redeem and making tender of the sums paid by Arrington in procuring his title. Further answering, it set up the due date of the note from Hudson to the bank, the failure of the latter to make any notations of payment on the margin of the record, and alleged that the debt was barred by limitation, and that by reason thereof its title was prior and paramount to the title of Arrington.

On the pleadings and admitted facts, the court found the interest of the United Royalty Company in and to an undivided one-half interest in and to the oil and gas royalty to be prior and paramount to the title acquired by Carl Arrington, and, by its decree, quieted and confirmed the title of the United Royalty Company. Carl Arrington has appealed, and thus states his contention relative to the point in issue: "Is the interest which is referred to as a royalty interest, which passed to appellee under the royalty conveyance from Dan W. Johnson, an interest or estate in land, or is it personal property?" He contends that an answer to this question is necessary for the decision in the case; that this court should hold that it is personal property, and in that event he claims the statute of limitation would have no application.

On the part of the appellee, the contention is made that the question stated above was not raised, either in the pleadings or statement of facts, upon which the case was tried in the court below, but that the only defense presented in the lower court, and upon which the finding of the court and its decree was predicated, was the plea that the mortgage debt upon which appellant's title is founded was barred by limitation because of a failure to comply with the requirements of § 7382 of the Digest.

We are of the opinion that the contention of the appellee is not well taken, because the nature of his interest was necessary for a determination of his rights, and this question was sufficiently raised by the pleadings and evidence adduced. We therefore proceed to a determination of that question.

The appellant contends that the royalty interest conveyed by Dan W. Johnson to the appellee is personal property, and, to sustain this contention, cites and relies upon the case of *Curlee* v. *Anderson & Patterson,* decided by one of the Courts of Civil Appeals of Texas and reported in 235 S. W., at page 622. That case, and others from other Courts of Civil Appeals in Texas, support the contention made, namely, that a conveyance of an interest in royalty under an oil and gas lease does not convey an interest in the land effective against a subsequent purchaser on foreclosure. *O'Brien* v. *Jones,* (Tex. Civ. App.) 239 S. W. 1013; *Farmers' & Merchants' Bank of Ranger* v. *Tullos,* (Tex. Civ. App.) 211 S. W. 847. We have been referred to no case announcing this rule which has been decided by the Supreme Court of Texas, and there appears to be a diversity of opinion among the Courts of Civil Appeals in that State. A later case than those which support appellant's contention is that of *Taylor* v. *Higgins Oil & Fuel Co.,* decided by the Court of Civil Appeals of Texas, January 11, 1928, reported in 2 S. W. (2d) 288. In that case it is said: "It is also well settled that such leases create a severance of the estate in the surface from the estate in the oil and minerals, which may be owned in their entirety by different parties. It is also the law of this State that the royalty interest retained by the lessor under such leases, whether owned by the original lessor or his vendees, is an estate in the land to be held and sold only under the laws regulating the sale of land." (Citing *Hager* v. *Stakes,* 116 Tex. 453, 294 S. W. 842.

The appellant contends that the rule announced in the Curlee case, *supra,* is supported by the weight of authority, and relies upon the cases of *Miller* v. *Sooy,* 120 Kan. 81, 242 Pac. 140; *Bellcourt* v. *Harrison,* 123 Kan. 310, 255 Pac. 52; *Walla Oil Co.* v. *Valentine,* 103 Wash. 359, 174 Pac. 980; and *Merredith* v. *Merredith,* 193 Ky.

192, 235 S. W. 757. We have examined these cases, and have reached the conclusion that they do not support the rule contended for, but rather hold to the contrary view. The case of *Merredith* v. *Merredith, supra,* merely held that, while neither a life tenant, nor the remainderman, acting alone, has power to make a valid lease of land for oil and gas production, they may jointly execute such an agreement among themselves on an apportionment of the profits, and, in the absence of an agreement between them, when the lease is jointly executed, as to what disposition shall be made of the income from the royalties, that the same will go to the life tenant and the corpus after his death to the remaindermen.

The case of *Walla Oil Co.* v. *Valentine, supra,* decided by the Supreme Court of the State of Washington, held that an ordinary oil and gas lease permitting the lessee to prospect for oil and gas establishes a mere chattel interest and not within any rule against conveyance of land except by writing and the real beneficial owner of the property right might be shown by parol. This case does not discuss the character of the estate in the owner of the royalty.

There seems to be some confusion in the decisions in failing to distinguish between accrued and unaccrued royalties, but it is clear from all of the decisions that ordinarily accrued royalties, strictly speaking, are a mere chose in action and therefore personal property. But, according to Mills-Willingham on the Law of Oil & Gas, page 179, unaccrued royalties are a part of the estate remaining in the lessor, and as such pass to the heirs, and are therefore an interest in land. It seems also that whether the royalty, when severed from the reversion, is to be deemed real or personal property depends upon the duration of the lease. If the oil and gas lease is for a term of years expiring at a certain time, it is a chattel real, and the severed royalty would be personal property; but where the lease may endure for an indeterminate period, it creates an estate in the nature of a qualified fee, and the royalty reserved would be an interest in realty.

We have held that leases given for a definite period in which exploration and discovery of the mineral might be made, to continue as long thereafter as oil and gas is produced, conveys not merely a license but an interest and easement in the land itself. *Standard Oil Co.* v. *Oil Waste Salvage Co.,* 170 Ark. 729, 281 S. W. 360; *Clark* v. *Dennis,* 172 Ark. 1096, 291 S. W. 807; *Henry* v. *Gulf Refining Co.,* 176 Ark. 133, 2 S. W. (2d) 687; and *Henry* v. *Gulf Refining Co.,* 179 Ark. 138, 15 S. W. (2d) 979. As a consequence of this rule, our court has held that an attempted conveyance of the royalty reserved by parol is void, this, of course, being on the theory that the royalty was an interest in real estate.

In *Allen* v. *Thompson,* 169 Ark. 169, 273 S. W. 396, where it was contended that the owner of a royalty had conveyed half the interest therein which was attempted to be evidenced by a notation on a check given for the purchase price, the court said: "The check was not in substance or form a contract between the parties. It was merely an evidence of the payment of the sum named therein for the royalties expressed in the two deeds. * * * The contract, if any, between the parties was oral and not enforcible as being within the statute of frauds." That a royalty is an interest in land and therefore a conveyance of it by parol is ineffective as within the statute of frauds seems to be the conclusion reached in *Brown* v. *Brown,* 33 N. J. Eq. 650; *King* v. *Kaiser,* 23 N. Y. Supp. 21, 52 N. Y. St. Reports, 281; and *State* v. *Royal Mineral Ass'n,* 132 Minn. 232. In the last-named case the court treated royalties as in the nature of a rent charge, and said: "Unaccrued rents are not personal property. They are incorporeal hereditaments. They are an incident to the reversion and follow the land. (Citing cases.) They pass with a sale or devise of the land. (Citing cases.) If transferred apart from the land, the provision of the statute of frauds relating to sales of land applies. (Citing cases.) In fact, although separable from the reversion, they are, until such separation, part of the land. (Citing cases.) 'For what is the land but the profits thereof?' "

In Mills-Willingham Law of Oil & Gas, after stating the general rule that royalties are to be treated as an

interest in real estate, at page 180, referring to the Texas cases holding to the contrary, it is said: "In Texas, notwithstanding that the royalty is treated as rents and not purchase price, several decisions by commissioners and the courts of civil appeals have treated the royalty as personal property. The position is indefensible in view of the fact that the lease is held to be a fee because of indefinite duration. The royalty has the same theoretical duration as the lease. It would seem that in Texas, where the lessor is held to have no reversion, the courts will ultimately recognize the royalty as a ground rent reserved in fee."

In the case of *Green* v. *Biddle,* 8 Wheat. 76, the following statement is found: "We are clearly of the opinion that the grant of one-half of the royalties, rents and income from the oil is a grant of one-half of the oil in place." This rule seems to have been in the mind of the court in its holding in the case of *Allen* v. *Thompson, supra,* and we now announce the rule to be that royalties in gas or oil, until brought to the surface and reduced to possession, are interests in real estate and not personal property.

It seems to have been conceded that the interest in the royalty acquired by Dan W. Johnson by virtue of the conveyance from J. R. Hudson, the owner of the land, was an interest in land, but the contention is made that, when Johnson conveyed to appellee one-half of his interest in the oil and gas royalties, the character of the property conveyed became changed from an interest in real estate to personal property. We can see no just reason for this contention. The language in the granting clause of the instrument named "royalty conveyance" from Johnson and wife to the appellee is as follows: "Do hereby bargain, sell, grant, convey, transfer, assign and set over to the second party (appellee), his heirs and assigns, an undivided one-half interest in and to the oil and gas royalty, which is, or may hereafter be, reserved by said party of the first part (exclusive of the oil and gas bonus and oil and gas rental money) in and under the following described property." This was effective to convey to the grantee precisely the same character of estate as was in

the grantor, which is not altered by the stipulation that the grantee should not be a necessary party in the leasing of the land, or that it authorized the grantor to execute such leases. *Cheatham* v. *Beck,* 96 Ark. 230, 131 S. W. 699; *Deming Investment Co.* v. *Bank of Judsonia,* 170 Ark. 65, 278 S. W. 634; Hughes on Arkansas Mortgages, § 475; *Dunlap* v. *Jackson,* 92 Okla. 246, 219 Pac. 314.

It follows, under the authority of *Dunn* v. *Smith,* (Tex. Civ.) 23 S. W. 449; *Bank of Mulberry* v. *Sprague,* 185 Ark. 410, 47 S. W. (2d) 601; and *Connerly* v. *Hoffman,* 184 Ark. 497, 42 S. W. (2d) 985, that the appellee, not having been made a party to the foreclosure proceeding under which appellant claims, may invoke the statute of limitation, and, as it is conceded that as to third parties the debt was barred for failure to comply with the provisions of § 7382 of the Digest, the court correctly held that appellee's title was prior and paramount to that of the appellant, and its decree is therefore affirmed.

HOUSE *v.* MCGEHEE.

4-3338

Opinion delivered November 27, 1933.

Edward Gordon, G. B. Colvin and *Calvin Sellers,* for appellant.

BUTLER, J. On October 11, 1933, the Honorable Abner McGehee, Judge of the Sixth Judicial Circuit of the State of Arkansas, comprising the counties of Pulaski and Perry, addressed a letter to the clerk of the circuit court of Perry County advising that he would hold an ad-

journed day of the July term of the Perry Circuit Court on November 2, 1933, and directing the clerk to notify the grand jury, who served at the regular July term, to report for duty on that day, whereupon the petitioner filed in this court a petition for a writ prohibiting the said judge from holding court on that day, or any other term of court in Perry County, until the next regular term of the court, or in the manner provided by law. Attached to this petition was a certificate of the clerk of the circuit court which, after stating his official position, certified "*that on the 6th day of September, 1933, the circuit* court of Perry County, adjourned without fixing any day for the reconvening of said court, and that the record of the proceedings of the circuit court of Perry County, for the July term, 1933, which was adjourned to September 5, 1933, contains no entry of record adjourning said court to any particular date, and no entry appears on the docket of the judge of said court directing the adjournment of the said court, either in due course or to any particular time or date."

There was also exhibited with the petition the certificate of the clerk of the circuit court of Pulaski County certifying that the division of the Pulaski Circuit Court presided over by Judge McGehee convened in regular session on the 25th day of September, 1933, the same being the day and date provided by law for the convening of the court, and that the first division of said court "was convened upon said day and date by the Honorable Abner McGehee, judge of said division of said court."

To this petition the Honorable Abner McGehee filed a response in which he stated the convening of the July term of the circuit court as provided by law and the impaneling of the grand jury, the return of the grand jury of certain indictments, and that upon that day, namely, the 18th of July, the grand jury was excused, subject to the call of the court, and the court was adjourned until September 6, 1933, upon which date it met, and, after the transaction of business, "was then adjourned subject to call, and the petit jury was excused subject to call."

It will be seen from the certificate of the clerk of the Perry Circuit Court that there was no order of the

court entered upon any record adjourning the court to any definite day after September 6, 1933, and the record is silent as to any adjourning order whatever. In the response of the presiding judge, the certificate of the clerk is not controverted, the judge stating that, after the proceedings on September 6th, "the court was then adjourned subject to call." It also appears that between the date when the court was adjourned on September 6th and the date on which the order to the clerk to notify the jury to assemble on November 2d, a regular term of the Pulaski Circuit Court intervened, one of the divisions of which was presided over by the Honorable Abner McGehee.

This state of facts brings the case within the rule announced in *Central Coal & Coke Co.* v. *Graham,* 129 Ark. 558, 196 S. W. 940, as follows: "The statutes of the State provide that a circuit court shall continue in session from day to day until the business is disposed of (Kirby's Digest, § 1320), but the court cannot stand open from day to day so as to conflict with the holding of court in another county in the same circuit, and an adjournment without specifying a day on which the court will reconvene without interference with the courts in other counties is void, and constitutes an expiration of the term. *Roberts & Schaeffer Co.* v. *Jones,* 82 Ark. 188, 191 S. W. 165. Such is also the effect of an adjournment to a date which conflicts with the holding of another court."

The adjournment of the court subject to call without specifying a day on which the court would reconvene conflicted with the holding of the court in Pulaski County, and, when the latter court convened, the regular July term of the Perry Circuit Court expired by operation of law. Therefore the judge had no authority to convene any term of the Perry Circuit Court except for the causes mentioned in §§ 2211 and 2218 of Crawford & Moses' Digest, until the succeeding term of the court fixed by statute, which would have been on the first Monday in February, 1934. See *Farelly Lake Levee Dist.* v. *Hudson,* 170 Ark. 1110, 282 S. W. 1002. Therefore, any court which the judge might attempt to hold in the interim, except

for the cause and in the manner provided by the sections aforesaid, and any action taken thereat would be void.

It appears from the recitals of the petition, which are not denied in the response, that the holding of the court on November 2 would occasion unnecessary and unreasonable expense to Perry County, and that the funds appropriated for the expense of that court had been exhausted. Therefore, since the convening of the court on November 2 would be without authority of law, and its proceedings thereat void, the prayer of the petition is granted, and the writ of prohibition ordered issued.

LOUISIANA OIL REFINING CORPORATION *v.* YELTON.

4-3219 & 4-3288

Opinion delivered December 4, 1933.

Ingram & Moher and *Buzbee, Harrison, Buzbee & Wright*, for appellant.

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

JOHNSON, C. J., (after stating the facts). Appellants first urge that the verdict against each appellant is not supported by the testimony. The basis for appellant's contention as to no liability against McKewen is put upon the following grounds:

That McKewen, prior to procuring the warrant of arrest, gave a full and fair statement of all the known facts to the public prosecutor, and he followed this advice. It suffices to say, in reference to this contention, that McKewen's testimony is flatly contradicted by that of the public prosecutor. This officer was a witness in the case and testified that, if McKewen had revealed all the facts when in his office, he would not have issued an information. It is true, of course, had McKewen given a full and fair statement of all the known facts in reference to the controversy to the public prosecutor, then had acted upon the advice of such official, it would be a complete defense. The jury found that McKewen did not make a full and fair statement of all the known facts to the public prosecutor, and its finding in this regard is supported by the testimony.

It is next said, in behalf of appellant McKewen, that the evidence fails to establish either want of probable cause or malice. This court held, in *Williams* v. *Orblitt,* 131 Ark. 408, 199 S. W. 91, that, in an action for damages for malicious prosecution, malice may be inferred where there was a lack of probable cause, even though there was no express showing of malice.

We also said in *Cable* v. *Carey,* 135 Ark. 137, 204 S. W. 748, that malice may be inferred from want of probable cause.

On the question of probable cause in the instant case but little need be said. Really, there can be no doubt but that appellant McKewen knew that appellee had no intention of stealing either the truck or the merchandise thereon. Without reviewing the testimony in this regard, it suffices to say that the jury was fully warranted in finding that appellant McKewen had no reason, cause or excuse for instituting the criminal prosecution against appellee. If appellant McKewen instituted the prosecution without probable cause, and we have no hesitancy in saying that he did so, then malice may be inferred.

Neither do we hesitate in saying that the testimony here presented fully warranted the jury in finding that the criminal prosecution instituted against appellee by appellant McKewen was without probable cause and with

malice. The contention, in reference to the nonliability of the Louisiana Oil Refining Corporation, is grounded upon the contention that McKewen, in obtaining the warrant of arrest in the criminal prosecution, was acting in his own right and not in aid of any business being transacted for the oil company, and that appellee was charged with stealing property of McKewen and not that of the oil corporation. The argument is that McKewen had a special ownership in the property and was fully justified in treating it as his own, and that the criminal prosecution was instituted against appellee in protection of this special ownership. On this question the jury was fully warranted in finding that McKewen was the agent and local manager of the appellant oil company in Stuttgart; also that he had the exclusive possession and control of the oil plant and merchandise located in that vicinity. The sale and disbursements of all the oil company's products in that vicinity was under the exclusive control of McKewen. Naturally, McKewen had the duty of protecting and preserving appellant oil company's merchandise, which had been theretofore entrusted to his care. In furtherance of the performance of this duty, he had the apparent authority to do and perform any and all things necessary for the preservation and protection of said property. This court expressly so decided in *Chicago, R. I. & P. Ry. Co.* v. *Gage,* 136 Ark. 122, 206 S. W. 141, wherein this court said:

"Here we have the fact that the agent was placed in custody of the property of the principal with authority to protect it, and the evidence clearly shows that the criminal prosecution was instituted, not for the purpose of punishing a past offense, but as a means of regaining possession of the property."

The facts in the instant case come clearly within the language used in the Gage case. Here, as there, an agent was placed in custody of the oil company's property with authority to preserve and protect it, and we are satisfied that the criminal prosecution was instituted by him for the sole and only purpose of regaining possession of the property, and not for the purpose of punishing a past

offense. At any rate, the jury was fully warranted in finding this to be the fact.

Our attention has been called to *Little Rock Traction & Electric Co.* v. *Walker*, 65 Ark. 144, 45 S. W. 57; *Little Rock Railway & Electric Co.* v. *Dobbins*, 78 Ark. 553, 95 S. W. 788; *St. Louis, I. M. & S. Ry. Co.* v. *Waters*, 105 Ark. 619, 152 S. W. 137; *Dickinson* v. *Muse*, 135 Ark. 76, 204 S. W. 609, and a number of other cases decided by this court. Without going into a detailed discussion of the principle of law discussed in the cases cited, we deem it sufficient to say that neither of these cases conflicts with the law as announced in the Gage case heretofore cited.

In any event, the jury was warranted in finding that appellant oil company had placed McKewen in charge of its properties and merchandise in the city of Stuttgart, with the implied authority to do any and all things necessary to preserve and protect its property, and that the criminal prosecution instituted against appellee by McKewen was done in performance of his duty as agent of the oil company.

It is next insisted on behalf of appellant, Louisiana Oil Refining Corporation, that the jury's verdict awarding punitive damages is not supported by the testimony.

Under a long line of decisions by this court, punitive damages are recoverable against a corporation for willful, wanton and malicious conduct of their agents and servants in line of their duties. *Citizens' R. R. Co.* v. *Steen*, 42 Ark. 321; *Railway Company* v. *Hall*, 53 Ark. 7, 13 S. W. 138; *Railroad Co.* v. *Davis*, 56 Ark. 51, 19 S. W. 107; *Fordyce* v. *Nix*, 58 Ark. 136, 23 S. W. 967; *St. Louis, I. M. & S. Ry. Co.* v. *Power*, 64 Ark. 142, 41 S. W. 50; *St. Louis, I. M. & S. Ry. Co.* v. *Wilson*, 70 Ark. 136, 66 S. W. 661.

In the case of *Little Rock Ry. & Electric Co.* v. *Dobbins, supra*, on the question of the right to recover punitive damages against a corporation, this court held: "This court has often, in cases of this class as well as in other cases, affirmed the doctrine that for acts done by the agents of corporations, in the course of its business, and of their employment, the corporation is respon-

sible, in the same manner and to the same extent as an individual is responsible under similar circumstances."

In the instant case we conclude that the jury was fully warranted in finding that the acts of McKewen in instituting criminal prosecution against appellee were, in truth and in fact, the acts of the oil company, and that the oil company is liable therefor.

Lastly, it is urged that the award by the jury of $5,000 as damages for the wrongful acts of the appellants is excessive. This contention should be sustained. Our attention has been called to no case, approved by this court, wherein an award of $5,000 was approved under similar facts and circumstances. We have reached the conclusion that an award of $2,500 will fully compensate appellee for all damage suffered by him to his reputation, character and good name by reason of the wrongful act complained of, and the judgment will therefore be reduced to this sum.

The judgment of the Arkansas Circuit Court is therefore reduced to $2,500, and, as thus modified, is affirmed.

STRAUSS *v.* MISSOURI STATE LIFE INSURANCE COMPANY.

4-3233

Opinion delivered December 4, 1933.

Robert D. Lee and *James E. Hogue,* for appellant.

R. B. McCulloch and *Coleman & Gantt,* for appellee.

JOHNSON, C. J. This suit was instituted by appellant against appellee, seeking recovery of the proceeds of two insurance policies aggregating $4,528.58. Appellee, in its answer, admitted the execution of the policies and its liability thereon for $4,528.58. As an affirmative defense or set-off, appellee alleged that on January 9, 1932, it recovered personal judgment against appellant and others for the sum of $48,735.83 in the United States District Court for the Western Division of the Eastern District of Arkansas; that, upon receipt of the proof of death furnished by appellant, the claims under the two policies were approved, and the proceeds were applied by appellee in reduction of its judgment against appellant; that on May 6, 1932, appellee advised appellant of said application of funds.

A jury trial being waived, the facts were submitted to the trial court for determination, and its findings were in favor of appellee. The facts in the case are undisputed and are to the effect as alleged in appellee's answer.

It is the contention of appellant that the judgment of the Federal District Court made and entered on January 9, 1932, is void, the contention being that said judgment was rendered against appellant without notice. Bearing on this question, it is admitted by appellant that she was duly served with summons when the foreclosure suit was instituted, but the contention is that the court lost jurisdiction of her person after the confirmation of the sale of the mortgaged property. We cannot agree to the contention. The Federal District Court for the Eastern District of Arkansas is a court of superior jurisdiction, and all necessary presumptions are indulged in aid of its judgments. Not only does this presumption attend all judgments and decrees of the Federal District Courts, but the practice here followed is fully authorized by equity rule No. 10 promulgated by the Supreme Court of the United States, which reads as follows:

"In suits for the foreclosure of mortgages, or for the enforcement of other liens, a decree may be rendered for any balance found to be due over and above the proceeds of the sale or sales; and execution may issue for the collection of the same as is provided in rule 8 when the decree is solely for the payment of money. * * *"

It suffices to say that the judgment rendered by the Federal District Court for the Eastern District of Arkansas was in full compliance with the rule just quoted, and that said court had jurisdiction of the subject-matter and person of appellant at the time of the rendition of said judgment.

In addition to what we have just said, it is a doctrine of law too long established to require citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the case; and, whether decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every court. *Peck* v. *Jennis,* 7 Howard, page 624.

It is next contended that act 102 of 1933 exempts the proceeds of the two policies of insurance in this controversy to appellant. On this question but little need be said. The testimony shows that the insured died in April, 1932; that the proof of death was made and approved by appellee on May 6, 1932. On the happening of these two events, that is to say, the death of the insured and the acceptance of the proof of death, the rights of the parties to the proceeds of said insurance became vested, and no subsequent act of the Legislature could impair this vested right. We therefore hold that act 102 of the Acts of 1933 has no application to the facts in this case.

No error appearing, the judgment of the trial court is affirmed.

STATE USE PIKE COUNTY *v.* WHEELING CORRUGATING COMPANY.

4-3232

Opinion delivered December 4, 1933.

[redacted]

P. L. Smith, for appellant.

George R. Steel and *O. A. Featherston,* for appellee.

JOHNSON, C. J., (after stating the facts). Appellee contends that the judgment of the circuit court quashing the order of the county court made and entered on March 9, 1933, should be affirmed for the following reasons:

First, that the circuit court heard testimony on trial of the cause which is not before this court on appeal. This contention is not substantiated by the record and judgment. On the contrary, the judgment shows upon its face that the cause was submitted to the circuit court upon the record as certified up from the county court, etc. This recital is an affirmative showing that no testimony was heard other than the records of the county court.

The second contention is, that the county court had no jurisdiction or authority in law to vacate a previous

judgment or order allowing claims. This contention is without merit. Section 6290 of Crawford & Moses' Digest affords ample authority to the county court for vacating and setting aside previous orders, which fall within the purview of said section.

The third contention is, that the county court order and judgment of date, March 9, 1933, does not show upon its face that it had jurisdiction of the person or subject-matter. This contention is grounded upon the theory that no presumptions are indulged in aid of judgments and orders rendered by county courts. This contention also is without merit. The county courts of the respective counties of the State are courts of superior jurisdiction in disbursing funds of the county and in allowing claims against such funds. This is true, because § 28 of article 7 of the Constitution of 1874 creates the county courts, and vests in them the exclusive jurisdiction to disburse county funds, and to allow claims against the same. The county courts of the respective counties of the State, while exercising the jurisdiction conferred by constitutional mandate, are exercising functions of a court of superior jurisdiction. *Collins* v. *Paepcke-Leicht Lumber Co.*, 74 Ark. 81, 84 S. W. 1044; *Massey* v. *Doke*, 123 Ark. 211, 185 S. W. 271.

Lastly, it is insisted that the judgment and order of the county court vacating and setting aside its previous order is void, because it shows upon its face that it was made and entered on March 9, 1933, which date is beyond the regular January, 1933, term This contention is precluded by the announcement heretofore recited. This court will presume if necessary to sustain jurisdiction, that the county court adjourned by proper order from its January, 1933, term until the date of the entry of this judgment, nothing to the contrary appearing in this record.

For the reasons aforesaid, the presumption is indulged that the county court had jurisdiction of the person and subject-matter therein determined; also that it was proceeding on March 9, 1933, in conformity with a valid adjourning order. It therefore follows that the judgment of the county court made and entered on March

9, 1933, is not void upon its face, but, on the contrary, is a valid and binding order, and judgment until reversed or modified on appeal.

The judgment of the Pike Circuit Court is therefore reversed and remanded.

NEW YORK LIFE INSURANCE COMPANY *v.* JACKSON.

4-3222

Opinion delivered December 4, 1933.

Louis H. Cooke and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

John Sherrill and *Osro Cobb*, for appellee.

SMITH, J. The recent case of *New York Life Insurance Company* v. *Farrell*, 187 Ark. 984, 63 S. W. (2d) 520, decides the exact question which is controlling here. In that case the insured had two policies in the New York Life Insurance Company, each for $5,000. In the instant case there were two policies, written by the same company, each for $10,000. The opinion in the Farrell case, *supra*, sets out the provisions of the policies there sued on in regard to disability insurance, which read as follows:

"Whenever the company receives due proof, before default in the payment of premium, 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 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 lifetime 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 on each income payment. If there be any indebtedness on the policy, the interest thereon may be deducted from each income payment."

Beginning about June 23, 1920, Gus Bertner, a soliciting agent for the appellant insurance company, wrote a number of life policies for Bruen O. Jackson. These policies exceeded, in the aggregate, over $200,000, the exact amount not being certain or important. Two of these policies, each of $10,000, contained, in identical language, the disability provisions copied above from the opinion in the Farrell case, *supra.*

In 1926, and while these two policies were in full force and effect, Jackson, the insured, became totally disabled, and remained so until his death, which occurred in 1932.

Jackson was a dealer in spot cotton and had a large number of bales of cotton on hand when the collapse of the cotton market wiped out his very considerable private fortune and wrecked his health. The testimony is practically undisputed that Jackson was totally disabled to

work or earn money since the latter part of 1926 to the date of his death. It is also clear that, had Jackson made the proof of this disability which the policies required, he would have been entitled to the disability benefits which his widow, as the administratrix of his estate, has brought this suit to recover.

At the trial from which this appeal comes, the court gave, over the appellant's objection, an instruction reading as follows: "No. 3. You are instructed that, if you believe from the evidence that the insured became totally and permanently disabled prior to the lapse of the policies sued on herein, and that he explained his condition fully to the special agent of the defendant and asked the agent to take the matter up with the company of adjusting and settling his rights under the policies, and that the local agent had knowledge of his financial and physical condition during the life of the policies, then you are instructed that the plaintiff is entitled to recover upon said policies."

The special agent to whom the instruction referred was Bertner, who had written all the policies, and there was testimony to the effect that Bertner knew Jackson was totally disabled, and there had been conferences between them in regard to the policies, especially in relation to their loan values. Bertner testified that he had written thousands of other policies, and that he did not have in mind that the policies here sued on contained provisions for disability benefits, and that he had not been requested to make any report to the insurance company in regard to Jackson's disability.

On January 16, 1932, the insured himself wrote the following letter to the general agent of the insurance company at Little Rock:

"As you probably know, at one time I carried quite an amount of insurance with your company, but due to severe financial reverses and failing health, causing my inability to work for gain or profit, I have been forced to drop several policies. A short while ago I asked an insurance man to go over my old policies to determine if I could in any way reinstate or derive some benefit

from any which I had presumed to be valueless. The above-numbered policy was brought to my attention.

"I find that the contract carried disability benefits and was in force from May 18, 1920, until May 18, 1928, on which date the automatic option of extended insurance seems to have gone into operation, due to my inability or failure to pay the premium. I can offer proof from competent, well-qualified and well-known physicians of this city that, beginning in January, 1927, I was adjudged by them to be totally and permanently disabled. I have the receipt for the premium on this policy due in May, 1927, and, according to the terms of the disability provisions, if I had notified you and proved my disability, that premium would have been waived as well as payment made to me of $1,000 a year. Naturally, being financially embarrassed at the time and physically unable to earn any money, I was not able to buy any new life insurance, and I would have been very pleased to have benefited by the waiver of premium option, which, according to the contract, I deserved.

"I desire that you forward this letter, with any comments you care to make to your home office, stating to them that I can furnish ample proof for my disability claim, and asking them if, assuming that the proof is competent, they will reinstate the contract and reimburse me for any just claim I might have. * * *

"I feel that this policy should be reinstated, and that I should pay the premiums due in May, 1930, and May, 1931, because I was receiving remuneration from my office of State Purchasing Agent during that time.

"Thanking you in advance for any services you can render me regarding this matter and assuring you of my continued good will toward you and your company, I am," etc.

This letter appears to corroborate the testimony of Bertner very conclusively. However, it is entirely certain that Bertner made no such report, whether requested to do so or not, and no report of any kind was made to any one except to Bertner.

It is quite obvious that the discussion between Jackson, the insured, and Bertner, the agent, more or less

casual, did not meet the requirement of the policy in regard to proof of disability.

It is insisted, however, that it is the fact of disability, and not proof thereof, which entitled the insured's administratrix to recover for the benefit of his estate the disability benefits to which the insured himself was entitled. This was the theory upon which the Farrell case was tried, and a judgment recovered. The opinion in that case sets out an instruction which permitted a recovery upon the finding that the insured was permanently disabled within the meaning of the policy sued on, which, as has been shown, is identical with the policy here sued on.

We held the instruction was erroneous, and should not have been given, and in that connection it was said:

"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 payments, etc.

"It is perfectly plain from this provision of the policy that it waives premiums only commencing with the anniversary 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."

The conclusion announced was based upon the decision of the Supreme Court of the United States in the case of *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 52 S. Ct. 230, as appears from the quotation there copied into our opinion from the opinion of the case cited.

The judgment of the court below must therefore be reversed, as there was no such proof of disability as the

policy required, and, as the cause appears to have been fully developed, it must be dismissed, and it is so ordered.

WINBERRY *v.* MITCHELL.

4-3182

Opinion delivered December 4, 1933.

Bush & Bush, for appellant.

Wade Kitchens and *W. H. Kitchens, Jr.*, for appellee.

SMITH, J. Appellee, plaintiff below, brought suit in ejectment to recover possession of a certain tract of land, described by metes and bounds. The cause was by consent transferred to equity, where a decree was rendered awarding her possession of the land.

The plaintiff, who is the grand aunt of appellant, the defendant, is a childless widow, seventy-seven years old. She was living on the land in question, and agreed with defendant to will him this land and all other property owned by her upon the consideration recited as follows: "It is agreed by all the parties concerned herein that I am to live with said B. G. Winberry as one of the family as long as I shall live, and, in consideration of the provisions of this will, I am to be furnished with suitable clothing and food and medical attention by him, and to be treated with kindness and humane consideration, as one of the family."

Pursuant to this contract, defendant, with his wife, moved into plaintiff's home, and has since resided there, and he states, in his brief, his right to retain possession of the land here sued for as follows: "Plaintiff made a will, by the terms of which she devised and bequeathed to the defendant the lands on which he now resides, and that, as a consideration to plaintiff for said provision in said will, defendant agreed to live in the house with plaintiff and to wait upon her so long as she should live; that defendant has complied with all the terms of his contract with plaintiff, but that plaintiff has been induced to attempt to cancel said contract, although defendant has at all times complied with and performed his contract with plaintiff; that plaintiff, without cause, left said farm, and that defendant is ready and willing to perform said contract; that defendant has a vested interest in said farm lands and residence, and is entitled to possession thereof."

The decree contains the recital of fact, as found by the court, "that defendant breached each and every condition of his alleged contract, and of the will," and, upon this finding and decree, it was ordered that a writ of possession issue in plaintiff's favor. This appeal is from that decree.

Defendant offered testimony to support the allegations of his answer, set out above; but we have no hesitancy in saying that the finding of fact by the chancellor is not contrary to the preponderance of the evidence.

The conduct of defendant indicates that he was under the impression that he had the present possession, and even ownership, of the property which he was to acquire by the will of his grand aunt upon her death, if and when he had performed the conditions which his contract with her imposed and required. He tore down a rent house without plaintiff's permission. He appears to have collected certain rents for which he did not account, and he borrowed money which he did not repay. The principal loan was for $200, which defendant says was largely used in repairing the family residence, but plaintiff was not consulted, and did not direct that the repairs be made.

Plaintiff bought and cooked her own food, but defendant says she did this from choice. She lived in one room of the house, where she cooked, ate and slept, and appears to have spent most of her time alone, and she was frequently left alone at home all day. On one very cold day she was left at home without a fire or fuel to make one, and suffered greatly from the cold. Plaintiff bought her own food and medicines as long as her money lasted. She testified that defendant wanted to "boss" her, and that, when he would not surrender the home to her, she left in August, 1931, and later brought this suit to recover possession.

The testimony shows that defendant was not cruel to plaintiff; on the contrary, he treated her kindly, but this was not all his contract required. He admits that he did not furnish or prepare food for the plaintiff, but testified that she was to buy her own food and clothing "as long as her money lasted," and that it was not exhausted when she left. But the contract did not so provide. She was entitled, under the contract, "to be treated with kindness and humane consideration as one of the family," this being the consideration for the contract, and, as there has been a failure of consideration, the contract ceases to be effective. The spirit of this contract was not merely that plaintiff should have her food and clothing and medical attention, which the testimony showed was not furnished her, but that she should be received into and treated as a member of the family, and not be required to spend her time in the solitude of her own room. The testimony shows that she not only did this, but that the defendant forbade her nephew and niece from visiting her. Under these circumstances, it is immaterial that he did nothing positively unkind or rude or uncivil, and the decree of the court must therefore be affirmed.

As has been said, the property sought to be recovered was described by metes and bounds, and it appears that it was not correctly described in the complaint and in the decree, but, as there is no question about the identity of the property in litigation, the description will be amended to correctly describe the property, and the court below will be directed to amend the decree so to do. It is so ordered.

MISSOURI PACIFIC RAILROAD COMPANY *v.* ANGUS.

4-3223

Opinion delivered December 4, 1933.

[redacted]

Thos. B. Pryor and *Daggett & Daggett*, for appellant.

W. J. Dungan and *Tom W. Campbell*, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant in the circuit court of Woodruff County to recover damages for injuries inflicted upon him by a mail bag or pouch which had been projected or thrown by a mail clerk from one of appellant's fast-moving eastbound passenger trains which failed to stop at the flag station at McCrory in response to a stop signal. Appellant filed an answer, denying liability for the injury. The cause was submitted to a jury upon the pleadings and testimony adduced, which resulted in a verdict and consequent judgment against appellant for $2,200, from which is this appeal.

There is little or no dispute about the facts in the case. Appellant has a flag station at McCrory with a chat platform between the depot and track, which extends eastward along the track about 50 feet. The mail crane is located about 175 feet east of the depot. Appellant, for a number of years, has allowed the mail clerks to throw off the mail bags at any point on the entire length of the chat platform without reference to the location of the mail crane. On the morning of January 31, 1932,

about three o'clock A. M., appellee took two guests, who had been on a bird hunt with him, to McCrory to board appellant's eastbound passenger train for Memphis. They saw the train coming and signaled it in the usual way to stop, and, hearing two short blasts of the whistle, concluded they had been seen, and stepped back seven or eight feet on the platform to wait for the train to stop. Instead of stopping, it increased its speed, and, while passing, the mail clerk threw out several mail pouches, among them a sack or pouch containing papers, which struck appellee on his neck and shoulders with great force, and which knocked him some ten feet or more and rendered him unconscious.

The failure to stop the train, the speed with which it passed the station, and throwing the bag of mail onto the platform were alleged as acts of negligence causing the injury.

Appellant introduced no testimony except certain rules and regulations of the United States Postal Service relative to the manner of dispatching mail bags or pouches from moving trains.

The facts in the instant case bring it clearly within the rules of law announced in the case of *Huddleston* v. *St. Louis, I. M. & S. Ry. Co.,* 90 Ark. 378, 119 S. W. 280. The undisputed facts show that appellee was rightfully upon the platform, and that he flagged the train in the usual manner, and that the agents of appellant ignored the signals given by him by refusing to stop and by increasing the speed of the train; that mail pouches or mail sacks containing papers were thrown onto the platform from the rapidly moving train as it passed the platform without regard to location of passengers who were standing there ready to board same had it stopped in response to the signal; that one of these sacks struck appellee and severely injured him; that the mail sack which struck him was thrown off onto the platform quite a distance from the mail crane.

Under the rules of the case above referred to, a presumption arose that the injury was the result of the negligence of the railroad company, as it owed the duty to appellee to use ordinary care to protect him against in-

juries by mail sacks which were thrown from the moving train, either by requiring the sacks to be thrown out at a certain place, or by warning against the danger therefrom, or by other means adopted for that purpose. No evidence was introduced by appellant to overcome this presumption of negligence, or to show that it protected or attempted to protect passengers standing upon the platform ready to embark.

Under these rules, as applied to the facts, the court instructed the jury more favorably than it should have done in behalf of appellant; so the instructions complained of which were given, and those requested by appellant and refused, were not prejudicial.

The requested instruction as to contributory negligence was properly refused as there was no evidence to warrant such an instruction.

No error appearing, the judgment is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY *v.* GRADY.
4-3224

Opinion delivered December 4, 1933.

[redacted]

[redacted]

[redacted]

Thomas B. Pryor and *Daggett & Daggett,* for appellant.

S. S. Hargraves, Winstead Johnson and *Fred A. Isgrig,* for appellee.

KIRBY, J., (after stating the facts). It is insisted that the testimony is insufficient to support the verdict or to show any negligence in failing to keep a lookout or that the injury was caused by the operation of the train.

The undisputed testimony shows that the place where the injury occurred was on a straight stretch of track 3 or 4 miles long and unobstructed in any way from the place where the decedent appeared to have been

struck by the train to far beyond where the body was found lying between the rails on the track badly mangled and torn. That both engines and trains that passed by the place where the injury occurred between the time deceased was seen walking on the track and the discovery of the body the next morning were equipped with strong head lights in good condition that cast a beam of light 800 to 1,000 feet ahead, and that either train could have been stopped in 600 feet at the rate of speed that they were going if they had discovered the peril of decedent. The enginemen both testified that a constant lookout was kept, that they did not discover him or his perilous position without any explanation tending to show why it could not have been done and the fact remains that the man was killed on the railroad track, all of the surrounding circumstances indicating that he was struck while walking on the track, knocked forward and dragged by the train from 50 to 100 yards along the track, blood, brains and fragments of flesh and clothing being scattered all along to where the body was found. The top of his head was mashed off, and the body was otherwise mutilated, one leg being gone and his clothing almost all torn off. There was no considerable amount of blood found anywhere along the right-of-way, except near where the body lay when found although it was splashed all along with brains and fragments of flesh and clothing from the place where the circumstances indicate he was first struck by the train. There was no effort made by any of the officers to investigate whether the death had been caused by any one else other than the railroad company, and there was no general belief aroused, so far as the testimony shows, that such was the case.

There is no merit in the contention that the testimony is insufficient to support the verdict nor that the death was caused other than by the operation of the railroad train, and under the circumstances herein the jury was warranted in inferring that such was the case and because of the failure of appellant's operatives of the train to keep the lookout as required by the statute and prevent injury to a trespasser even when his perilous position could have been discovered and the injury pre-

vented by the exercise of such ordinary care as the law, § 8568, Crawford & Moses' Digest, required under such circumstances. *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 107 Ark. 431, 155 S. W. 510; *St. Louis-S. F. Ry. Co.* v. *Crick,* 182 Ark. 312, 32 S. W. (2d) 815; *Chicago, R. I. & P. Ry. Co.* v. *Cook,* 187 Ark. 914, 63 S. W. (2d) 341.

The testimony introduced attempting to show that the decedent might have been killed by being stabbed and put on the track of the railroad company where he was struck and run over is not sufficient to raise a doubt about how the death occurred. There was no considerable amount of blood found anywhere to indicate such bleeding as would necessarily have resulted from the severance of the arteries except the blood found in the immediate vicinity of the mangled and torn body, which would not have been discovered there so far from where the circumstances showed the train struck decedent, nor at all if he had been killed somewhere else and the body placed on the tracks where it was struck by the train. It is understood that dead bodies do not bleed profusely.

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

WASHINGTON NATIONAL INSURANCE COMPANY *v.* MARTIN.

4-3221

Opinion delivered December 4, 1933.

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George W. Emerson, for appellant.

Fred A. Isgrig and *Harry Robinson,* for appellee.

KIRBY, J., (after stating the facts). Appellant insists that, since a purported copy of the application was attached to the policy and delivered to the insured, and retained in his possession from the time of the delivery thereof until the trial of the case, without any complaint being made by him to the company of the incorrectness

of the answers in the application, that, by reason of these facts, he is bound by the answers contained therein, as though they had been true, because of his failure to complain within a reasonable time of their incorrectness and untruthfulness, and notify the company thereof, and by accepting the policy, and is precluded from rescinding same or denying that it did not conform to his application; and cites in support thereof the case of *Inter-State Southern Life Ins. Co.* v. *Holzhouer,* 177 Ark. 97, 5 S. W. (2d) 732.

The above case is quite different from the one at bar, the insured there bringing an action to reform the policy, alleging that it did not contain certain clauses and agreements that the agent who had written the policy assured him would be in it, and the suit to reform the policy was brought after the lapse of 4 months after its issuance, to add something to the policy which it did not contain.

In this case, the answers to the questions in the application claimed to constitute false representations and warranties were not written or made by Martin, but by the company's agent, Cross. Martin had only had the policy in his possession 8 days before he sustained the injury, which is the basis of this action. Cross knew of the injury within a short time after it happened, and accepted Martin's proof of loss.

In *Remmel* v. *Griffin,* 81 Ark. 296, 99 S. W. 84, this court said: "It was his duty to examine the policy in a reasonable time after he received it—that is, in such time as he could have done so—and, if he rejected it, to so inform the insurance company or its agent, and, failing to do so, he is deemed to have accepted it. After such acceptance, he cannot avoid the payment of his note on the ground that he did not read the policy, unless he was induced by the insurance company or its agent not to do so."

There is no question here of a failure to accept the policy as in the Griffin case, or a failure to accept it within a reasonable time, as the injury occurred within 8 days after the delivery of the policy, and, although the undisputed testimony shows that the answers in the application as appeared on the purported copy attached to

the policy were false and may have constituted false representations and warranties that might have voided the policy, it is also true that the undisputed proof shows that this application was not signed by the insured, who testified that he had not made any such representations and warranties, but stated the truth to the agent, who procured the application, and same were falsely written by him without the knowledge or consent of the applicant. It was also shown that insured did not read his policy, was not aware of the false answers inserted therein by the company's agent, and, of course, was not bound thereby; and the company is estopped to set up such false answers and representations in avoidance of the policy. *Providence Life Ins. Co.* v. *Reutlinger,* 58 Ark. 529, 25 S. W. 835; *Southern Insurance Co.* v. *Hastings,* 64 Ark. 257, 41 S. W. 1093; *Insurance Co.* v. *Brodie,* 52 Ark. 11, 11 S. W. 1016; *Kister* v. *Lebanon Mutual Ins. Co.,* 128 Pa. 553, 18 Atl. 447, 5 L. R. A. (Pa.) 646; *Otte* v. *Hartford Life Ins. Co.,* 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532; *Bennett* v. *Massachusetts Mutual Life Ins. Co.,* 107 Tenn. 371, 64 S. W. 758.

The insured has done his duty in the premises when he imparts to the agent the requisite truthful information to enable him to write the answers correctly in the application in conformity to the information given him, and the insured had the right to rely upon his performing that duty, and his failure to do so, whether the result of a mistake or a deliberate fraud, cannot operate to prejudice the insured. *Fireman's Fund Ins. Co.* v. *Norwood,* 16 C. C. A. 136, 32 U. S. Appeals 490, 69 Fed. 71; *Germania Life Ins. Co.* v. *Lunkenheimer,* 127 Ind. 536, 26 N. E. 1082; *Michigan Mutual Life Ins. Co.* v. *Leon,* 138 Ind. 636, 37 N. E. 584; *Howe* v. *Providence Fund Society,* 7 Ind. App. 586, 34 N. E. 830; *Stone* v. *Hawkeye Ins. Co.,* 68 Iowa 737, 28 N. W. 47; *Dryer* v. *Security Fire Ins. Co.,* 82 N. W. 494; *Continental Ins. Co.* v. *Pearce,* 39 Kan. 396, 18 Pac. 291, 7 Am. St. 557; *Kansas Mill Owners' & Mfrs. Mutual Fire Ins. Co.* v. *Central National Bank,* 60 Kan. 630, 57 Pac. 524; *Dowling* v. *Merchants' Ins. Co.,* 168 Pa. 234, 31 Atl. 1087; *Cottrill* v. *Krum,* 100 Mo. 400, 13 S. W. 753, 18 Am. St. Rep. 549;

McCarty v. *New York Life Ins. Co.,* 74 Minn. 530, 77 N. W. 426; *Baker* v. *Ohio Farmers' Ins. Co.,* 70 Mich. 199, 38 N. W. 216; *State Ins. Co.* v. *Taylor,* 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; *Welsh* v. *Fire Association of Philadelphia,* 120 Wis. 456, 98 N. W. 227.

The fact that a purported copy of the application was attached to the policy and retained by the insured upon its delivery does not of itself as a matter of law charge him with knowledge of the misrepresentations wrongfully written therein by the company's agent, or estop the beneficiary from showing that they were not in fact made by the insured. *Busboom* v. *Capital F. Ins. Co.,* 111 Neb. 855, 197 N. W. 957; *Olsson* v. *Midland Ins. Co.,* 138 Minn. 424, 165 N. W. 474; *Welch* v. *Fire Ass'n of Phila.,* 120 Wis. 456, 98 N. W. 227; *Baker* v. *Ohio F. Ins. Co.,* 70 Mich. 199, 38 N. W. 216, 14 S. W. Rep. 485; *State Ins. Co.* v. *Taylor,* 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; and *Donnelly* v. *Cedar Rapids Ins. Co.,* 70 Iowa 693, 28 N. W. 607.

We do not find that the court erred in the assessment of the penalty and attorney's fee, nor any other prejudicial error in the record, and the judgment is affirmed.

WILSON *v.* MURRAY.

4-3160

Opinion delivered December 4, 1933.

W. A. Leach and *J. D. Thweatt* and *Cooper Thweatt,* for appellant.

Emmet Vaughan, for appellee.

KIRBY, J. This action involves the right to possession of certain lands in Prairie County, Arkansas, to-wit: The southwest quarter (SW¼) of section eleven (11), township four (4) north, range four (4) west, containing one hundred sixty (160) acres.

On the 10th day of June, 1929, at the collector's sale for delinquent taxes, the tract of land in controversy was sold to the State for taxes, penalty and costs due thereon for the year 1928, the time for redemption having expired, and, said lands remaining unredeemed, the same were struck off to the State and duly certified to the State of Arkansas by the county clerk as forfeited lands.

On the 8th day of August, 1932, the State of Arkansas issued to appellee, Charles Murray, Sr., a donation certificate for said lands. On the 10th of October, 1932, the State Land Commissioner extended to the 5th day of January, 1933, the time for compliance with the donation laws by the donee in said certificate. It is claimed by the donee that, on the 28th day of December, 1932, he took possession of said lands, and he did, after a fashion, come into possession of a tenant house situated thereon. On the 10th day of January, 1933, the donee brought this action in ejectment in the Prairie Circuit Court to recover the possession of said lands, alleging that he had donated the same from the State of Arkansas, and was entitled to the immediate possession thereof, and that appellants were in wrongful possession. The donation certificate was attached to the complaint as evidence of his title and right to possession.

Appellants answered and, after a demurrer to the answer had been overruled, on motion of the appellee, Murray, the cause was transferred to equity. Subsequently, on the 25th day of April, 1933, appellants filed an amended and substituted answer in which it was denied that the appellee, Murray, was entitled to the pos-

session of the lands. It was admitted therein that the land had sold for taxes, and that the appellee, Murray, had donated same, but it was denied that he had acquired any right to possession of the land by his donation for the reason that the tax sale upon which the donation was based was void on account of irregularities in said sale. It was further admitted that appellants were in possession of the lands as tenants of the owner, and no affirmative relief was prayed.

On the 2d day of May, 1933, the State of Arkansas was made a party plaintiff by amendment, and it was alleged in this amendment that the lands were sold to the State for the taxes for the year 1928, and were subsequently certified to the State as forfeited lands, and that the State was the owner thereof, subject to the rights of the donee, Chas. Murray, Sr. On the same day, a demurrer to the answer was filed, the gist of which was that the answer shows on its face that the title to the lands was in the State subject to the rights of the donee, and that same set up no right or title in the appellants that would entitle them to question the validity of the tax sale, nor the donee's right to possession.

The chancellor held that the answer was insufficient in that the appellants did not tender to the State her taxes, nor to the donee the expenses of donation nor the value of improvements he might have made. The appellants declined to plead further, and a decree was entered awarding the possession of the lands to the donee, and this appeal seeks the reversal thereof.

This is a suit in ejectment, not one to try titles, but only the right to possession of the lands under a donation certificate duly issued by the State. Such an action may be maintained in all cases where the plaintiff is lawfully entitled to possession of the premises. Section 3686, Crawford & Moses' Digest. "The action of ejectment is a possessory action and may be maintained in this State in all cases where there is a lawful right of possession against one who wrongfully holds possession from the person having the better right." *Hill* v. *Plunkett,* 41 Ark. 465; *Gaither* v. *Lawson,* 31 Ark. 279; *Brummett* v. *Pearl,* 36 Ark. 471.

The plaintiff in ejectment must show written evidence of his title or claim, and "the defendant in his answer shall plead in the same manner as above required of the plaintiff." Section 3691, Crawford & Moses' Digest.

Appellee exhibited his donation certificate with his complaint and attempted to take possession of the lands within the time provided therein, and did move on the place, in a tent, and found defendants in possession, attempting to hold it without any right whatever. The answer set up no right to possession, except that it stated that the defendants were in possession of the land as tenants of Prouty & Company, the alleged owner, but failed to exhibit the contract or to show any title in Prouty & Company. They also failed to show the date of the alleged contract, and showed no right to possession. Plaintiff demurred to the answer because it did not plead as the statute required by showing written evidence of defendant's right to possession; and the complaint and answer both showed the title to the lands to be in the State, subject to the plaintiff's right under his donation certificate. The demurrer challenges the right of defendants, who admitted that the title to the land was in the State, and that same had forfeited for nonpayment of taxes and a donation certificate had been issued to the plaintiff, to claim adversely to the State or its donee, claiming that defendants could not do so without first setting up some right to possession in themselves. The answer was properly held insufficient. *Beard* v. *Wilson,* 52 Ark. 290, 12 S. W. 567.

The appellants showed no interest in the property, and did not exhibit any written evidence of title thereto with their answer indicating any interest which it was their duty to protect. After the State's donation certificate was lawfully issued, the plaintiff had the right to take possession of the lands under its provisions, and this right could not be defeated by any one except the original owner, his grantees or assigns, none of whom appear in this case.

Under the statute, § 10,112, Crawford & Moses' Digest, the clerk certifies the forfeited lands sold to the

State, "and thereupon the title to all lands embraced in such certificate shall vest in the State." The State herself claims the right to the possession of these lands for her donee in aid of the certificate issued to him.

The appellants did not exhibit any written evidence of title, nor claim to have been owners or entitled to possession thereof at the time of the forfeiture of the lands, nor did they show any right under the statute to question the appellee's right of possession to said lands. No error appearing, the decree is affirmed.

UNION SAWMILL COMPANY *v.* LANGLEY.

4-3225

Opinion delivered December 4, 1933.

Gaughan, Sifford, Godwin & Gaughan, for appellant.
J. V. Spencer and *McNalley & Sellers,* for appellee.

MEHAFFY, J. The appellee, G. W. Langley, as guardian of G. W. Langley, Jr., a minor ten years of age, filed in the Ouachita Circuit Court a complaint against the appellant, alleging that on September 21, 1932, the said G. W. Langley, Jr., sustained an injury while riding on a truck belonging to the appellant, and in charge of one of the employees of appellant, by reason of the carelessness and negligence of the driver of said truck; that G. W. Langley, Jr., was a child of tender years, and permitted to ride on said truck by the employee of appellant, and that said G. W. Langley, Jr., was without discretion; that the seat of the truck on which he was permitted to ride was nothing more than a board without any sides or other means of preventing the persons sitting thereon from falling off of said seat; that the seat was only as wide as the body of the truck, and there were no fenders on the back wheels of said truck; that the truck was unsafe for a child of the age and experience of G. W. Langley, Jr. Other acts of negligence were alleged, and damages were prayed in the sum of $500.

Answer was filed, denying all the allegations of the complaint, some evidence was taken, and it was shown that the parties had agreed on a settlement of $500, and judgment was entered accordingly. The $500 was paid to the guardian, and satisfaction was entered on record.

Thereafter, on April 4, 1933, during the same term of court, a motion was filed by the appellee to set aside the judgment for $500. The evidence shows that the appellee lives in Union County, and the appellant also is located in Union County, and has no place of business in Ouachita County; that, prior to the time of filing the

complaint in the Ouachita Circuit Court, appellee had already, by written contract, employed an attorney in Union County to bring suit for damages against the appellant; that the manager of appellant sought to compromise the claim for damages, and secured an agreement with G. W. Langley to settle the damages for $500. Thereupon, a representative of the appellant took G. W. Langley to the probate court in Union County, where the said G. W. Langley was, by the probate court, appointed guardian for G. W. Langley, Jr., the appellant's representatives arranging for the bond of Langley as guardian. The appellant's representatives then took Langley to Camden, in Ouachita County, where the complaint and answer were filed, and judgment had for the $500. The attorneys for appellant prepared the complaint for appellee, and prepared the answer, and told Langley that he would have to be represented by some attorney, and introduced him to Mr. Bower, a practicing lawyer at Camden. The facts with reference to the agreement and settlement were stated to Mr. Bower, and he signed the complaint for the plaintiff. He was in the court room when the evidence was taken, but he took no part in the proceedings, the attorneys for the appellant examining the witnesses, and making the statement to the court.

The undisputed evidence shows that, before the parties went to Camden, and before the appointment of Langley as guardian, Langley told the representatives of the appellant that he had employed an attorney, and the representatives of the appellant told him they would not settle with the attorney, but would settle with him.

Langley testified that he wanted to see his attorney, and the representatives of the appellant would not agree for him to do this. This is disputed by the appellant's witnesses. They admit that he told them about his attorney, but testify that they did not prevent him from seeing his attorney.

Among other things, the court, in its judgment setting aside the former judgment, said: "The court, being now well and sufficiently advised, doth find that the judgment heretofore entered herein at this term of the court should be set aside."

The court also in its order, after setting aside the judgment, stated that the cause was reinstated upon the docket. The appellants objected and excepted to this. The appellee then moved the court for permission to enter a voluntary nonsuit, and said motion was by the court granted, and the cause was dismissed without prejudice, and the appellant excepted.

We agree with the appellant that there is no law that forbids or prevents any one from settling or compromising with his adversary, without consulting his attorney. However, if the court believed that appellee was prevented from consulting his attorney, or even if the court believed that he was not prevented, but the appellant's agents simply told him that they would settle with him and not his attorney, this, with the other evidence in the case, might lead the court to believe that the minor had not been properly represented, and, if so, of course he would set aside the judgment formerly entered.

But we think this is immaterial, because all courts of record have inherent power to vacate or set aside their judgments or orders during the term at which they are rendered. This is a power of daily exercise by courts, and its exercise within proper limitations of time and propriety, cannot be questioned. 15 R. C. L. 688; *Democrat P. & L. Co.* v. *Van Buren County,* 184 Ark. 973, 43 S. W. (2d) 1075; *Martin* v. *St. Imp. Dist. No. 349,* 178 Ark. 588, 11 S. W. (2d) 469; *Ashley* v. *Hyde,* 6 Ark. 92, 42 Am. Dec. 685; *Underwood* v. *Sledge,* 27 Ark. 295; *Wells-Fargo Co.* v. *W. B. Baker Lbr. Co.,* 107 Ark. 414, 155 S. W. 122.

We have repeatedly held that, during the term of court at which a judgment is rendered, the court has the inherent power to set aside the judgment, and it may do so without stating any cause. Appellant refers to the statute and numerous authorities, but they all refer to setting aside judgment after the term of court in which they were rendered. We know of no case, and our attention has been called to none, that prohibits a court from controlling its orders and judgments during the term in which they were entered. It therefore becomes unnecessary to set out the evidence taken on the motion to set

aside the judgment. It was proper, of course, for the court to hear evidence, if he wished to do so in order to determine whether the judgment should be set aside.

It is, however, contended by the appellant that the appellee should not have been permitted to take a nonsuit without paying back the money that had been paid. We think a complete answer to this is that no request was made by appellant for an order to repay the money until after the nonsuit was taken. It is true that the response filed by appellant shows this request. The response was permitted to be filed by the court, but the bill of exceptions shows that, before it was filed the attorney for the appellee stated: "Plaintiff desires to take a voluntary nonsuit." The attorney for the appellant said: "The court should require the money that has been paid to be returned." The court thereupon said: "If there is any way to have the money impounded, if you can impound the money, you may do so. I don't think the court has anything to do with it." After some further statements by court and counsel, the counsel for the appellant said: "We have not had an opportunity to file our response. I don't think they should be permitted to take any order until we put our response in, and see what question that is going to raise. I think we are entitled to ask, in our response, that they tender this money back that they have received." Then the court told him he could file his response, but the motion for a nonsuit had already been granted. The response had not only not been filed, but the attorney himself did not know what it would contain. He stated that he thought they were entitled to ask for a return of the money.

It should be kept in mind that the judgment had been set aside and the cause reinstated, and stood on the docket just as it did before any judgment was ever had. That is, it was a case on the docket to be tried, and the statute provides that the plaintiff may take a nonsuit before the final submission of the case to the jury or the court, where the trial is by the court. Section 1261 of Crawford & Moses' Digest.

Section 1262 of Crawford & Moses' Digest authorizes the plaintiff or his attorney to dismiss any suit pending

in any of the courts of this State, except actions of replevin, in vacation in the office of the clerk on the payment of all costs that may have accrued therein. We think therefore there is no question but what the appellee had a right to take a nonsuit, and the court had the right to grant appellee's request.

It appears from appellant's response that it seeks the recovery of the $500 paid. If that response had been filed before the nonsuit was taken, the taking of the nonsuit by appellee, or the dismissal of his cause of action, would not have resulted in the dismissal of the counterclaim or set-off. This has been many times held by this court, and we do not deem it necessary to review the authorities. In all cases where a defendant in a suit has filed a counterclaim or set-off, the dismissal by plaintiff of his suit does not affect the right of the defendant to try his counterclaim.

It appears from the record in this case that no one knew what the response would be until after the nonsuit was taken. If, however, the response is still pending, it may be tried and determined by the court whether the $500 should be returned or not.

The record, however, shows that the parties all live in Union County, and that suit has already been filed in that county for damages, and is now pending there, and in that suit appellant can ask for a return of the $500. It appears that this suit in Union County was instituted by the attorney who had been employed by the appellee, and was filed two days after the original judgment in the Ouachita Circuit Court. When the attorney filed the suit in Union County, he had not been informed of the proceeding in Ouachita County. Whatever course may be taken by appellant, with reference to the $500, does not affect this appeal. If no nonsuit had been taken, the appellant could not have appealed from the order setting aside the judgment. *Democrat P. & L. Co.* v. *Van Buren County, supra.*

This court has many times held that, where settlements were made and releases given, after the payment of money in settlement, the injured party could maintain a suit without paying back the money received in

the settlement. If the settlement was alleged to have been obtained by fraud, the money would not have to be paid back in order to maintain the suit, but on the trial he would have to show by the evidence facts sufficient to justify the setting aside of the settlement.

It is useless to cite authorities on the proposition that a settlement and release obtained by fraud will not only be set aside by the court, but we have uniformly held that the plaintiff is not required to pay the money back in order to maintain suit. So far as this minor is concerned, this judgment is nothing more nor less than a release; the only way a release could be had from the minor. A minor has as much right to maintain a suit for personal injuries without paying money back which he has received on settlement as a person of mature years would have.

This is an appeal from a judgment setting aside a judgment obtained at the same term of court. From this order there could be no appeal, because there was no judgment to appeal from. When the judgment was set aside, the court reinstated the cause; it then stood on the docket in the same manner it did before any judgment was entered.

The appellant, however, contends that the court did not find that there was any fraud. It is true he did not use the term "fraud," but he did use the following language: "Under all the evidence here, I don't think this minor has had an opportunity to present his cause of action to the court as he should have."

He also stated that, when the original judgment was rendered, there was no evidence as to the extent of the injury, and very little evidence about how it occurred, and he then says: "Whether that was due to Mr. Langley's fault, or either party's fault, or whether or not it may have been due to the haste of the court" is unimportant. "The case was taken up in between the trial of other cases." The court also said in setting aside the judgment: "I don't feel like, under all of the evidence of the hearing had that day, this minor has had a full opportunity to have his case heard."

This was the finding of the trial court after he had heard all the evidence, and, if the conduct of either party or both parties prevented the minor's cause from being fairly presented, it was a fraud perpetrated against the minor, and it would make no difference whether it was intentional or unintentional. He may or may not have a cause of action, but he has a right to have this question determined without putting any more burdens on him than we would put on a mature person.

We find no error, and the judgment is affirmed.

HUDSPETH *v.* STATE.

Crim. 3864

Opinion delivered December 4, 1933.

Edward H. Coulter, for appellant.

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

MEHAFFY, J. The appellant, managing officer of the Citizens' Bank & Trust Company at Harrison, Arkansas, was indicted by the grand jury on a charge of knowingly accepting deposits in the Citizens' Bank & Trust Company of Harrison, while said institution was in an insolvent condition. He was also indicted on numerous other charges growing out of the bank failure. His son, also an official in the bank, was indicted, as were several other officers of the banks, both in Boone County and in other counties.

At the July term, 1932, of the Boone Circuit Court, appellant filed his verified petition for a change of venue. The petition was in proper form, and supported by the affidavits of seven persons, each of whom stated that he was a qualified elector; was an actual resident of Boone County; not related to the defendant; that he had read the petition for a change of venue, and was familiar with the facts therein contained, and that he believed the statements to be true.

The petition for a change of venue was overruled without any evidence being taken. Thereafter appellant entered a plea of guilty to the charge of receiving deposits in an insolvent bank, and the cause was continued until the January, 1933, term. At the July, 1933, term, appellant filed his verified petition for permission to withdraw his plea of guilty theretofore entered, and stated that, after the court had overruled his motion for

change of venue, he was approached by the officers of the court for a compromise of all the cases, those against himself, and other officers of the bank at Harrison, and the banks elsewhere. He alleged that an agreement was made between the prosecuting attorney, the court, and appellant, to the effect that all the indictments except the one in this cause should be dismissed against all the defendants upon appellant's payment of costs in each action, including a prosecuting attorney's fee of $25 in each case; that no further indictments or prosecutions would be instituted in the judicial district; that appellant would enter his plea of guilty in this particular case, which plea was at said time entered; that he should receive a sentence in the penitentiary of this State for a term of one year, and that, prior to the procurement of said sentence, all the above-mentioned cases should be dismissed, and that the appellant might elect to receive his sentence at an adjourned term of court, 1932, or at the January, 1933, term of said court, at appellant's option; that at the January, 1933, term of the court, it was published in the newspaper at Harrison that the court did not intend to abide by certain portions of the agreement which had been entered into; that the agreements entered into by the officials of the court have not been performed, and the statements of officials indicated that they did not intend to perform said agreement; that appellant desired to withdraw his plea of guilty; that he was innocent of the charge, and entered said plea of guilty solely for the purpose of protecting his friends and former business associates; that he was entitled to withdraw said plea of guilty because, first, said plea was conditional; second, because the agreement, on the part of the court officials, had not been performed or kept.

After filing petition to withdraw plea of guilty, appellant filed his verified petition to disqualify the trial judge in the hearing on the motion to withdraw the plea of guilty. Testimony was then taken on the motion to disqualify the judge. The trial judge denied the petition to disqualify, and denied appellant's petition to withdraw plea of guilty, and sentenced appellant to three years in the penitentiary.

The court then dismissed the cases against the parties who had been indicted in connection with the bank failure in Boone County. Motion for new trial was filed and overruled, and the case is here on appeal.

Appellant urges a reversal, first, because he says the court erred in overruling his motion for change of venue. We agree with appellant that it was error for the court to overrule the motion for change of venue. The application for change of venue was in compliance with §§ 3087 and 3088 of Crawford & Moses' Digest. *Ward* v. *State,* 68 Ark. 466, 60 S. W. 31; *Spurgeon* v. *State,* 160 Ark. 112, 254 S. W. 376.

While it was error to overrule the petition for change of venue, this error was waived, and the petition abandoned by entering a plea of guilty. The plea of guilty is wholly inconsistent with motion for change of venue. A plea of guilty waives any defect not jurisdictional, and which may be taken advantage of by motion to quash or by plea in abatement.

The right to a jury is waived also, and with, of course, the constitutional guaranties with respect to the conduct of criminal prosecutions. 16 C. J. 403, 404, § 738; *People* v. *Popescue,* 345 Ill. 142, 177 N. E. 739, 77 A. L. R. 1199; *People* v. *Busby,* 119 Cal. App. 6 Pac. (2d) 114; *State* v. *Brinkley,* 193 N. C. 747, 138 S. E. 138; *Kachnic* v. *United States,* 53 Fed. (2d) 312, 79 A. L. R. 1366.

Appellant contends that the plea of guilty was conditional. The law authorizes but three kinds of pleas to an indictment: First, a plea of guilty; second, a plea of not guilty; and, third, a former conviction or acquittal. Crawford & Moses' Digest, § 3074.

A conditional plea of guilty is not authorized, and the court could not accept such a plea. *Cox* v. *State,* 114 Ark. 236, 169 S. W. 789 *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723; *Wolf* v. *State,* 102 Ark. 295, 144 S. W. 208. It is within the discretion of the court to permit a plea of guilty to be withdrawn. The record does not show that the plea was entered conditionally. The evidence is in conflict as to what took place, and we think there was

no abuse of discretion in refusing to permit appellant to withdraw his plea of guilty.

It is urged that the judgment should be reversed because the trial court overruled appellant's petition to disqualify the presiding judge. Attention is called to 15 R. C. L. 526, 530, and 16 R. C. L. 530. We do not think these authorities sustain appellant's contention.

Considerable testimony was taken on the question of the judge's disqualification, but practically all of it was to the effect that an agreement had been made, under the terms of which all the cases against others indicted in connection with the failure of several banks controlled by appellant, some of which were pending in other counties, were to be dismissed. Appellant contended that these cases in other counties were to be dismissed according to the agreement, but the trial judge did not so understand it. The evidence did not show bias or prejudice of the judge in the sense that it disqualified the trial judge.

It is said in 15 R. C. L. 530, § 18, one of the authorities relied on by appellant: "The basis of the disqualification is that personal bias or prejudice renders the judge unable to exercise his functions impartially in the particular case, and therefore it must be shown that he is biased against or entertains ill will or hostility toward the defendant of such a character as might prevent him from giving the defendant a fair trial; and this must be shown as a matter of fact, and not as a matter of opinion of the defendant or any other person. The words "bias" and "prejudice," as used in the law of the subject under consideration, refer to the mental attitude or disposition of the judge towards a party to the litigation, and not to any views that he may entertain regarding the subject-matter involved."

Section 20 of article 7 of the Constitution of the State of Arkansas provides: "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may

have been of counsel or have presided in any inferior court."

Section 2107 of Crawford & Moses' Digest is as follows: "No judge of the circuit court, judge of the court of probate or justice of the peace shall sit on the determination of any cause or proceeding in which he is interested or related to either party within the fourth degree of consanguinity or affinity, or shall have been of counsel, without consent of parties." *Jones* v. *State,* 61 Ark. 88, 32 S. W. 81.

It is next contended that the court erred in overruling the motion of appellant for a jury to assess the punishment. A plea of guilty waives any defects not jurisdictional, and appellant, by entering his plea of guilty, waives the right to a jury. It is the duty of the judge when a plea of guilty is entered, to pronounce judgment. 16 C. J. 402, § 738.

"While generally no evidence of guilt is required in order to proceed to judgment, for the defendant has himself supplied the necessary proof, yet where the court possesses any discretion as to the extent of the punishment, it is its duty to hear evidence as to aggravation and mitigation of the offense." 16 C. J. 404, § 738.

It does not appear that any evidence was taken at the time appellant was sentenced, but the evidence does show that, at the time it is alleged an agreement was made, the punishment should be fixed at one year.

After a careful consideration of all the evidence and circumstances, we have reached the conclusion that the punishment should be reduced to one year.

The judgment of the circuit court is therefore modified by reducing the punishment to one year, and, as thus modified, the judgment is affirmed.

HUMPHREYS, J., concurs in opinion, but dissents from reducing punishment.

HERNDON *v.* WASSON.

4-3308

Opinion delivered December 4, 1933.

C. M. Walser, for appellant.

Hal L. Norwood, Attorney General, and *Will G. Akers, O. T. Ward, amici curiae,* for appellee.

McHANEY, J. Appellants, Herndon and Cornelius, have organized a voluntary association for the purpose of furnishing burial benefits to those who may become members of such association, and who conform to the by-laws, rules and regulations thereof. They applied to the Securities Division of the State Bank Department for a permit to sell certificates of membership in the association under the authority of § 5 of act 264, Acts of 1933, p. 820. The application for a permit was refused because the department was of the opinion that appellants proposed to engage in the life insurance business, and that they should first comply with the insurance laws and obtain authority from the Commissioner of Insurance, before the bank department would be authorized by law to issue a permit to sell its membership certificates. Appellants then brought mandamus to compel the Commissioner to proceed according to law in respect of said application, alleging that it was not an insurance association, and that the insurance laws have no application. The circuit court denied the writ, and this appeal followed.

We are of the opinion that the circuit court erred in refusing to award the writ. Section 5 of said act 264 provides that an association, such as appellants propose to operate, "is hereby declared to be an investment company, and shall be required to submit an application, pay

a similar fee, and obtain a permit from the Securities Division of the Bank Commissioner in the manner as now provided by law of other investment companies, and shall be required,'' etc. Act 264 deals wholly with investment companies. No mention is made of insurance companies or associations. While no doubt, the Legislature has the power to classify such associations as appellants' to be insurance companies, neither act 264 nor any other act, with which we are familiar, has done so. It is contended by appellee that appellants come within the purview of act 139 of 1925, relating to assessment, life, health and accident insurance associations, but we cannot agree that such is the fact. Burial associations are not included by name, and a careful reading of said act shows they were not contemplated. The business of such associations does not come therefore under the jurisdiction of the Insurance Commissioner, especially in view of § 5 of act 264, Acts of 1933. See *State ex rel. Reece* v. *Gooch,* 165 Tenn. 97, 52 S. W. (2d) 143. It was there held that such associations do not come under the jurisdiction of the insurance commissioner of Tennessee under insurance laws quite similar to ours.

We do not pass upon the merits or demerits of the plan of the association, whether the plan is good or bad, as that is a matter for the consideration of the Bank Commissioner. We do hold, however, that the Commissioner should consider the application for a permit without regard to the insurance laws of the State. The judgment will be reversed, and the cause remanded with directions to award the writ as prayed.

MAYO *v.* BANK OF MARVELL.
4-3328

Opinion delivered December 4, 1933.

W. M. Mayo and *T. K. Riddick,* for appellant.
Moore, Daggett & Burke, for appellee.

McHaney, J. Appellant, J. Edwin Mayo, is the administrator in succession of the estate of Walter P. Mayo, and he and the other appellants are the children and sole heirs at law of R. D. Mayo, who was the first administrator of the estate of Walter P. Mayo, with the will annexed. The will, after providing for payment of certain bequests out of life insurance policies to named legatees, made his father, R. D. Mayo, his residuary legatee, and named him as executor of said estate. Walter P. Mayo left a large estate consisting of real and personal properties in Monroe and Phillips counties, Arkansas. R. D. Mayo qualified as executor, and continued to act as such until his death on April 12, 1926. A few days later, appellant, J. Edwin Mayo, was appointed and qualified as administrator in succession of said estate. There was no administration on the estate of R. D. Mayo. The proceeds of the insurance policies bequeathed to various legatees were collected by R. D. Mayo, but neither he nor his son, J. Edwin, paid over the proceeds of such policies to the various legatees, with two exceptions. The estate has never been closed. Walter P. Mayo was the owner of approximately 3,000 acres of land, 1,400 acres of which was in a high state of cultivation, and the remainder consisted of virgin timber lands of a large value.

After taking charge of said estate, J. Edwin Mayo and the others heirs of R. D. Mayo, appellants, became indebted to the Bank of Marvell for borrowed money evidenced by notes, in the year 1926, for a large sum. Failing to pay same, suit was brought against appellants thereon in Phillips Circuit Court and on November 20, 1931, judgment was rendered on these notes in favor of appellee against appellants, heirs of R. D. Mayo, for the sum of $16,809.47 with interest from date until paid at the rate of 8 per cent. per annum. It appears that, a short time after the rendition of this judgment, Judge John I. Moore, attorney for appellee, agreed with the then counsel for appellants, that no execution would be issued on said judgment without the consent of their counsel. This agreement was made to afford additional time to appellants to sell some of the assets of the estate to take care of appellee's debt, which was a debt incurred by them in the operation of said estate. Pursuant to this agreement, no execution was issued on appellee's judgment until March 29, 1933, when appellee caused an execution to be issued out of the Phillips Circuit Court, directed to the sheriff of Monroe County, who made a levy upon the interest of appellants in and to the 3,000 acres of land formerly belonging to Walter P. Mayo, deceased. Thereafter, on May 3, appellants filed this action against appellee and the sheriff of Monroe County, and others to enjoin and restrain the sheriff from selling the property upon which the execution had been levied.

The court, on a final hearing, denied the relief prayed, and dismissed the complaint for want of equity, from which is this appeal.

The court correctly dismissed the complaint for want of equity. There was no equity in it. The undisputed proof shows that no debts were probated against the estate of Walter P. Mayo, deceased, and that there was no administration upon the estate of the father, R. D. Mayo, deceased. Under these circumstances, the lands of the decedent were not an asset in his hands for the payment of debts, because there were no debts. Appellant, J. Edwin Mayo, as administrator, had no right to

their possession and control. Section 67, Crawford & Moses' Digest, provides that: "Lands shall be assets in the hands of the executor or administrator, and shall be deemed in their possession, and subject to their control for the payment of debts." This court has many times held that the administrator has no control of his decedent's lands, nor the rents thereof, when not needed for the payment of debts. *Stewart* v. *Smiley,* 46 Ark. 373; *Jones* v. *Jones,* 107 Ark. 402, 155 S. W. 117, and many more recent cases. The legal title to an intestate's lands, upon his death, descends to and vests in his heirs at law, subject to the widow's dower, and the payment of debts through his administrator. *Culberhouse* v. *Shirey,* 42 Ark. 25; *Mobley* v. *Andrews,* 55 Ark. 222, 17 S. W. 805; *Burton* v. *Gorman,* 125 Ark. 141, 188 S. W. 561. There being no debts, the administrator in this case had no title or interest in the lands of the testator. It appears, however, that he took possession both as administrator and in his own right, and with the consent of the other heirs, and attempted to conduct the farming business as such administrator.

Appellants contend that the administrator was entitled to the protection of the chancery court from an execution against the heirs, and levied upon lands belonging to the estate of the testator. But the administrator is not entitled to protection from a proceeding in which he, as administrator, has no interest. Having no interest in the lands as administrator, it is difficult to perceive what right he would have to prevent the levy of an execution against the heirs.

It is also contended by appellants that the jurisdiction of the equity court should have been invoked to prevent the violation of the agreement between counsel above mentioned as to the issuance of an execution under the judgment in favor of appellee. It is true that there was such an agreement, but it may be said, first, that it was without consideration; and, second, that such agreement was not to last forever, but only for a reasonable time to enable appellants to make disposition of the timber land belonging to the estate to satisfy the judgment

and other debts incurred by appellants. The undisputed proof shows this to be a fact. This agreement was permitted to stand, and no execution was issued from the date of the judgment to March 29, 1933, more than a year and four months, and appellants do not contend that this was not a reasonable time.

The rights of legatees are not involved in this appeal, although one of them was a party plaintiff in the action. The legacies were to be paid out of specific funds, the proceeds of certain life insurance policies. Whether by standing by, permitting the executor and administrator in succession to use said funds for other purposes, they may now recover out of the corpus of the residuary estate is another question, and one that is not before us.

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

MISSOURI & NORTH ARKANSAS RAILROAD COMPANY *v.* ROBINSON.

4-3231

Opinion delivered December 4, 1933.

J. Sam Rowland and *Campbell & Smith,* for appellant.

Fred Isgrig, S. S. Hargraves and *Winstead Johnson,* for appellee.

BUTLER, J. On June 30, 1931, Ralph Cunningham, an extra brakeman of the appellant company, while engaged in the performance of his part of the duty of switching a box car on appellant's side track at Cotton Plant, Arkansas, fell from a part of the moving train and the wheels of the engine and tender passed across his legs, severing them, one above and the other below the knee. This injury resulted in his death about two hours later.

In an action to recover for the death of Cunningham, a verdict was returned for the plaintiff in the sum of $5,000 for physical pain and mental anguish for the benefit of the estate, and $10,000 as pecuniary loss to his widow. This verdict and the judgment based thereon is challenged, in the first place, for the refusal of the trial court to grant a continuance on motion of the appellant company. It was alleged and proved at the hearing of the motion that an interval of about twenty-one months had elapsed from the date of the casualty until the filing of the suit; that the investigation by the company was made a short time after the first event, and that, notwithstanding the delay in bringing the suit, its hearing was set, and the case tried, within thirty days after the suit was filed. The general attorney for the company had been in bad health for some time, and on the advice of his physician had not participated in the trial cases since December 10, 1932, as he had not been able to do so. On Monday before the Friday following, the date set for the trial, the general attorney and the presiding judge dis-

cussed the physical condition of the former over the telephone, and in the conversation the attorney told the judge of his physical disabilities, and that he would get some one to help him. On Wednesday following, the attorney, whose residence is in Harrison, called Mr. Campbell of the law firm of Campbell & Smith of Forrest City, where the case was to be tried, and engaged him to assist at the trial. Mr. Rowland, the general attorney, traveled from Harrison to Forrest City *via* Little Rock, where he had a tooth extracted. He reached there at an early morning hour on Thursday, and was in such condition that he remained in bed from the time of his arrival until Friday morning. He was present in the court on Friday morning when the motion for continuance was made and remained during the trial, but stated that he was in no condition to do so and should not. The special agent had been in Forrest City since the day before the trial and had been consulting with Mr. Campbell. All of appellant's witnesses had arrived on that day, and Mr. Campbell had an opportunity to discover from them what their testimony would be. Mr. Rowland was of the opinion that he would be wholly unable to conduct the case himself, and this was also the opinion of his physician, whose certificate to that effect was filed with the motion. Mr. Rowland thought he would be unable to assist Mr. Campbell and had not been able to discuss the case with him. He thought that, in a trial of this magnitude, Campbell & Smith did not, and could not, have time to make proper investigation of the case; and he did not believe any attorney in the length of time they had could properly prepare the case for trial. The motion for continuance was grounded on the above facts. Mr. Campbell made no statement.

From the facts stated we are unable to say that Mr. Campbell was unable to properly acquaint himself with the facts or the law or that appellant would have been able to present its case in a more favorable light at a subsequent time. The granting of a continuance ordinarily rests in the sound discretion of the trial court, and

we cannot say that there is such an abuse of the discretion shown as would warrant us in disturbing its ruling.

It is next contended that the evidence fails to show any negligence on the part of the appellant's employees, and the court erred in failing to direct a verdict in its favor. In this connection we note the error assigned for failure to give appellant's instruction No. 4 by which the court was requested to withdraw from the consideration of the jury any evidence tending to show negligence of its employees in failing to observe the rules with reference to making a "running switch," for the reason that there were no such allegations in the complaint.

The negligence alleged as the proximate cause of Cunningham's injury was that, while he was at his post of duty and engaged in the part assigned to him in the operation of switching a car from appellant's main line, "after the car which was being set out had been kicked into the sidetrack, the defendant's engineer in charge of said engine, without warning to Cunningham, abruptly, carelessly, negligently and without proper care and caution reversed said engine and started the same with a sudden jerk and twirl of the motor and threw Cunningham to the ground. * * * That, just as Cunningham was thrown to the ground by a sudden jerk of the engine, the defendant's engineer in charge of said engine and controlling its operation was signalled to stop, which he failed to do until the engine and tender had passed entirely over the body of the deceased; that the defendant's engineer in charge of said engine was negligent and careless in the operation of said engine by suddenly starting the same with a jerk so as to throw the said Cunningham to the ground, and that he was negligent and careless in the operation of said engine by not keeping a proper lookout for signals to stop, and, after he had observed them, he then failed to obey same."

The evidence is undisputed that Cunningham's proper place was on the engineer's side (right) on the running board affixed to, and across the rear end of the tender, to which was attached the car to be side-tracked and which it was Cunningham's duty to uncouple at the

proper time by drawing a pin which fastened it to the rear of the tender. During the switching operation he was seen by the "swing brakeman," who had opened the switch, as he was in the act of falling.

It is the theory of the appellant that Cunningham left his place on the right, or engineer's, side, where he should have remained, and for some unknown reason endeavored to walk along the running board to the left side of the train, and, while thus engaged and the train was in motion, in some way lost his balance and fell while the locomotive was being handled in a careful way and in the manner which was usual and necessary to accomplish the switching operation. But there is no evidence to indicate that he voluntarily left his proper station, and he was last seen just previous to his fall at the place where he should have been on the right, or engineer's side. There was some testimony given by a section foreman who was at work about three hundred yards away, as to the operation of the locomotive, to the effect that it was handled, in the opinion of the witness, in a manner out of the ordinary and the movement was unusual in that "it stopped too quick and started too quick." There is no testimony that we are able to discover tending to show a failure of the engineer to keep a proper lookout or to observe and obey the signals given, but whether the evidence is sufficient to submit to the jury the negligence alleged, is unnecessary for us to decide, because there is substantial evidence on other grounds to submit that question to the jury.

The record is sufficient to sustain the inference that a running switch is a highly dangerous operation, and the rules of the company which were introduced prescribe how and when such a switch is justified and the manner in which it should be made. Rule No. 317 is as follows: "A running switch must not be made when practical to avoid it, but, when made, great care must be taken to prevent accidents." There was evidence that at Cotton Plant the situation was such that generally a car to be set on the side track could be placed in front of the locomotive and pushed upon it, thus obviating the

necessity of making a running switch which would be more dangerous. There was no evidence that any circumstances existed making it necessary to employ the more dangerous operation of making a running switch. The testimony does not describe in detail the manner in which a switch of that sort is made, but there is sufficient testimony to show that it required the slowing down or stopping of the locomotive at a given point and then a sudden movement in reverse, and that this was dangerous to the safety of one who like Cunningham must ride the train and quickly uncouple the car.

It was a question, then, for the jury to determine whether the operation adopted was negligence and whether it was the proximate cause of the injury to Cunningham. The record discloses that all of this evidence was introduced without any objection being made. This, under settled rules, justified the court in treating the complaint as amended to conform to the proof, and it did not err in refusing to give instruction No. 4, withdrawing this evidence from the jury.

A witness was called in rebuttal for the purpose of contradicting the statements of appellant's witnesses. It is insisted that the manner in which this witness was questioned and his responses to these questions were improper, and the court erred in not sustaining appellant's objections thereto. The appellee's witnesses were asked on cross-examination if they did not make certain statements in the presence of the rebutting witness at a certain time and place. They denied making these statements. The witness on rebuttal was questioned from notes he had prepared in which the alleged statements were set down. These were read to him just as they were asked the witnesses sought to be impeached, and he was asked if they were made. The questions were such as admitted of the answer, "yes" or "no." This was the proper manner to impeach the witnesses by proving contradictory statements. All of the statements alleged to have been made and as contradictory of the evidence given by the witnesses related to the extent of the

pain and suffering endured by Cunningham and as to whether it was consciously suffered.

It is finally insisted that the damages awarded are excessive and not sustained by the evidence. Damages were awarded on two grounds: One for the estate on account of the pain and suffering endured by the deceased, and the other to the widow for pecuniary loss.

It will be remembered that both of Cunningham's legs were severed. The proof is clear that after his injury he was conscious, realized his condition, and gave unmistakable evidence of great suffering. It is true that immediately after the injury was sustained he lay as if dead, but he soon recovered from this swoon. It is also true that his drugged brain might not have registered pain acutely at all times, but it required six hypodermic injections of an opiate within the short time he lived, and this is sufficient to show that the pain must have been great indeed. It is difficult to form any just or adequate conception of the pain and suffering or the poignancy of the anguish of mind endured by Cunningham until he died, and we cannot say that the damages on account of this are excessive.

But, as to the damages awarded for the pecuniary loss sustained by the widow, the amount assessed is grossly excessive. The evidence is to the effect that Cunningham at one time had been a conductor on the Rock Island Railway, but at what time, or for how long, he held this position, is not shown; but that he had not been thus employed, however, for a number of years, is clear. What he first did after leaving the service of the railroad is not shown, but for eight years prior to 1927 he was in the cafe business in Brinkley, Arkansas, which, according to the testimony of his widow, was profitable, and he earned from three to four thousand dollars a year in that business. In 1927, however, he sold out this business in Brinkley and went to St. Louis where he engaged for a short time in a similar business which proved unprofitable. After this, he had no regular employment and when he was killed he was being intermittently employed as a brakeman on appellant's railway. The tes-

timony relating to his earnings from 1927, most favorable to the appellee, is that of the widow, Mrs. Cunningham. Speaking of his employment after his venture in St. Louis, she testified as follows. "His next employment was with the Missouri & North Arkansas Railroad. His work with the Missouri & North Arkansas Railroad wasn't regular. He worked there a few months, and then he was cut off of the board and came back to St. Louis, and spent all summer. Then he went back and had extra work. When he would be cut off of the board, he would come home and stay until he was recalled. He always contributed to my support. When my husband worked for the Rock Island he received standard pay, about $85 every two weeks. I couldn't say what his earnings were with the Missouri & North Arkansas Railroad; it all depends upon the time he would get to work. He worked so irregularly. He was on the extra board. He was a man of good habits, an industrious man, kind and considerate to his family. I think he entered the service of the Missouri & North Arkansas Railroad in the fall of 1928. His employment was intermittent, depending on business conditions. He gave me about $75 or $80 a month, depending on his earnings. * * * When he went to work in 1928, I did not see very much of him. He spent most of the time away from home."

Appellee calls attention to the testimony of Mrs. Cunningham to the effect that Cunningham made from three to four thousand dollars a year while operating the cafe in Brinkley, but this was in the past. He argues that Cunningham, by working 26 days a month as a brakeman, would earn $95.16, and that he worked at least three-fourths of his time as brakeman. We have carefully examined the record and find nothing that would justify this assumption. Appellee also asserts that sooner or later Cunningham would have become a conductor again, but we think this was hardly to be expected, both on account of the length of time he had been out of regular service and because of his advanced age. There is nothing to justify appellee's argument to the effect that the jury might have believed that Cunningham would re-

engage in business and make more than he could either as a brakeman or conductor. The evidence is to the contrary. Before the business conditions which now obtain, when times were prosperous, Cunningham gave up his cafe business in Brinkley and attempted to re-engage in the same line of business in St. Louis and was forced to abandon it and did not attempt to again enter that business elsewhere, although during 1928 and 1929 it is well known that business of all kinds was apparently profitable.

Appellee also contends that at the time of Cunningham's death, and before, he was giving to Mrs. Cunningham as living expenses from $75 to $100 a month. This contention, too, is not supported by the proof. The most that was said as to this last proposition was the statement made by Mrs. Cunningham, after telling of her husband's earnings as a Rock Island conductor and the irregularity of his employment since he began to work with the appellant company, that "he gave me about $75 or $80 a month, depending on his earnings." It was also argued that the evidence shows that Cunningham would have continued to contribute from $75 to $100 a month to his wife for the rest of his life out of money "he had previously earned in the restaurant business." This might be true, but out of whatever estate he left she would be entitled to a part under the law, and not because of the manner of his death and his earning power, and contribution from it could not be measured by the extent of his gifts to her out of what he had already accumulated. So far as we have been able to ascertain from the record before us it is uncertain how frequently Cunningham worked, or for what length of time over any given period. Therefore, any verdict based on this ground must be wholly conjectural and speculative. Ordinary experience and knowledge of human affairs show that, when one has reached the age of the deceased, his opportunities and powers for earning rapidly lessen, and, although Cunningham's life expectancy was thirteen years, it is wholly irrational to believe that during these years he would have earned a wage equal to that of his vigorous manhood. Then, too, out of his earnings some-

thing must have been expended for his own support, for, from Mrs. Cunningham's testimony, it seems that he had not resided in the home except for short intervals from 1928 up until the time of his death when he was living in Brinkley and his wife was living in St. Louis. Mrs. Cunningham said: "When he went to work in 1928 I didn't see very much of him. He spent most of his time away from home."

We are of the opinion, therefore, that the amount of the verdict, in any view of the evidence, would not be justified for a sum greater than $2,500. Accordingly, the judgment for the benefit of the widow will be reduced to that sum, and judgment entered here therefor. In all other respects the judgment is correct, and it is affirmed.

WASSON *v.* PLANTERS' BANK & TRUST COMPANY.

4-3358

Opinion delivered December 4, 1933.

W. R. Roddy, for appellant.

M. B. Norfleet and *Trieber & Lasley*, for appellee.

BUTLER, J. On August 25, 1933, act No. 15 of the Extraordinary Session of the Forty-Ninth General Assembly of the State of Arkansas was approved. The purposes of this act are accurately stated in its title, which is as follows: "An act to qualify State banks for deposit insurance under congressional statute, and to recognize the rights of, and permit, the Bank Commissioner to co-operate and deal with federal deposit insurance corporation in respect to State insured banks and State member banks of the Federal Reserve System, as contemplated by said congressional statute; to authorize and validate the issuance by State banks in certain cases of common and/or one or more classes of preferred non-assessable and single-liability capital stock; and to reaffirm the legal and equitable remedies of creditors and

other interested parties against banks under management of the Bank Commissioner."

Section 1 of the act deals with the first purpose stated in the title of the act and gives to banks and trust companies and the Bank Commissioner the authority to effectuate that purpose.

Section 2 deals with the nature of the capital stock of banks and provides for the issuance by banks or trust companies, organized after the effective date of the act, of nonassessable and single liability preferred or common stock, and provides how and in what event and under what conditions banks and trust companies already existing, whether going concerns or operating on a restricted basis, or undergoing liquidation, or under the management of the Bank Commissioner, may convert stock held in such institutions into nonassessable and single liability stock either common or preferred.

Section 2-A relates to the status of the liability existing against owners of stock in banks existing at the time of the passage of the act.

Section 3 provides for the preservation of all remedies at law or in equity of creditors and other parties in interest against banks, trust companies, or building and loan associations, taken in charge for purposes of management by the Bank Commissioner, except in certain named particulars; and provides that the statute of limitations applicable to any claims against such institutions shall not be suspended or impaired during the management by the Bank Commissioner.

Section 3-A provides for the issuance by the Bank Commissioner of a certificate evidencing the claim of a depositor against any bank or trust company taken over for purpose of management where the right of withdrawal of the deposit is restricted in any way.

Section 4 provides for a repeal of all laws in conflict with the provisions of the act, and that, if any of its provisions should be held invalid for any reason, the remainder of the act should not be affected thereby.

Section 5 is the emergency clause setting forth the nature of the emergency existing and the necessity for the immediate operation of the act.

Section 2, among other things, provides that where the original charter did not provide for the issuance of preferred stock, the bank or trust company seeking to issue the same might so provide by an amendment to the charter, which action must be approved by the Bank Commissioner.

The appellee bank is seeking to partake of the benefits prescribed by the act of Congress, *supra,* and to accomplish that purpose its stockholders filed with the Bank Commissioner a proposed amendment to the charter of the bank by which authority was given the bank to convert its stock into nonassessable and single liability stock, a certain amount of which was to be preferred stock as provided for by act No. 15. The Bank Commissioner took the position that there was no legal authority for an amendment of the character proposed, and refused to entertain the application or to make any formal ruling on the merits thereof. Thereupon a petition for mandamus was filed in the second division of the Pulaski Circuit Court to compel the Bank Commissioner to exercise his discretion by passing upon the merits of the proposed amendment bearing upon the welfare of the bank, its stockholders and creditors, and to make a ruling either allowing or rejecting the proposed amendment. From the judgment of the circuit court granting the prayer of the petition, this appeal is prosecuted.

The validity of the act is attacked on seven separate grounds. The first point made is that it authorized the conversion of outstanding stock subject to an assessment to the amount of 100 per cent. of its face value into nonassessable and single liability stock whereby the rights of existing creditors are impaired and results in the violation of the obligation of the contract, and depriving them of their property without due process of law within the meaning of the National and State Constitutions prohibiting legislation of that character. It is contended that an analysis of § 2 shows that it specifically authorizes the conversion of outstanding assessable stock into nonassessable stock and contains no provision safeguarding the rights of creditors who hold obligations of the bank

antedating the passage of the act, and thus extinguishes the stockholders' liability to creditors of the bank then existing, and that there is no language in the act subsequent to § 2 which, properly construed, protects the creditors in their rights against the stockholders, existing prior to the enactment of act No. 15.

Section 2 consists of one long and involved paragraph, but there is no unsurmountable difficulty in arriving at its meaning. It simply provides that any bank or trust company then or thereafter organized, where withdrawal of its demand deposits shall have been restricted or where they may have been taken in charge by the Bank Commissioner, either for liquidation or management under existing laws, and if the corporation shall be reorganized by the removal of all restrictions on the withdrawal of its deposits except such as are expressly agreed to by the depositors, or where the Bank Commissioner's charge for purposes of liquidation or management shall have been terminated, or where as a successor to it another bank or trust company shall be organized assuming in whole or in part its deposit liabilities, then, in either event, where the action is authorized in the original articles of agreement or so authorized by amendment to the articles (the amendment to be submitted to and approved by the Bank Commissioner) all or part of the capital stock outstanding may be converted and the issuance of other shares may be authorized, which converted stock and such as is newly issued shall not "subject the owners thereof to any liability either to restore the capital or said respective bank or trust company, or, in addition to the amounts invested therein, for any of its debts, contracts or engagements." The meaning of the language quoted is obscure, and if, as contended by the appellant, it relieves the stock of the banks existing prior to the passage of the act from assessment for the benefit of then existing creditors, it might be deemed as an impairment of the obligation of the contract existing between the bank and its creditor, and, for that reason, void on constitutional grounds.

It is well settled that a statute ought to be construed so that its validity be upheld, if any reasonable interpretation of its language justifies that action, and, where the language is of doubtful import, the entire act should be looked to. Under these settled canons of construction, when we examine § 2-A in connection with the part of the act challenged and quoted, *supra,* it is apparent that the Legislature was dealing with the stockholders' liability with respect to debts of the bank contracted after the passage of the act and was not intended to, and did not, relieve the owners of stock in any existing banking institution from liability with relation to debts which the bank owed at that time, either to depositors or any other class of creditors. We think there can be no mistake as to what the Legislature intended, for by § 2-A it provided that "when bank stock is converted as provided for in § 2, nothing in this act shall be construed as to relieve in any manner the double liability existing against owners of stock in old banks and/or trust companies in which the stock is being converted."

The appellee correctly interprets the statute to mean, when §§ 2 and 2-A are read together, that holders of converted stock are not subject to double liability in respect thereof, but that those who were holders of stock subject to a double liability are not relieved therefrom, and continue subject to assessment to 100 per cent. of the par value of the stock outstanding on the date of the act for the satisfaction of the debts of the bank or trust company contracted prior to the conversion, even though such stock may have been converted into nonassessable stock in a new organization. The liability on the stock of a bank or trust company, existing at the time of the passage of the act, would remain and continue, even though the liability had not been fixed by the levy of any assessment against the stock. Therefore, since the act of conversion of stock in an existing bank into stock of a new organization does not in any degree affect any liability for debts then existing, it could not, and does not, deprive any such creditor of any rights, and does not violate the obligation of a contract or deprive the creditor of his property without due process of law.

The next point made is that the act violates the same constitutional provisions because it may lessen the value of the shares of a common stockholder without his consent by reason of the issuance of preferred stock authorized by the act. This is the only objection to the validity of the act about which, in our opinion, there can be any question. It is contended that, where a corporation is created with common stock only, an implied contract exists between the corporators that the net profits of the corporation will be divided among the holders of such common stock in proportion to their ownership of shares; and, if thereafter preferred stock is issued, the result would be that the owners of common stock would not participate in the profits as intended, but their rights would be deferred to the preferred stock, and their profits diminished by the amount of dividends paid the same; and that therefore, unless the charter itself reserved the power of issuing preferred stock, the unanimous consent of the holders of common stock is necessary to validate such issue, and that, as the charter of the appellee bank did not reserve the right to issue preferred stock, the act is invalid because it permits the same to be done by a mere majority of the stockholders.

To sustain this contention, the appellant cites the case of *Einstein* v. *Raritan Woolen Mills,* a case from the New Jersey equity courts, reported in 74 N. J. Eq. 624, 70 Atl. 295. In that case there were two questions, one as to the power of the corporation, without the assent of all its shareholders, to increase the amount of its capital stock, and the other, as to the right of the corporation to issue preferred stock and compel its substitution for present outstanding common stock without the consent of all the shareholders. In holding that the corporation could do neither, because it would be an impairment of the obligation of contract, the court cited the case of *Chicago City Ry.* v. *Allerton,* 18 Wall. (U. S.) 233, as authority for its conclusion. That case is not authority for the point decided in *Einstein* v. *Raritan, etc., supra,* for there the only question was as to the power of the board of directors, acting alone to increase the capital

stock without the matter being submitted to, and approved by, the stockholders, and the only authority claimed was the provision in the charter "that the corporate powers of said corporation shall be vested in, and exercised by, a board of directors," etc. The court held that this was no authority for the act complained of, since that provision in the charter authorized the performance merely of the ordinary business transactions of the corporation and did not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. The doctrine of the case of *Einstein* v. *Raritan, supra,* was reaffirmed in the case of *Allen* v. *Francisco Sugar Co.,* 92 N. J. Eq. 391, 110 Atl. 37.

It appears that at the time of the decision in the Einstein case there was no reservation in the Constitution or statutes of New Jersey for an alteration in the charter of the corporation, and that question was not passed upon. There are other decisions which apparently deny the right of the State to alter the contract of the stockholders as between themselves by statute passed after the formation of the corporation, but, in those States in which the power is reserved to alter or amend charters of corporations, it seems that such legislation is upheld and, in general, that the charter may be altered so as to impose greater burdens on the stockholders than were imposed at the time the charter was granted or makes possible a diminution in the value of their shares, where such alteration does not involve a confiscation of the rights of the individuals, deprive them of their property without due process of law, or violate the elementary principles of natural justice. In re *College Hill Land Ass'n, etc.,* 157 Cal. 596, 108 Pac. 681; *Peters* v. *U. S. Mortgage Co.,* 13 Del. Chy. 11, 114 Atl. 598; *Somerville* v. *St. L. Mining, etc., Co.,* 46 Mont. 268, 127 Pac. 464, L. R. A. 1915B 811; *Hinckley* v. *Schwarzschild, etc.,* 95 N. Y. Supp. 357; *Winfree* v. *Riverside Cotton Mill,* 113 Va. 717, 75 S. E. 309.

In this State, the right to alter or repeal laws under which corporations may have been formed and to alter, revoke or annul any charter of corporations by legislative

act is expressly reserved by § 6, article 12, of the Constitution. Previous to January 1, 1914, stock in banking corporations was nonassessable for debts due by the corporation, but the General Assembly of 1913 passed an act, by the last section of which double liability was imposed on stock for all the debts and engagements of the bank, and which became effective January 1, 1914. This act was attacked in the case of *Davis* v. *Moore,* 130 Ark. 128, 197 S. W. 295, on constitutional grounds, and the same was upheld by this court on the power of the Legislature to make any alteration in the articles of incorporation under the reserve power retained in the Constitution, so that no injustice shall be done the incorporators. The court said: "We do not think this statute falls within the terms of the limitation upon the power of the Legislature with respect to confining amendments to those which do no injustice to the corporators." The constitutionality of that act was also upheld by the Court of Appeals of New York, 134 N. E. 596, on appeal from the appellate division of the Supreme Court in the case of *Maxwell, etc.,* v. *Thompson,* 186 N. Y. Supp. 208. In the opinion rendered in the last-named court, § 6, art. 12, of our Constitution was quoted, the statute reviewed, and the conclusion reached that it was constitutional, both under the laws of the State of Arkansas on the authority of *Davis* v. *Moore, supra,* and of the Constitution and statutes of the State of New York.

In the case of *Bank of Blytheville* v. *State,* 148 Ark. 504, 230 S. W. 550, the court had under consideration the statute (§§ 2832-2835 of Crawford & Moses' Digest) making stockholders of banks liable for public funds deposited therein. Its constitutionality was attacked on the contention, among others, that it impaired existing obligations of contract in violation of art. 1, § 10, of the Federal Constitution, and also that it came within the limitation of the powers of the Legislature contained in § 6, art. 12, of our Constitution. The court, in overruling both contentions, said: "Every objection urged by appellants against the constitutionality of the acts finds an answer in the fact that a corporation accepts its charter powers subject to the reserved right in the State to alter or re-

voke the charter whenever, in the opinion of the General Assembly, such revocation or alteration is for the protection of the citizens of the State, if done in such a manner that no injustice may be done to the corporators. Before an act revoking or changing the charter of a corporation can be declared unconstitutional, it must appear that the effect of the act is confiscatory of the stock or property of the corporation."

The right to alter the charter, reserved by the State, necessarily vested the Legislature with power to provide for the issuance of preferred stock, and, since it does not appear that any elementary principle of natural justice would be violated, or that the issuance of preferred stock in the manner provided by the act would work any confiscation of the stockholders' property in their stock, it is our opinion that no constitutional prohibition is violated, because the rights of all parties, it must be presumed, will be protected by the Bank Commissioner when he passes on the merits of the application for amendment. It may also be said that, since an act of the General Assembly passed at its 1905 session, every corporation organized under the laws of this State by virtue of said act has had the power to issue preferred stock, either where the right was expressed by certificate of incorporation or in an amendment thereof. The provision of the act is § 1703 of Crawford & Moses' Digest, which is that "Every corporation organized under the laws of the State of Arkansas shall have power to issue preferred stock with such preferences and voting powers and restrictions or qualifications therein as shall be stated and expressed in certificate of incorporation, or in any certificate of amendment thereof."

The third point raised by the appellant is that the phraseology of the act does not authorize the issuance of nonassessable preferred stock, the argument being that the general provision contained in the last sentence of § 2, authorizing any bank or trust company organized after the passage of the act to issue common or preferred stock, relates to a particular provision providing for the reorganization of restricted banks, those in the hands of the Commissioner for liquidation or management, and

that, since the appellees were not proceeding under the prior particular provisions, they were not entitled to any relief. We see no merit in this contention.

The fourth ground of objection is that, because of the ambiguity of the language of §§ 2 and 2-A, there is no authority to issue nonassessable stock. As already noted, we find no ambiguity when the two sections are read together, and we regard the language as sufficiently definite to accomplish the purpose designed.

We find no merit in the 5th objection, that the addition of §§ 2-A and 3-A to the original bill by way of amendment changed the purpose of the measure, and therefore the legislation is void under § 21 of art. 5 of our Constitution. Section 2-A, as we have seen, does not change the original purpose of the measure, but clarifies and makes certain the provisions of § 2 with respect to the continuing liability of existing stock. Section 3-A merely provides for a certificate of indebtedness to be issued to the owners of frozen deposits. One of the purposes of the act was to preserve the rights of such depositors as then existed, and § 3-A merely provided for the evidence of the amount of the existing claim. But, if it should be obnoxious as not within the purpose of the act as originally drawn, it could be eliminated without impairing the remainder of the act, and giving effect to the intention of the law-making body as expressed in § 4 of its act, *supra;* the remainder of the act, if otherwise unobjectionable, will be sustained.

It is contended in the sixth place that the act violates § 23 of art. 5 of our Constitution, which restrains the Legislature from amending or extending provisions of a statute by reference to its title. The particular complaint made is that, under the act, the issuance of nonassessable stock will be "executed, submitted to, and approved by, the Bank Commissioner, and filed with the county clerk, all in a manner and form as now provided by law." The answer to this is that the statute is original in form, and by its own language grants powers, confers rights and creates burdens or obligations, and the reference to existing laws is for the purpose of pointing out the procedure in executing the power, en-

forcing the right, or discharging the duty. *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889.

In the last place, it is insisted that the act was not enacted through proper legislative proceedings. We deem it unimportant to set out the errors alleged, since we think a fair construction of the record of the House and Senate do not in any particular sustain the complaint made, or render it uncertain as to the identity of the legislation considered in the bill, which, as amended, finally and properly became the act now under consideration.

It follows, from the views expressed, that the action of the circuit court in awarding the writ prayed was correct, and its judgment is therefore affirmed.

HAYS *v.* HARRIS.

4-3382

Opinion delivered December 4, 1933.

June P. Wooten and *A. G. Frankel,* for appellant.

W. G. Riddick and *R. D. Campbell,* for appellee.

PER CURIAM. This proceeding is a continuation of the litigation reflected in the following opinions of this

court: *Terry* v. *Harris, ante* p. 60, and *Terry* v. *Harris, ante,* p. 174, in which there was an opinion *per curiam.*

It appears that, upon the rendition of the opinion *per curiam, supra,* the contestant, Hays, filed a second or substitute complaint to which there was attached jurisdictional affidavits complying with the requirements of § 3772, Crawford & Moses' Digest. A motion was sustained in the court below to dismiss this second complaint upon the ground that it had not been filed within the time allowed by law, and, upon that motion being sustained, the circuit court made an order dismissing the suit for that reason.

The contestant has applied to us for a writ of mandamus to compel the circuit judge to proceed with the trial of the cause. Upon oral argument before us, it was agreed by the parties hereto that this proceeding be treated as an appeal from this order of the circuit court, and we are asked by both parties to decide the case upon its merits. We have for decision therefore the question, whether this second complaint was filed within the time allowed by law.

The applicable statute is § 3772, Crawford & Moses' Digest, which reads as follows: "A right of action is hereby conferred on any candidate to contest the certification of nomination or the certification of vote as made by the county central committee. The action shall be brought in the circuit court. If for the office of representative or a county or township office, in the circuit court of the county; and if for a circuit or district office, within any county in the circuit or district wherein any of the wrongful acts occurred; and if for United States senator or a State office, in the Pulaski Circuit Court. The complaint shall be supported by the affidavit of at least ten reputable citizens, and shall be filed within ten days of the certification complained of, if the complaint is against the certification in one county, and within twenty days if against the certification in more than one county. The complaint shall be answered within ten days."

It will be remembered that the original complaint has been dismissed, and this second or substituted complaint was filed much later than twenty days after the certifica-

tion of the vote as made by the respective county committees, but within less than twenty days after the chairman and secretary of the State Central Committee had cast up such returns based on said certification and had certified the congressional nominee to the State Election Board, as required by the opinion delivered October 30, 1933.

Section 3772, Crawford & Moses' Digest, copied above, applies alike to contests for county, district and State offices. The only difference, in respect to the time within which such contests must be instituted, is that in cases of contests of "the certification complained of" for nomination for county offices, the suits must be instituted within ten days, whereas such suits in regard to the "certification in more than one county" shall be begun within twenty days after such certification. Obviously, the right of action conferred by the statute to contest the certification of nomination or the certification of the vote means the same thing in contests for nominations for county offices as in cases of contests for district or State offices. The only distinction made by the statute is in the difference of time within which such contests must be instituted.

This court had occasion in the case of *Wilson* v. *Land,* 166 Ark. 182, 265 S. W. 661, to construe the provisions of the statute authorizing contests for nominations, and to determine whether the provisions in regard to contesting certificates of nomination operated to extend the time within which a contest must be brought to contest the certification of the vote by the county committee, and it was expressly held that the limitation of the time within which a contest of the certification of the votes must be instituted was not extended by the provision of the statute that there might be a contest of the certification of the nomination.

The facts in the case of *Wilson* v. *Land, supra,* were: The county central committee of Jefferson County met on August 15, 1924, and canvassed the returns of the election held in that county and filed with that committee, as required by law. This committee ordered that the nominees be certified to the county convention, which was

to meet on August 18, 1924, it being intended thereby to have the county convention certify the nomination pursuant to the tabulation of the county committee previously made. The county convention was held on August 18, and a certificate of nomination for the office of county treasurer was awarded to the candidate whose nomination was later contested. This contest was filed on August 26, 1924, in proper form, accompanied by the jurisdictional affidavits. It is obvious that this was within ten days of the date upon which the nomination had been certified, but was one day more than ten days after the certification of the vote. Upon these facts it was contended that the contest had been instituted within the time limited by law, the contention being there made, as it is here, that a contest might be instituted within ten days of either the certification of the vote or the certification of the nomination.

But, in overruling that contention, it was there said: "As we have already seen, the right to contest a primary election is purely statutory, and the Legislature may confer it upon such terms as it sees fit. Thus it will be seen that a right of action is given any candidate to contest the certification of vote as made by the county central committee. The statute is unambiguous in this respect, and it was evidently the intention of the Legislature to provide for a speedy hearing and determination of a contest. In our opinion, it was not necessary, under the statute, that contest proceedings should be delayed until a certificate of nomination had been actually issued by either the county convention or by the county central committee. We think that, when the county central committee has canvassed and tabulated the votes, and it is ascertained by this canvass and tabulation which candidate has received the greatest number of votes, the opposing candidate may at once, and must, within ten days thereafter, begin his contest proceedings although no certificate of nomination has been issued."

It was there held that, inasmuch as the contest must be instituted within the time limited by law (which, in the case of county offices, is ten days and in the case of State and district offices it is twenty days), there was no addi-

tional extension of time, because the statute conferred the right to contest the certification of the nomination. In other words, any contest, which challenges the canvass and tabulation by the county committee or committees, must be instituted within the time limited after that action had been taken, and was not extended by the right which was conferred to contest the certification of the nomination as well.

If effect is given to this decision, it follows that any suit which challenges the action of the county committees must be brought within ten days after such action in the case of county offices, and within twenty days in the case of district and State offices.

Now, it is easily conceivable that a county convention, in the case of a county office, might take such action in regard to the vote as canvassed and tabulated by the county committee as to change the result ascertained and declared by the county committee, in which event that action of the convention might be contested, and a suit for that purpose could be brought within twenty days after that action was taken. So, here, it appears, from the opinion in the case of *Terry* v. *Harris,* involving this identical election, the State convention, in ordering the election here contested, has provided that "the returns of the election shall be made and certified to the secretary of the State Central Committee within the time after said special primary election is held as is now provided by law for such returns, and certification made following general primary elections. The chairman and secretary of the State Central Committee will cast up such returns based on said certificates and certify the nominee to the State Election Board."

Now, we do not understand it to be alleged that the executive officers of the State committee have taken any action or have done anything, except to perform the ministerial duty of casting up the returns based on the certificates delivered to them, as required by the resolution of the State committee pursuant to and under the authority of which the election was held. Had it been alleged that these executive officers of the State commit-

tee had fraudulently or erroneously performed this ministerial duty, that action would be the subject of contest, and such contest could be instituted within twenty days after the action had been taken.

But it is alleged only, as we understand the record before us, that these executive officers have only discharged this ministerial duty, and there is no allegation that they have done any act which itself affords ground for contest.

On the contrary, it is obvious that the contestant now seeks, as he sought in his original suit, to question the votes cast in the various counties of the Congressional District as compiled and tabulated by the respective county committees.

This can not be done under the interpretation given § 3772 in the case of *Wilson* v. *Land, supra,* for, as was said in that case, it was not necessary under this statute that the contest proceeding should be delayed until certification of nomination had actually been issued by the agency clothed with that authority.

The circuit court was correct, therefore, in holding that this second suit was not filed within the time allowed by law, and it was properly dismissed for that reason.

MIDDLETON *v.* MCCOY.

4-3242

Opinion delivered December 11, 1933.

Hays & Turner and *Alonzo D. Camp,* for appellant.

Robert J. Brown, Jr., for appellee.

JOHNSON, C. J., (after stating the facts). If the chancellor's finding to the effect that the deed from T. G. McCoy to appellee was for a valuable consideration, and was not executed with the intent to cheat, hinder or defraud creditors, is not clearly against the preponderance of the testimony, this case must be affirmed. *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 National Bank,* 101 Ark. 368, 142 S. W. 856; *Kissire* v. *Plunkett-Jarrell Grocer Co.,* 103 Ark. 473, 145 S. W. 567.

It is stipulated by counsel that lot 14, block 2, Pinehurst Addition, was the homestead of T. G. McCoy at the time of the conveyance. Therefore, under the law, he

could sell or give same away if he liked, and his creditors would have no right to complain. When the homestead is subtracted from the deed of T. G. McCoy, it leaves only lot 1, Bragg's Second Addition, which was sold for a consideration of $550. This is a valuable consideration. It is true the testimony tends to show that this lot was worth approximately $1,500, if sold on "reasonable terms," but it can not be certainly said that a conveyance was voluntary which carried an expressed consideration of this sum of money.

Since this conveyance was not a voluntary one, no presumption of fraudulent intent attends its execution either in the grantors or grantee. Section 108, 12 R. C. L., Fraudulent Conveyances, page 594.

We conclude that the chancellor's finding is not clearly against the preponderance of the testimony, and its judgment should therefore be affirmed.

POSTAL TELEGRAPH-CABLE COMPANY *v.* WHITE.

4-3234

Opinion delivered December 11, 1933.

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Samuel C. Bowman, Mann & Mann and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Fred A. Isgrig, S. S. Hargraves and *Winstead Johnson,* for appellee.

JOHNSON, C. J., (after stating the facts). This case must be reversed because of the error of the trial court in giving to the jury instructions Nos. 1, 2 and 3 on behalf of appellee. It will be noted that instruction No. 1, given on behalf of appellee, ignores all the defenses offered by appellant, that is to say, the defenses of assumption of risk, contributory negligence and the release of liability. Each of these instructions directed the jury to return a verdict in favor of appellee on the hypothesis therein stated, wholly ignoring the defenses of assumption of risk, contributory negligence and a valid release. It is insisted, on behalf of appellee, that this error was cured because the court specifically told the jury in an instruction that they should consider all the instructions given as a whole. This exact question was before this court in the case of *Natural Gas & Fuel Co.* v. *Lyles,* 174 Ark. 146, 294 S. W. 395, in which the fifth headnote reads: "In a suit by an employee for personal injuries, an instruction that the jury should render a verdict for the employee, if they found the employer guilty of negligent acts detailed in instruction, *held* erroneous, as excluding the defenses of contributory negligence and assumed risk."

The defenses of assumed risk, contributory negligence and a valid release all were outstanding in favor of appellant at all stages of this proceeding, and, before the jury should have been instructed to find for appellee, it should have been conditioned upon each of these defenses. In other words, if appellee had executed a valid release, this should have impelled a verdict for appellant; or if appellee had assumed the risk of this collision, the verdict of the jury should have been for appellant; or if appellee's contributory negligence, if any, was greater than the negligence of Clyde White, if any, a verdict should have been returned in favor of appellant. Instructions Nos. 1, 2 and 3 wholly ignored these defenses.

This court held in the Lyles cases, cited *supra,* on this exact question: "Appellee contends that the omission in the two instructions to take into account appellant's defenses of contributory negligence and the assumption of the risk by appellee was cured by instructions numbers 2 and 4 requested by appellant and given by the court. Number 2 related to contributory negligence, and number 4 to the assumption of the risk, and would have cured the defect, had the court not told the jury in both cases to render a verdict in favor of appellee in case they found that appellant was guilty of negligence as alleged. This declaration on the part of the court created a conflict between the two instructions given at the request of appellee and instructions 2 and 4 given at the request of appellant. *Southern Anthracite Co.* v. *Bowen,* 93 Ark. 140, 151-152, 124 S. W. 1048."

It will thus be seen that instructions numbered 1, 2 and 3, given on behalf of appellee, were in conflict with the correct instructions given on behalf of appellant, and were therefore prejudicial.

Since this case must be reversed and remanded for a new trial, we deem it proper to discuss some other questions in the case which will probably recur. It is insisted here, and will probably be insisted on a new trial, that the trial court should have directed a verdict in favor of appellant because, as it is said, the testimony of appellee was false and not worthy of belief wherein he testified that his brother, Clyde White, grabbed the steering wheel and turned the truck into the path of the touring car driven by Holland. This contention is bottomed upon the theory that appellee had testified in two previous trials, in neither of which he had testified to the same state of facts and circumstances. On this question, it suffices to say that, under our system of government, the trial jury is the sole and unfettered judges of the credibility of witnesses and the weight that should be given to their testimony.

Section 22, article 7, of the Constitution of 1874 provides in part: "Judges shall not charge juries with regard to matters of fact, but shall declare the law," etc.

In the early case of *Wilcox* v. *Boothe,* 19 Ark. 684, this court held: "It is the province of the jury, and not of the appellate court, to weigh the evidence and determine whether the testimony of a witness is to be believed." In the more recent cases of *Shearer* v. *Farmers' & Merchants' Bank,* 121 Ark. 529, 182 S. W. 262, this court said: "The jury, being the judges of the credibility of the witnesses, their verdict will not be disturbed on appeal."

Again it was said by this court in the case of *Kimbro* v. *Wells,* 121 Ark. 45, 180 S. W. 342, that: "The weight of evidence and credibility of witnesses is solely for the jury, and they are authorized to accept such part of the testimony as they believe to be true, and reject that which they believe to be false."

It may be that appellee had testified in previous trials to statement of facts contradictory to his testimony here given, but this would go only to his credibility as a witness and the weight that should be given to his testimony by the jury. The trial court was therefore correct in refusing to direct a verdict in favor of appellant on this theory.

The next insistence is that appellee cannot maintain this suit because of the execution of a release in favor of appellant. The circumstances surrounding this release are to the effect that, when a person is employed by appellant, he is furnished with what is denominated a "blue book," wherein it is delineated that the employees of appellant upon receiving disability while in the employ of appellant, shall receive certain benefits therein explained and described. After receipt of the injuries herein complained of, appellant sent to appellee, at Forrest City, certain papers to be executed by him, in reference to the acceptance or rejection of this plan. Appellee testified, in effect, that he did not read the details of these instructions, but assumed that they were for the purposes purported in the letter, that is to say, to enable him to draw his wages while suffering from his injuries. He further testified, in effect, that he did not know, and had no intention of releasing his cause of action when he

signed the papers. Many other circumstances were testified to in reference to the advancement of this plan and the procuring of the release which we deem unimportant to here set out.

The trial court submitted the validity or invalidity of this release under instructions Nos. 5, 6 and 7 on behalf of appellee, and certain requested instructions on behalf of appellant. We think the trial court was correct in submitting this question to the jury, and that the instructions given in this behalf were correct declarations of law. We are unwilling to say, under all the facts and circumstances in this case, that the paper signed by appellee was a voluntary release as a matter of law. Section 7147, Crawford & Moses' Digest, provides: "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any such corporation to exempt itself from any liability created by this act, shall to that extent be void. Provided, that in any action brought against any such corporation under or by virtue of any of the provisions of this act, such corporations may set off therein any sum it has contributed or paid to any insurance relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

We think the testimony was sufficient to submit the question to the jury.

Other alleged errors will probably not occur on retrial of the case, and we therefore refrain from discussing them.

The case is reversed for a new trial.

McHaney, J. Mr. Justice Smith, Mr. Justice Butler and I concur. We hold that the release was executed voluntarily and without any fraud or misrepresentation, and is valid and binding on appellee. We are therefore of the opinion that the judgment should be reversed and the cause dismissed.

Butler, J., (dissenting). I concur in the decision reversing the case because of the giving of certain erroneous instructions which are pointed out in the major-

ity opinion, but I respectfully dissent from that part of the opinion which holds that it was a question for the jury to say from the evidence adduced whether the release executed by the appellee was valid and binding, and from that part of the opinion which indorses the action of the trial court in applying § 7147 of Crawford & Moses' Digest to the "Pension and Benefit Plan" of the appellant company upon which the release pleaded was grounded.

I shall discuss that plan first and whether or not it comes within the inhibition of § 7147, *supra,* which is a part of an act providing that all corporations, except those engaged in interstate commerce, shall be liable to employees for personal injuries received, and that contributory negligence on the part of an employee shall not bar a recovery. Section 7147 provides that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any such corporation to exempt itself from any liability created by this act, shall to that extent be void." To determine whether or not that section applies, the nature and provisions of the Pension and Benefit Plan must be discussed.

Paragraph 1 of the Pension and Benefit Plan provides for its establishment.

Paragraph 2 deals with definitions of words and phrases used.

Paragraph 3 provides for retirement pensions—that is, that its employees upon reaching a certain age may retire at the employee's request—and when male employees reach the age of 70 and female employees reach the age of 65 years they must be retired on pension. It also provides how the retirement pension shall be paid and the amount thereof.

Paragraph 4 provides for disability benefits, and is to the effect that any employee who becomes disabled by reason of an accident arising out of, or in the course of, his employment by the company shall be entitled to benefits in the amount and manner prescribed therein.

Paragraph 5 provides for death benefits and pensions to dependents. The sole limitation as to the pay-

ment of the benefits is that the accident resulting in disability or death must have arisen out of and in the course of employment by the company, and the plan takes no cognizance of how the accident occurred, and the benefits are payable whether the accident is unavoidable or occasioned by the employee's own negligence or not.

Paragraph 6 contains general provisions. Section 6 thereof provides: "In case of accident resulting in injury to or death of an employee, he or his dependents must elect whether to claim benefits under this plan, or to prosecute such claim at law for damages as he or they may have against the company. If election is made to claim the benefits under this plan, such election shall be in writing and shall release the company from all claims and demands, other than under the plan which the employee or his beneficiaries may have against it on account of such accident. Should claim be made other than under this plan, nothing shall be payable hereunder."

It will be seen that this plan is quite different from the contract considered by the court in the case of *Standard Pipe Line Company* v. *Burnett, post* p. 491. The principal point of distinction is the right of election remaining in the employee under § 6 of paragraph 6, *supra.* Under the election provided by that section, it is clear that the plan, considered in its entirety, is beneficient in its purpose and free from any intent to enable the company to exempt itself from liability under the law. In the event of an accident, the employee has an opportunity to fully advise himself in order to determine what course he will pursue. If he should think that the accident was unavoidable, for which no one was to blame, or if it was occasioned by one of those risks ordinarily incident to the employment which he had assumed, or if it was his own carelessness, and that only, which occasioned the accident, he might take advantage of the plan and recover the benefits thereunder, although there was no legal liability of the employer to respond in damages; whereas, if he should determine or be of the opinion that the accident was the result of some negligent act of the agents

or employees of the company for which it was legally responsible, he might bring his action at law, and, if liability was established, recover such damages as would fully and fairly compensate him for the injury received.

This plan seems to me to be just and fair. If any one has the advantage, it is the employee, and he may exercise his own free choice in the determination of whether he shall accept benefits under the plan or prosecute his claim for damages in court. How this plan can be construed as a device to exempt the company from liability, I am unable to see. Indeed, this court in the case of *Western Union Tel. Co.* v. *Robinson,* 146 Ark. 406, 225 S. W. 649, had this identical plan before it, and the release executed by the employee as provided in § 6 of paragraph 6, *supra,* and expressly held that: "The 'Plan for Employees' Pensions, Disability Benefits and Insurance,' inaugurated by the appellant and accepted by the appellee, constituted a written contract between the appellant and the appellee, which was free from fraud, based upon a valid consideration, and binding upon the appellant and the appellee." I am of the opinion that the trial court erroneously instructed the jury by giving to it for its consideration § 7147, *supra.*

In dealing with the question whether the release was procured by fraud and leaving that to be determined by the jury, the only ground upon which the majority bases its conclusion is stated in the opinion as follows: "Appellee testified, in effect, that he did not read the details of these instructions, but assumed that they were for the purposes purported in the letter, that is to say, to enable him to draw his wages while suffering from his injuries. He further testified, in effect, that he did not know and had no intention of releasing his cause of action when he signed the papers." The undisputed facts are that the company waited a month and four days after the accident before it offered to the appellee his choice of accepting the company's plan of settlement or of bringing suit, and at that time appellee had practically recovered from his injuries, for he returned to the full performance of his duties within less than three weeks

thereafter. At the time the release was sent to him he was in the full possession of his faculties and had recovered from the shock of the accident. No agent of the company presented the release to him; it was sent through the mail, accompanied by a letter informing him that the company was ready to pay his regular salary for the time he had been off, provided he would sign the "Election to the Benefit Plan" which was inclosed. When appellee was first employed by the company, he received a book fully explaining the plan and which he had in his possession and from which he might fully inform himself as to his right thereunder. The language of § 6, quoted above, is not obscure, but plain and direct, so that one having only ordinary intelligence and the ability to read could understand it. The material part of the release sent to appellee is as follows:

"In consideration of one dollar and of the first installment of such benefits, to me in hand paid, the receipt of which is hereby acknowledged, and of said company's promise and agreement, through the committee, to pay to me all such benefits as provided in and by said plan, do hereby release and forever discharge said company, its allied and associated companies, its and their respective successors and assigns, of and from all manner of action, cause or causes of action suits, damages, claims and demands whatsoever—except the claim hereunder for said benefits under this plan—which against said company because of and/or growing out of the accident above described and the resulting injuries and/or death, and the medical and other expenses paid or to be paid or incurred in connection therewith which I now have or which my heirs, executors, administrators, or successors, may or might have."

There is nothing misleading in this release. Appellee had his book containing and explaining the plan; he had the release, with no one to interfere or to offer any inducement; he might read and study at his leisure and then sign or not at his own free will.

The only ground upon which the court bases its opinion is, that appellee testified that he did not read the de-

tails of the instructions (we presume the court meant the release) but assumed that they were for the purposes set out in the letter—that is, to enable him to draw his wages while suffeirng from his injuries—and that he had no intention of releasing his cause of action when he signed the paper. In the first place, the letter accompanying the release purported to enclose "the Election to the Benefit Plan" and to say that because appellee did not read the release and had no intention of releasing his cause of action was a fraud perpetrated on him by the company, requires more authority and better reasoning than the court has given. He could read; there is nothing to show that he was mentally deficient, and the law imposed upon him the duty to read the release, and because he did not is now no excuse or justification for receding from the terms of the instrument which he signed, and it may be noted that it was witnessed by his own friends and neighbors with no representative of the company present.

In *Kansas City Sou. Ry. Co.* v. *Armstrong,* 115 Ark. 123, 171 S. W. 123, it is said: "When plaintiff executed a release in full to the defendant of an unliquidated claim for a certain consideration, while she was in the full possession of her faculties, and without any fraud or undue influence on the part of the defendant or its agents, she will be held bound thereby, and parol testimony to show that the release was only partial will be inadmissible."

In *Crockett* v. *Mo. Pac. Ry. Co.,* 179 Ark. 527, 16 S. W. (2d) 980, it was held: "An employee's release of the railroad, his employer, for a consideration paid, from all damages resulting from an accident when the motor car on which he was riding collided with another motor car, was binding, where no fraud in its procurement and no mental incapacity was shown, and no claim that the employee executed the release in reliance upon a statement of a railroad physician."

The court talks about other circumstances which were testified to with reference to the "advancement of its plan and the procuring of the release, which we deem unimportant to here set out." I have examined the rec-

ord with care, and I can find no pertinent circumstance bearing upon the question of the release in any particular, and I agree with the court that such circumstances as were in evidence are "unimportant."

Appellee returned to work after his injury on April 8, 1930, and continued to work in the same line of employment, performing practically the same duties as before, until November 9, 1931—more than a year—without making any complaint of his physical condition or questioning the validity of the release. On the last-mentioned date, while lifting a heavy weight, he suffered a rupture, necessitating an operation which kept him from work for a month or longer. On December 30, 1931, he executed a release precisely like the one he had executed on March 20, 1930, which he now claims was fraudulently procured. After his recovery from the rupture he was again employed by the company, and was given light work to do, but finally, several months thereafter, he was discharged. About four months thereafter he brought this suit—a total period of two years and seven months having elapsed after the date on which he alleges the injury occurred from which his present disability results.

In the case of *Kilgo* v. *Continental Cas. Co.*, 140 Ark. 336, 215 S. W. 689, this court held that, where a plaintiff delayed over two years before bringing suit, he was barred by his laches from complaint of any fraud in the procurement of the release on the ground that one defrauded must within a reasonable time after the fraud is discovered, elect to rescind, if such be his purpose.

In the recent case of *St. Louis, I. M. & S. Ry. Co.* v. *Hall,* 182 Ark. 477, 32 S. W. (2d) 440, it was held: "Where plaintiff took advantage of a settlement paid for release from liability after knowledge of alleged misrepresentations, he will be held to have ratified the settlement. One who seeks to disaffirm a release for misrepresentation should do so quickly as reasonable diligence would allow."

Under the doctrine of those cases it seems to me that, having waited for two years and seven months to disaffirm the release executed, the appellee cannot now

disaffirm the same, for certainly no reasonable diligence has been shown, and he had abundant opportunity to have thought over the matter of the release, and if he decided that he had been imposed upon he had ample time to make his complaint. Instead of that, he took advantage of a similar release over a year after he had signed the first. It is my opinion that the plan adopted by the company is fair and not in violation of any law; that there is not a scintilla of evidence to show that any unfair advantage was taken of the appellee in the procurement of the release, or any fraud practiced upon him. On the contrary, he knew, or should have known, just what he was doing, and his acts are binding upon him. Furthermore, if there was any evidence to show an unfair advantage taken of appellee in the procurement of the release by his acceptance of its benefits and his delay for a period of two years and seven months to take any steps to disaffirm his contract, it is now binding upon him, and this case should be reversed and dismissed.

I am authorized to say that SMITH and MCHANEY, JJ., concur in this opinion.

WATSON *v.* GATTIS.

4-3236

Opinion delivered December 11, 1933.

Cochran, Arnett & Woolsey, for appellant.

G. C. Carter, for appellee.

SMITH, J. An annual school election was held in School District No. 39 of Franklin County for the purpose of voting the school tax and of electing three school directors for the terms of one, two and three years, respectively. The election returns, including the poll books, tally sheets and ballots, were returned by the election officers to the county court, to canvass the returns and declare the result as required by act 247 of the Acts of 1933, page 778.

The tally sheets showed the following candidates for directors had received the number of votes set opposite their names: Jess Reaves, 24; C. A. Kuykendall, 26; J. R. Gattis, 28; Henry Soller, 22; Loyd Matthews, 24; Earnest Carpenter, 23. The tally sheets did not show the length of the terms for which the candidates had been voted, but on the back of the tally sheets was this notation: "Henry Soller, one year; Loyd Matthews, two years; Earnest Carpenter, three years."

The county judge made an examination of the tally sheets and of the ballots, and found that only 17 of the voters had designated on their ballots the length of the terms for which the various candidates were voted, and of these 15 had voted for Henry Soller, for one year, Loyd Matthews, for two years, and Earnest Carpenter, for three years. The county court thereupon issued certificates of election to these persons for one, two and three years, respectively, and they qualified as directors.

Thereafter Reaves, Kuykendall and Gattis filed in the circuit court a petition for a writ of mandamus against the county judge requiring him to issue certificates of election to Gattis for three years; to Kuykendall for two years, and to Reaves for one year. It was alleged that, although Reaves and Matthews had received the same number of votes, the latter was not eligible.

The circuit court made a finding, which the testimony supports, to the effect that when the balloting began it was agreed by the electors then present that the candidate receiving the highest number of votes should be regarded as having been elected for the three-year term; the one receiving the next largest number of votes should be regarded as having been elected to the two-year term, and the candidate receiving the third largest number of votes should be regarded as having been elected to the one-year term. This agreement was announced to electors who came in later, but in the afternoon a judge of the election wrote upon the blackboard in the school room where the election was being held the names of three candidates and opposite their names he wrote the terms for which they were candidates, one, two and three years, respectively, and 17 votes appear to have been cast in accordance with that notation.

It was the opinion of the circuit judge that the agreement set out above should be enforced, and that the ballots should be interpreted with reference to it, and upon that finding the county court was directed to issue certificates of election to Gattis and Kuykendall for terms of three and two years, respectively, and this appeal is from that order.

The judgment appealed from must be reversed for several reasons. In the first place, it may be said that the agreement whereby the length of the terms was made dependent upon the vote received by a successful candidate was nothing more than a "gentlemen's agreement," which the courts will not enforce, because it was in contravention of the law. Certainly, it could not bind those persons who were not parties to it and who voted as the law contemplated all the electors should do.

The law does not require that the ballots used in a school election be printed, but it does require that they be either printed or written. There is no such thing as voting orally or conditionally. Section 3 of article 3 of the Constitution requires that: "All elections by the people shall be by ballot," and the ballot itself must express the elector's will. The elector himself would not be permitted to testify that, having failed to vote specifically for any candidate for any particular term, he nevertheless intended that his ballot should express his assent that when his ballot had been counted it should be treated as having been cast for the highest candidate for the longest term, and for the next highest candidate for the next longest term.

It appears that 17 electors ignored this agreement and cast their ballots conforming to the law by designating the term for which they had voted for each candidate.

At § 77 of the chapter on Elections in 9 R. C. L., page 1062, it is said that: "It is plain, moreover, that where there are more offices than one to be voted for, ballots making no designation of the office will be insufficient for uncertainty; and where there are two officers to be elected for different terms, ballots which do not designate the terms should be rejected."

The action of the county court conformed to this view of the law, as the county court counted only those ballots which had been cast for a particular candidate for one of the definite terms of office.

The judgment must be reversed for another reason, and that is, that mandamus did not lie to control the decision of the county court, nor can it be used to correct an erroneous decision already made. The county court did not refuse to perform the duty imposed upon it by § 2 of act 247, *supra*. In fact, it had acted before the writ was prayed for or had been awarded, and, whether erroneous or not, the county court could not be compelled by mandamus to reverse its ruling. *Graves* v. *McConnell*, 162 Ark. 167, 257 S. W. 104. Section 30 of act 169 of the Acts of 1931, page 495, as amended by act 247 of the Acts of 1933, provided an adequate and definite remedy for the review of the alleged error of the county

court. *Automatic Weighing Co.* v. *Carter*, 95 Ark. 118, 128 S. W. 557.

The judgment of the circuit court must therefore be reversed, and the cause dismissed.

BRADFORD *v.* BURROW.

4-3244

Opinion delivered December 11, 1933.

Lamb & Adams, for appellant.

Maddox & Greer and *J. Brinkerhoff*, for appellee.

SMITH, J. The only question involved on this appeal is whether, in the redemption of lands sold to the State for taxes, the county warrants of the county in which the land is located must be received by the county treasurer for the amount of taxes owing to the county. The circuit court held, under a petition for mandamus to require the acceptance of the tender of such warrants, that they must be accepted for that purpose, and the county treasurer has appealed from that judgment.

Section 10,100, Crawford & Moses' Digest, provides the "mode of redemption" of land sold to an individual for the nonpayment of taxes, and reads as follows: "Any owner, or his agent, or any other person for the owner desiring to redeem any land, town or city lot or part thereof sold for taxes, under or by virtue of any law of this State, may, within the time limited by law for such redemption, deposit with the county treasurer, upon the certificate of the clerk of the county court describing such land, town or city lot, an amount of money equal

to the taxes for which such land, or town or city lot was sold, together with penalty and cost and the taxes subsequently paid thereon by such person, or those claiming under him, with interest at the rate of 10 per cent. per annum on the whole amount so paid, and the county treasurer shall, upon the payment of said sum, within ten days thereafter notify the purchaser that said sum is in the treasury and subject to his order."

This section is a re-enactment of § 5775, Mansfield's Digest, with the added requirement that the county treasurer shall, within ten days after receiving the redemption money, notify the tax purchaser that said sum is in the treasury subject to his order.

This court, in the case of *Murphy* v. *Smith,* 49 Ark. 37, 3 S. W. 891, construed § 5775, Mansfield's Digest, as requiring that the entire amount necessary to effect a redemption from a tax sale to an individual must be paid in the coin or treasury notes of the United States made legal tender by acts of Congress, that is, the whole amount must be paid in money, and no part thereof may be paid in county warrants.

Section 10,101, Crawford & Moses' Digest, defines the duty of the county treasurer, and § 10,102, Crawford & Moses' Digest, defines the duty of the county clerk, in perfecting the redemption.

Section 10,104, Crawford & Moses' Digest, has reference to the redemption of land sold to the State, and reads as follows: "Lands sold to the State may be redeemed within two years after sale, subject to the same restrictions, conditions and regulations as hereinbefore described in relation to the redemption of lands sold for taxes, by the application to the clerk of the county court, and payment of the same amount and penalty hereinbefore mentioned, and the taxes which would have accrued thereon if such land or lot had been continued on the tax books and the taxes extended to the county treasurer, and the amount due the State shall be paid by the county treasurer to the county collector, who shall give duplicate receipts therefor, stating in said receipts the amount belonging to each fund, separately, one of which shall be immediately forwarded by the

treasurer to the auditor, and the other to the clerk of the county court, who shall make quarterly reports to the Auditor of the amounts due the State on account of such redemption of any land sold to the State as herein provided. It shall be the duty of the clerk of the county court to make a note thereof on the record book of such sale provided for in this act."

The insistence, for the reversal of the judgment of the court below, is that the statute providing for the redemption of lands sold to individuals having been construed as requiring payment in money, the statute providing for the redemption of lands sold to the State should receive the same construction, and the same requirement be imposed, and that redemptions are authorized in the latter case only upon the payment in money of the whole amount required to redeem, including the portion to which the county is entitled.

We do not so construe § 10,104, Crawford & Moses' Digest. We think its purpose is to prescribe a similar procedure to be followed by the landowner in either case. Section 10,104 does not expressly require payment in money, as does § 10,100 in case of sales to individuals. If the statute were so construed, grave doubt would arise as to its constitutionality, for § 10 of article 16 of the Constitution provides that: "The taxes of counties, towns and cities shall only be payable in lawful currency of the United States, or the orders or warrants of said counties, towns and cities, respectively." That statutes should be so construed as to render them constitutional if they are reasonably susceptible of such construction is a settled rule of interpretation. *Stillwell* v. *Jackson,* 77 Ark. 250, 93 S. W. 71; *Dobbs* v. *Holland,* 140 Ark. 398, 215 S. W. 742; *Booe* v. *Sims,* 139 Ark. 595, 215 S. W. 649; *Commissioners, etc.,* v. *Quapaw Club,* 145 Ark. 283, 225 S. W. 886; *Logan* v. *State,* 150 Ark. 486, 234 S. W. 493; *Board of Commissioners* v. *Furlow,* 165 Ark. 63, 262 S. W. 991; *Hazelrigg* v. *Board of Penitentiary Commissioners,* 184 Ark. 154, 40 S. W. (2d) 998.

Section 10,104, Crawford & Moses' Digest, will be better understood if it is read in connection with other

statutes on the subject of payment of county taxes. Among these are the following:

Section 1988, Crawford & Moses' Digest, provides that: "The county taxes of any county of this State, levied in pursuance of law, shall only be payable in the lawful currency of the United States or scrip or warrants of the county by whose authority the same were issued, drawn in pursuance of law and not inconsistent with this act. * * *"

Section 1993, Crawford & Moses' Digest, provides that: "All county warrants and county scrip shall be receivable for any taxes for county purposes, except for interest on the public debt and for sinking fund, and for all debts due the county by whose authority the same were issued; * * * without regard to the time or date of issuance of such warrant, scrip, acceptance or money, or the purpose for which they were issued; and it is hereby made the duty of, and authority is hereby conferred upon, the county court of the respective counties, or the judge thereof in vacation, to make all lawful orders compelling collectors, both county and municipal, to comply with the provisions and intent of this act. Provided, that nothing in this act shall authorize the collector to receive scrip issued since the adoption of the Constitution in payment of the tax levied to pay the indebtedness existing before the adoption of the Constitution."

Section 2008, Crawford & Moses' Digest, provides that: "All warrants drawn on the treasury shall be received, irrespective of their number and date, in payment of all taxes, duties, fines, penalties and forfeitures accruing to the county."

Section 10,045, Crawford & Moses' Digest, provides that: "The collector shall receive county warrants in payment of county taxes; * * *. 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." This section of the Digest has been amended by § 9 of act 275 of the Acts of 1933, page 843, but in a respect here unimportant to be considered.

These sections of the statutes, or similar statutes which they have amended, have been construed in the following cases: *Daniel* v. *Askew,* 36 Ark. 487; *Whitthorne* v. *Jett,* 39 Ark. 139; *Worthen* v. *Roots,* 34 Ark. 356; *Murphy* v. *Smith,* 49 Ark. 37, 3 S. W. 891; *Richie* v. *Frazer,* 50 Ark. 393, 8 S. W. 143; *Crudup* v. *Ramsey,* 54 Ark. 168, 15 S. W. 458; *Hill* v. *Logan County,* 57 Ark. 400, 21 S. W. 1063; *St. Louis Nat. Bank* v. *Marion County,* 72 Ark. 27, 79 S. W. 791; *Bartlett* v. *Willis,* 147 Ark. 374, 227 S. W. 596; *Stanfield* v. *Kincannon,* 185 Ark. 125, 46 S. W. (2d) 22; *Stanfield* v. *Friddle,* 185 Ark. 879, 50 S. W. (2d) 237. There are other cases to the same effect.

The purport of all these decisions is that a county may not refuse to receive its warrants in payment of any demand due it.

The subject was very thoroughly considered in the case of *Stillwell* v. *Jackson,* 77 Ark. 250, 93 S. W. 71. The facts in that case were that the county court of Ashley County made an order for the construction of a new courthouse, in which it was provided that "a special levy of two mills tax on the dollar be and the same is hereby levied on all the taxable property of Ashley County to build a new courthouse, and that said tax be receivable only in currency or proper warrants drawn by proper order on the courthouse fund." The question was raised whether the courthouse tax could be paid in warrants drawn upon funds appropriated for ordinary county purposes.

There was a review of various sections of the Constitution in regard to the assessment and payment of taxes, and also of statutes upon that subject. After this review the court declared the law to be that "all county warrants shall be receivable for all county taxes, except those levied to pay indebtedness existing at the time of the adoption of the Constitution and interest thereon." The court there quoted from the case of *Worthen* v. *Roots,* 34 Ark. 366, as follows: "A review of all this legislation anterior and subsequent to the Constitution of 1874, together with that Constitution itself, reveals a settled policy, almost in terms enjoined by the Constitution itself, * * * of supporting the credit of the counties, and encouraging the citizens to render their services with

alacrity, by making claims against the county a set-off for taxes."

In the case of *Gould* v. *Davis,* 133 Ark. 90, 202 S. W. 37, there was construed a special act providing for the funding of the indebtedness of Garland County, § 4 of this act provides that: "No county warrants hereafter issued by said county shall be receivable for taxes, nor in payment of any fines, penalty or forfeiture, but shall be payable only in the current money of the United States." It was held that this section of the act was violative of § 10, article 16, of the Constitution, hereinabove quoted from, and that the act was void on that account.

The effect of the numerous cases which have construed the various statutes relating to county revenues appear to clearly declare the policy and effect of the warrants in satisfaction of any claim due it.

The case of *Murphy* v. *Smith,* 49 Ark. 37, 3 S. W. 891, *supra,* is not contrary to this view. There the land had been sold to an individual, and the county's demand for the taxes had been paid by the sale. Thereafter the landowner owed the county nothing on account of the taxes for the nonpayment of which the land had been sold. They had been paid. The demand was due to the tax purchaser, who was under no duty, statutory or otherwise, to receive anything except lawful money; indeed, § 10,100, Crawford & Moses' Digest, recognizes this right of the purchaser and gives its sanction to be paid in money. When the sale is to the State, it is for the benefit of all the taxing agencies entitled to portions of the taxes, and the redemption is also for their benefit. It is, at last and in effect, a delayed payment of the taxes, which the law has permitted to be made, and the county then has no more right to refuse to accept its warrants in payment of its taxes than it originally had. It was still a demand due the county which the Constitution and the statutes of the State provide may be paid in the warrants of the county.

There is involved in this case no construction of Amendment to the Constitution No. 17 authorizing

the levy and collection of a construction and building tax for purposes authorized by that amendment.

The writ of mandamus was therefore properly awarded, and the judgment of the circuit court will be affirmed.

SIDES *v.* JANES.

4-3226

Opinion delivered December 11, 1933.

O. T. Ward and *Basil Baker,* for appellant.

Harrison, Smith & Taylor, Holifield & Upton and *Dudley & Barrett*, for appellee.

HUMPHREYS, J. This is a suit in equity by appellees against appellants to enjoin the administration of the estate of C. L. Sides, deceased, by J. B. Blakemore, as administrator, with the will annexed, and to recover from said administrator the assets of said estate in his possession for the benefit of said estate and themselves, and to recover from Ira Sides, for the benefit of the estate and themselves, the amount of $8,650 that belong-

ed to deceased, which he obtained out of a bank lock box which he and deceased had used jointly and for which he did not account in his settlement as administrator before his discharge, and to recover from him and his co-administrator, R. E. French, for the benefit of the estate and themselves, $552 overplus from the sale of cattle belonging to deceased, for which they did not account in their settlement before being discharged, and to recover from said original administrators, for the benefit of Linnie Janes, the sum of $581.62, which they collected and for which they took credit in their settlement before being discharged; and to recover, for the benefit of the estate and themselves, $2,148.50 from Mamie French, which she received from said original administrators under the erroneous belief that deceased had given said money to her in his lifetime.

The grounds upon which appellees sought relief were that the will of deceased was annulled by a family agreement which could not be interposed as a defense in the probation of the will and the administration of the estate thereunder; and that the original administrators should return to the estate such amounts as either or both retained and for which they did not account in their settlement before being discharged; and that they erroneously took credit for rents in their settlement of the estate which belonged to Linnie Janes; and that Mamie French should return to the estate the amount she received from the original administrators under the belief that it had been given to her by the deceased in his lifetime.

Appellants interposed the defenses that the chancery court was without jurisdiction to entertain the suit for the reason that the probate court had original and exclusive jurisdiction of the cause of action, and that all funds belonging to the estate had been properly inventoried and accounted for in the settlement by the original administrators before their discharge, and that the money turned over to Mamie French by them had been given to her by the deceased in his lifetime.

Upon a hearing of the cause, the chancellor found that in 1905 deceased executed a will giving and devis-

ing his estate to four of his children, to the exclusion of his daughter Linnie Janes, to whom he gave only $5, and that all five of his children knew of the execution of the will; that, shortly after the death of C. L. Sides, in February, 1929, all the heirs, disregarding the contents of the will, entered into a family settlement or agreement by which all were to share equally in the estate, and, in order to effectuate that purpose, Ira Sides and R. E. French were selected to administer the estate through the probate court without charge for their services and, after paying the indebtedness, to divide the estate between the heirs, share and share alike; that, pursuant to the agreement, each of the five heirs received about two hundred acres of land, which was conveyed to them by properly executed deeds; that, in further consummation of the family settlement, Ira Sides and R. E. French proceeded to administer upon the personal estate, and, in the course of about two and one-half years, paid all the indebtedness and paid to each heir $2,000; that on April 23, 1931, Ira Sides, disregarding the family agreement, filed the will which deceased had executed in 1905 with the probate clerk for the Eastern District of Clay County, and, on October 12, 1931, the administrators filed an inventory of the estate and their final settlement thereof; that exceptions to the inventory and settlement and to the probation of the will were filed by Linnie Janes and Anna French, two of the heirs and appellees herein; that on a hearing of the exceptions by the probate court, the inventory and settlement were approved and the will admitted to probate; that the original administrators were thereupon discharged and J. B. Blakemore was appointed administrator with the will annexed; that the judgment probating the will and approving the settlement of the original administrators were appealed from by three of the heirs, Linnie Janes, Anna French and Earl Sides; that on November 2, 1932, while the appeal was pending in the circuit court, this suit in equity was instituted, to which a demurrer was filed raising the jurisdiction of the chancery court to try the cause, which demurrer was overruled, over appellants' objection; that appellants then filed an answer

to the complaint denying the allegations thereof; that subsequently the appeals to the circuit court from the orders of the probate court approving the settlement of the original administrators and the probation of the will were transferred to the chancery court and consolidated with this suit, over the objection of appellants herein; that Ira Sides found in a lock box $8,650 in currency belonging to the estate, which he failed to include in the inventory and account for in his final settlement; that the original administrators collected rents in the sum of $581.60, which they failed to pay her; that Ira Sides retained $522 from the sale of cattle belonging to the estate, for which he did not account in his final settlement; that the administrators turned over to Mamie French $2,148.50 found in fruit jars on the premises occupied by C. L. Sides prior to his death under a claim that it was given to her by her father in his lifetime and that she now has the money in her possession; that the testimony failed to show that it was given to her by her father.

Based upon these findings, a decree was rendered, as follows:

"(1) That the appellants, and each of them, be and they are perpetually enjoined from asserting any rights under the alleged will of the said C. L. Sides, deceased, and J. B. Blakemore, as administrator with said will annexed, be and is hereby discharged.

"(2) That appellees have and receive of and from the appellant, Ira Sides, for the benefit of themselves and for the estate of C. L. Sides, the sum of $8,650, together with six per cent. interest thereon from August 15, 1929, until paid.

"(3) That the administrators have no right to claim $581.62 rents belonging to appellee Linnie Janes, and credit for said rent should not be given them in their final accounting as hereinafter directed.

"(4) That appellees have and recover of and from the appellant, Ira Sides, for the benefit of themselves and the estate of C. L. Sides, the sum of $522, being the amount retained by him as the sale price of cattle as hereinabove set out, together with interest on said sum

at the rate of six per cent. per annum from August 15, 1929, until paid.

"(5) That appellees have and recover of and from Mamie French, for the benefit of themselves and the estate of C. L. Sides, the sum of $2,192.50, together with interest thereon from 1st day of October, 1931, at the rate of six per cent. per annum.

"(6) That the part of this suit involving the inventory, accounts and final settlements of the administrators be and the same is hereby remanded to the circuit court for final disposition, with directions to said court in stating said account to charge the administrators and individuals in accordance with this opinion in so far as this decree determines title, and to order a distribution of said estate, among the five heirs thereto, or their representatives in equal portions in accordance with the final settlement agreed upon, and that no compensation be allowed said administrators for their services.

"(7) That the appellants, Ira Sides, Mamie French and R. E. French, will pay all costs of this proceeding, and that appellees may have execution on this judgment."

Appellants prayed and have duly prosecuted an appeal to the Supreme Court from the decree thus rendered, and appellees have prayed and duly prosecuted a cross-appeal from the decree remanding the inventory, accounts, and final settlements of the administrators to the circuit court for final disposition.

The testimony is voluminous, and no useful purpose could be served by setting it out in this opinion. Suffice it to say that, after a careful reading thereof, we are of opinion that the findings of fact by the chancellor are sustained by a preponderance of the evidence.

It is contended that the decree should be reversed because the probate court had exclusive original jurisdiction over the will and administration of the estate of deceased, C. L. Sides. It is true that, under the Constitution of this State, article 7, § 34, exclusive original jurisdiction was conferred on probate courts in matters relative to the probate of wills and to administration of estates of deceased persons, but no authority is conferred

upon probate courts by this provision of the Constitution to cancel or annul wills or to settle the title to property where the title thereto is in question. This court said in the case of *Moss* v. *Moose,* 184 Ark. 802, 44 S. W. (2d) 825, that "it has been repeatedly held that it was not the purpose of the Constitution and statutory provision to invest the probate court with jurisdiction to contest rights and matters of litigation as to the title of property between the executor or administrator and others." *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166; *Moss* v. *Sandefur,* 15 Ark. 381; *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39.

The main purpose of the instant suit was to determine the ownership of moneys found in a lock box and upon a farm upon which deceased had resided, and to annul or supersede the will of deceased sought to be probated, by a family settlement or agreement. These were matters over which the probate court had no jurisdiction, and which might be determined in a court of equity. It was said, in substance, by this court in the case of *McCarley* v. *Carter,* 187 Ark. 282, 59 S. W. (2d) 596, that the fact that a will has been admitted to probate does not preclude inquiry by another court having jurisdiction into the rights of the parties under the will and to declare same void for forgery or for other reasons.

The record herein reflects that, at the time of the institution of the suit in the chancery court, the original administrators had paid all the debts of the deceased out of the assets of the estate and had divided about $10,000 amongst the heirs in addition to the lands received by each pursuant to the family settlement, at which time Ira Sides sought to have the purported will probated and the estate administered thereunder by another administrator, and that this purpose was effected by procuring the probation of the will and the appointment of J. B. Blakemore as the administrator with the will annexed, and an order of the probate court approving the settlement of the administrators and their discharge, all over the objection and exception of appellees, and from which orders appellees prosecuted appeals to the circuit court.

The record also reflects that these appeals were transferred to the chancery court and consolidated with this suit, over appellants' objection and exception.

The chancery court had jurisdiction to try and determine the main issues in the case—that is, whether there was a family agreement superseding and annulling the will and whether the moneys found in the lock box and buried on the farm belonged to deceased; and it also became the duty of the chancery court to order the administrator with the will annexed to turn over the assets he received from the original administrators for a division among the heirs of the estate. All the assets of the estate had been collected, and all the debts had been paid, and no necessity remained for further administration thereof.

The instant case comes within the rule announced in the recent case of *United States Fidelity & Guaranty Company* v. *Edmondson,* 187 Ark. 257, 59 S. W. (2d) 488, and is not governed by the rule announced in the case of *Coppege* v. *Weaver*, 90 Ark. 444, 119 S. W. 678, and kindred cases cited by appellants. In the latter cases there was a necessity for remanding them to the probate court in order that the administration might be continued and final settlement made; but, in the instant case, no such necessity existed. We said in the Edmondson case, *supra,* that it was a case "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."

The decree is therefore in all things affirmed except that part thereof remanding the inventory, accounts, and final settlements of the administrators to the circuit court for final disposition with directions. In that particular, the decree is reversed on cross-appeal with directions to the chancery court to falsify and surcharge all accounts in their entirety and to enter a final decree dividing the property among the heirs according to their several interests.

Mr. Justice BUTLER dissents.

COOK *v.* DOBBS.

4-3237

Opinion delivered December 11, 1933.

R. L. Derryberry and *J. Loyd Shouse,* for appellant.

J. H. Black, for appellee.

HUMPHREYS, J. This is an appeal from a decree rendered by special chancellor Berry Floyd, in the chancery court of Marion County, in favor of W. H. Dobbs, on motion filed in an original attachment proceeding for a judgment against the intervener, G. E. Roberts, and his bondsmen, J. B. Cook, N. A. Lowery and W. F. Butler, for the value of certain property not returned by them in the attachment proceeding in the same court, wherein

W. H. Dobbs was plaintiff and Paul Stone defendant. The attachment proceeding was tried by the regular chancellor, Judge Sam Williams, at a prior term of court, and a decree rendered therein.

It was alleged in the motion that the intervener, G. E. Roberts, obtained the release of 1,400 railroad ties which had been attached in the attachment proceeding by filing a bond conditioned for their return; and, in the decree sustaining the attachment, the intervener was ordered to return or deliver them to the sheriff, which he failed to do; and that his bondsmen, J. B. Cook, N. A. Lowery and W. F. Butler, are liable therefor.

J. B. Cook and Floyd Butler denied the execution of the bond or that the intervener, J. B. Roberts, failed to return or deliver any of the property ordered to be returned or delivered in said decree. This answer was sworn to before the clerk of the court.

When the motion was called for trial, appellants herein objected to the trial thereof on oral evidence, and requested that same be heard on depositions, which request was refused, over their objection and exception.

Appellants contend that this ruling by the court constituted prejudicial, and therefore reversible, error. We do not understand that the statute allowing the use of depositions in equitable proceedings is mandatory. The language of the statute is that "depositions may be used on the trial of all issues, and upon all motions in actions by equitable proceedings." Even though the request to do so was made by appellants, and refused by the court, no showing is made that the action of the court prejudiced them in any way. No reversible error was committed by allowing the motion to be tried on oral evidence.

The next contention of appellants for a reversal of the decree finding that they executed the intervener's bond is that there is no evidence whatever to support it. They call attention to the fact that they verified the response denying the execution of the bond, and to the recital in the decree that the issues joined by the motion and response were tried upon the evidence of certain witnesses and certain excerpts from the witnesses who testi-

fied in the attachment proceeding, and that none of said witnesses testified that the intervener's bond was given. The decree did not recite specifically that all the pleadings and proceedings in the attachment suit were before the special chancellor, but, of course, they were, as this motion was filed in that case. The transcript herein shows that the clerk read the original decree in the attachment proceeding to the special chancellor, yet no mention was made of it in the decree rendered by the chancellor. It appears that, in the original decree the intervener's bond called in question was referred to. In the decree sought to be reversed on this appeal, the special chancellor specifically found "from the record in this case that J. B. Cook, Floyd Butler and N. A. Lowery are the bondsmen of the intervener, G. E. Roberts," meaning, of course, that the record in the attachment proceeding before him, and subject to his inspection, showed that they had executed the bond. This proceeding, by motion in the attachment suit, was a continuation thereof for the purpose of obtaining the property, or its value, from the intervener and his bondsmen, who failed to return the attached property to the sheriff in accordance with the original decree. The record in the entire proceeding was necessarily before the special chancellor, and we must presume from his finding that the intervener's bond, signed by appellants, was in the files and inspected by him.

Appellants also contend for a reversal of the decree on the ground that the evidence fails to show that the 1,400 railroad ties attached by the sheriff were delivered to the intervener on his cross-bond. The evidence was conflicting in this particular, and we cannot say, after a careful reading thereof, that the finding of the special chancellor was contrary to a clear preponderance of the evidence.

No error appearing, the decree is in all things affirmed.

BROCKMAN *v.* BOARD OF DIRECTORS OF JEFFERSON COUNTY BRIDGE DISTRICT.

4-3238

Opinion delivered December 11, 1933.

[redacted]

E. W. Brockman, for appellant.

Bridges, McGaughy & Bridges, for appellee.

KIRBY, J., (after stating the facts). The appellant seeks to collect fees against certain delinquent lands of the district embraced in this suit and have them taxed against each particular tract described therein as costs for his compensation for the collection of the delinquent taxes for 1929 and 1930 as provided in said act 121 of 1921.

He alleged that said act making provision for the collection of delinquent taxes was enacted long prior to the adoption of amendment No. 12 to the Constitution, prohibiting the passage of local acts by the Legislature, and that by its terms he was entitled to have the court fix a reasonable sum to be taxed as attorney's fees against each tract of land set out in the complaint; and that said act of the Legislature, No. 274 of 1933, entitled: "An Act to Amend § 1 of act 121 of the Special Acts of the General Assembly of the State of Arkansas, approved February 1, 1921," left out of the provisions of said act all reference to the collection fees for the service, and instead provided: "And it shall be the duty of said attorney to do and perform all and singular the duties incumbent on the attorney for the Jefferson County Bridge District, and said service shall be performed by the prosecuting attorney of said county without additional salary to that now provided by law for the prosecuting attorney of Jefferson County."

It is insisted that said § 1 of act 274 of 1933, is void as being in conflict with article 19, § 11, of the Constitution in that it endeavors to diminish the salary of the prosecuting attorney during his term of office, and further is in conflict with Amendment No. 12 of the Constitution, attempting to amend a special act of the Legislature.

The court made the following declaration of law: "The intervention in this case as presented by E. W. Brockman, as prosecuting attorney of Jefferson County and made attorney for the Jefferson County Bridge District under act No. 121 of the General Assembly for the year 1921, presents the issue as to whether act No. 274 of the Acts of the General Assembly for the year 1933, amended or repealed said act No. 121 for the year 1921. This court is not passing on any phase of the case as to the justness of the act, the amount of work to be done, or fees fixed therefor, but solely on the question of the constitutionality of act No. 274 of the Acts of 1933. Since the adoption of the constitutional amendment which prohibits the Legislature from passing a local or special act, the Legislature cannot amend a local act, but it can repeal a local act, either entirely or only some particular part of it."

Article 19, § 11, of the Constitution provides that prosecuting attorneys, with other specified State officials, "shall each receive a salary, to be established by law, which shall not be increased or diminished during their respective terms, nor shall any of them, except the prosecuting attorneys, * * * receive to his own use any fees, etc." Under the statute a salary is provided for prosecuting attorneys which can be said within the meaning of the above section to be established by law, and said section also prohibits the increasing or diminishing of the salary during the respective terms of office. The prohibition, however, is to the salary only, and does not affect one whose compensation is not definite and fixed, but is uncertain in amount and consists in fees or percentages. 46 C. J. 1024, and cases cited in footnote 55. See also, *State* v. *Grimes*, 7 Wash. 445, 35 Pac. 361, where a like provision of the Constitution of Washington re-

ceived such construction. No compensation had been fixed for the services herein before the act of 1933 reduced the compensation, and: "A constitutional provision prohibiting a change of compensation after an election or appointment during the term of an office does not apply where, prior to such time, no salary or compensation had been fixed for the office." 46 C. J. 1025.

Said act 274 of 1933 is not in conflict with article 19, § 11, of the Constitution. It is obvious that the framers of the Constitution had in mind only the stipulated salaries of the public officials mentioned, prohibiting their being increased or decreased during their respective terms of office, and not the addition or deduction of some fee allowed for a particular service. *Purnell* v. *Mann,* 105 Ky. 87, 48 S. W. 407.

Neither does said act 274 of 1933, conflict with said Amendment No. 12 to the Constitution, which reads as follows: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts." Said amendment expressly provides that it shall not prohibit the repeal of local or special acts.

"There are two ways of repealing a statute or part thereof; one is by express terms, the other by necessary implication. The question of repeal is one of intent, and must be solved by determining as near as may be the intent of the Legislature.

"An express repeal is the abrogation or annulment of a previously existing law by the enactment of a subsequent statute which declared that the former law shall be revoked or abrogated." 59 C. J., § 502.

The Constitution provides the method for amending a law and requires that whatever part thereof is to be retained "shall be re-enacted and published at length." Article 5, § 23. It is invariably held all of the section or law that is omitted and not re-enacted in the provisions of the amendatory act as proposed, is repealed. Applegate's Constitution of Arkansas Annotated, article 5, § 23, p. 47, and cases cited.

This court has already held, construing Amendment No. 12 to the Constitution, that the Legislature has the right to repeal a local act entirely or only some particular part of it. *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. (2d) 362.

The method adopted here by re-enacting the particular part of the act proposed to be retained, effected only the repeal of that part omitted, and was within the competency of the Legislature, as correctly held by the chancellor herein.

If an additional duty is prescribed or imposed upon a public official without any provision for any further salary or compensation paid, it does not relieve him from the performance of such duty, it being presumed that the Legislature concluded that his salary or fees already provided are sufficient for the additional service required to be rendered.

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

ARKANSAS POWER & LIGHT COMPANY *v.* DILLINGER.

4-3209

Opinion delivered December 11, 1933.

[redacted]

[redacted]

Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron*, for appellant.

M. B. Norfleet, L. A. Hardin and *C. W. Garner*, for appellee.

KIRBY, J., (after stating the facts). It is insisted that said instruction No. 1, given for appellee, is erroneous in that it required a higher degree of care to be exercised by the motorman in proportion to the greater danger to be avoided than the law warrants. Said instruction reads as follows: "The court instructs the jury that the defendant in the operation of its street cars in the city of Little Rock over and across streets that people are constantly traveling over, it is the duty of the operatives of the said street car to exercise due care. The operators must be governed to some extent by the circumstances that surround them at the various street crossings along their line. And, if you find from the evidence that there was a building on the east side of said street car track and south of 23d Street, and was built and situated so that the view to said 23d Street was cut off and obstructed, so that the operatives of said street car could not see an automobile approaching said car line from the east until said automobile was near or upon said tracks, then the operatives of said street cars traveling north and approaching said 23d Street crossing would be required to exercise a higher degree of care in proportion to the greater danger; and the operatives of said street car should reduce the speed of said street car or take other precaution, so as to have their street car under such control as would enable them to avoid dangers and injuries to others using or traveling over said tracks at said crossing."

The instruction is not open to the objection made against it, and only tells the jury that the care necessary to be exercised would increase with the apparent dangers to be avoided, which, under the circumstances, would only be ordinary care, or that care which a reasonably prudent and cautious person would exercise under similar circumstances, and it was not meant to, and did not, require the exercise of a greater degree of care than ordinary care.

In *St. Louis, I. M. & S. R. Co.* v. *Chamberlain,* 105 Ark. 180, 190, 150 S. W. 157, it is said: "The degree of care varies with the circumstances of each case, and necessarily depends upon the hazard or danger. It would not be improper to say that a greater degree of care should be exercised when the situation or circumstances is more dangerous or hazardous. Under such circumstances, a reasonably prudent and cautious person would exercise greater care than when the situation involved less or no danger. The exercise of the greater care, under more dangerous and hazardous circumstances, would therefore only be the exercise of that care which a reasonably prudent and cautious person would exercise under similar circumstances, and would therefore be at last only ordinary care. And this, we think, is but the meaning and effect of the instruction given." See also *Bona* v. *Thomas Auto Co.,* 137 Ark. 224, 208 S. W. 306; *Carter* v. *Brown,* 136 Ark. 23, 206 S. W. 71; and *Minor* v. *Mapes,* 102 Ark. 351-54, 144 S. W. 219.

Appellant next complains that appellee's requested instruction No. 3, stating that appellee relied upon the doctrine of discovered peril or last clear chance for recovery, etc., is erroneous, and that said doctrine has no application whatever in this case. Appellant, however, asked instructions on the same point, and the instruction complained of is not out of harmony with this court's former declarations upon such doctrine: *Pankey* v. *L. R. Ry. & Elec. Co.,* 117 Ark. 337, 174 S. W. 1170; *Hot Springs St. Ry. Co.* v. *Hildreth,* 72 Ark. 572, 82 S. W. 245; *Citizens' St. Ry. Co.* v. *Steen,* 42 Ark. 321; *Chicago, R. I. & P. Ry. Co.* v. *Bunch,* 82 Ark. 522, 102 S. W. 369; *St. Louis, I. M. & S. Ry. Co.* v. *Freeman,* 36 Ark. 46.

In *St. Louis S. W. R. Co.* v. *Simpson,* 184 Ark. 638, 43 S. W. (2d) 251, the court said: "The discovered peril doctrine, or the doctrine of the last clear chance, as it is sometimes called, constitutes an exception to the rule that the contributory negligence of the plaintiff is a bar to this action. Under this doctrine, where one discovers the perilous situation of another in time, by the exercise of ordinary care, to prevent injury to him, it is his duty to do

so, and he is guilty of negligence if he fails to do so, which is regarded in law as the proximate cause of the injury, and this, too, regardless of the contributory negligence of the injured person. Such a person is regarded in law as having the last clear chance to prevent injury or death to another, and it is his duty to do so."

Although this case was reversed by the United States Supreme Court, 286 U. S. 346, on the facts, the rule of law appears not to have been affected thereby. See also *Mo. Pac. Ry. Co.* v. *Skipper,* 174 Ark. 1096, 298 S. W. 849.

Appellant, by its instructions asked for and granted by the court, had the issues submitted to the jury on the doctrine of last clear chance, and the jury found against appellant on conflicting testimony.

Appellant makes a strong determined assault upon the rule of the last clear chance doctrine as announced by our decisions and cites cases from most of the other jurisdictions in favor of its contention; but the matter has long been settled here, and we do not regard that there exists any necessity for additions or amendments to this doctrine as already announced.

We do not set out any further instructions complained of, but, after a careful examination of them all, we believe appellant had the benefit of several instructions that were more favorable to its contention than the law warrants.

A careful examination of the whole record discloses that no prejudicial error was committed in the trial of this case. The judgment is affirmed.

ARMSTRONG *v.* MCCLUSKEY.

4-3183

Opinion delivered December 11, 1933.

H. L. Ponder, for appellant.

W. P. Smith and *O. C. Blackford*, for appellee.

KIRBY, J. The appellant, J. W. Armstrong, as receiver of the Planters' National Bank of Walnut Ridge, brought this suit in the Lawrence Chancery Court for the Eastern District against the appellees on the following promissory note:

"Principal Date 10-28-1931 Paid $1.54 Bal. $498.46

"$500

"Walnut Ridge, Ark., 1-15-27.

"Six months after date, for value received, we or either of us promise to pay to the order of J. M. Whit-

low five hundred and no/100 dollars at the Lawrence County Bank, Walnut Ridge, Ark., with interest at the rate of 10 per cent. per annum from date until paid. The makers and indorsers of this note hereby severally waive presentment of payment, notice of nonpayment, protest and consent that time of payment may be extended without notice thereof. If interest is not paid when due, same shall then become as principal, and bear interest at the same rate until paid.

[Signed] "J. A. McCluskey,
"D. D. Allison,
"W. H. Broadway.

"Notice 1-28-31.
"Indorsed:

"2-1-28 pd.				$38.00
"2-6-28 pd.				8.10
"2-15-28	11.45	2-16-28	6.70	18.15
"3-10-28 "				42.00
"3-17-28 "				2.10
"3-20-28 "				59.50
"1-22-28 J. M. Whitlow.				

"Indorsed to Clarence Whitlow without recourse, Clarence Whitlow."

The appellee, Allison, filed a separate answer and cross-complaint, in which he alleged as one of his defenses that the note was void for usury. He alleged that J. M. Whitlow, acting through his son and general agent, Clarence Whitlow, had unlawfully and fraudulently conspired with his son, together with the defendant, Davis, to make a usurious loan on the said note to the said Davis by writing on the face of the note the name of J. M. Whitlow as payee, without the authority or knowledge of the defendant, Allison, and loaned to Judson Davis the sum of $400 only, taking his note in the sum of $500 and charging an extra $100 by reserving the same; that the said loan and transaction was, and is, usurious and void.

McCluskey, Clarence Whitlow and Judson Davis, who were also made parties to the suit, filed no answer, but the defendant, J. M. Whitlow, filed a separate unverified answer denying that he was the principal, and that

Clarence Whitlow was his agent, and alleging that, as soon as he learned of the transaction, he immediately and before maturity repudiated the transaction, and thereupon the said Clarence Whitlow paid him the face value of said note, and he in turn indorsed the same to Clarence Whitlow without recourse on him; that Clarence Whitlow was not his general agent, and had no authority to make the transaction for him in matters of taking notes or in any other matters, and realleged that he repudiated his son's acts within a few days after his son took the note.

On the evidence adduced, the trial court found: "That this is a suit upon a promissory note dated January 15, 1927, for the sum of five hundred dollars, payable to the order of J. M. Whitlow, with ten per cent. per annum interest from date until paid, signed by J. A. McCluskey, D. D. Allison and W. H. Broadway; the court further finds that Clarence Whitlow, acting as the agent of his father and co-defendant, J. M. Whitlow, made the loan represented by the note sued on herein, as agent for his father and co-defendant, J. M. Whitlow, and, as such charged the sum of one hundred dollars, as a bonus, paying over only the sum of $400, accepting a note for the sum of five hundred dollars, bearing ten per cent. interest per annum from date until paid.

"That said loan was usurious, and that the reservation of said one hundred dollars, together with the ten per cent. interest charged, was a greater sum for the loan and forbearance of money [than] allowed by law, so as to render said loan and note sued on void; that the defendant, J. M. Whitlow, knew at the time of the reservation of said one hundred dollars at the time his agent made said loan, and ratified his actions as his agent by accepting said note and the benefits thereunder, and did not attempt to escape his liability on account of said usury until more than one year after making said loan, when he attempted to escape liability by indorsing said note to his son without recourse on January 22, 1928.

"The court further finds that Clarence Whitlow, after said note had been indorsed to him by his father

and co-defendant, J. M. Whitlow, his principal, without recourse, indorsed the note and placed the same as collateral for another note he owed Planters' National Bank of Walnut Ridge, the said bank accepting said note as additional collateral to an old note already due said bank by said Clarence Whitlow, after maturity, without consideration and with the indorsement of J. M. Whitlow without recourse, and for that reason should not recover as against J. M. Whitlow."

The court then entered a decree by default against McCluskey, Judson Davis and Clarence Whitlow in the sum sued for, and decreed that the plaintiff take nothing as against Allison and J. M. Whitlow, and canceled the note as to the defendant, D. D. Allison.

The appellant, receiver, first contends that the evidence adduced to establish usury fails to meet the requirements of the rule announced in *Holt* v. *Kirby,* 57 Ark. 256, 21 S. W. 432, and *Briggs* v. *Steel,* 91 Ark. 458, 121 S. W. 754, and approved in many subsequent decisions. That rule may be thus stated: To establish usury there must be shown an agreement by which the borrower agrees to pay and the lender knowingly receives a higher rate of interest than is allowable by law for the loan or forbearance for money, and that the same was actually taken or received. Usury will not be inferred where an opposite conclusion can be fairly reached and the burden rests upon the one pleading it to establish his plea by a fair preponderance of testimony.

The appellant next contends that, since the testimony shows that the loan was negotiated and the transaction completed by an agent of J. M. Whitlow, it was necessary to establish the awareness of the principal of the usurious agreement, or of facts from which his knowledge may be inferred, (*Van Deventer* v. *Smith,* 123 Ark. 612, 186 S. W. 59), and that in these particulars the evidence fails. We agree with counsel on the principles of law announced, but think he errs when he contends that under the evidence their application acquits the lender, J. M. Whitlow, of the charge of usury and establishes the validity of the note and the appellee, Allison's, liability.

The evidence relating to the fact of usury, and the knowledge of J. M. Whitlow of the unlawful dealing of his agent in effecting the loan, is so connected that both contentions may be disposed of in a single discussion. In considering the testimony on these related subjects, we bear in mind the principle that there can be no device or trickery on the part of the lender to evade the statute against usury under, or behind which, the law will not look in order to learn the real nature of the transaction, and that any given facts may be established by the proof of circumstances surrounding the transaction, as well as by direct evidence. There were only two persons present when the loan was made and the note delivered, Clarence Whitlow, the son of J. M. Whitlow, and Judson Davis, for the benefit of whom and of Davis' partner, McCluskey, the note was signed by Allison. Clarence Whitlow testified in positive terms that the full $500 was paid over to Judson Davis, and there was nothing retained or reserved in addition to the lawful rate of interest charged. But there was brought out in his examination, and from other evidence in the case, proof of circumstances which tended to contradict his direct testimony. He also testified that he was the general agent of J. M. Whitlow, and was authorized to, and did frequently, sign his father's name to checks, draw money of his father, make loans for him, take notes and sign his father's name to indorsements thereon. J. M. Whitlow except by his unverified answer, made no denial of this part of the testimony of his son, Clarence Whitlow. Clarence Whitlow further testified that, in dealing with the transaction with Davis, he acted for his father as he was authorized to do, put his father's name in the blank left for the payee, collected the payments which Davis would make from time to time, and finally wrote the indorsement "without recourse" to himself, to which he signed his father's name.

Judson Davis, the other party having direct knowledge of the transaction, stated that Clarence Whitlow gave him only $400 and reserved $100 in addition to the 10 per cent. interest for making the loan; that, just before the trial, Clarence Whitlow came to him in an endeavor to influence him to testify "in line" with the testi-

mony that he (Clarence) would give relative to the amount of money he received as the proceeds of the note; that he wanted him to say that it was $500. This part of Davis' testimony was not disputed by Whitlow. In Clarence Whitlow's testimony, no reason was given as to why the transaction did not meet with his father's approval, and it is certain, from the date appearing on the note and from Clarence's testimony, that it was not indorsed to him without recourse until the 22d of January, 1928, a year after the date of the note and six months beyond its maturity.

In determining the questions presented, the court had for its consideration, not only the direct evidence, but the peculiar circumstances surrounding the transaction, to narrate all of which would unduly extend this opinion, and which we think was sufficient to support the court's finding of fact.

The trial court was of the opinion that, because of J. M. Whitlow's indorsement on the note without recourse, coupled with the fact that the appellant accepted the same as collateral for a past-due note of Clarence Whitlow, he was not liable therefore for its payment. In this the court was mistaken. An assignment of a note without recourse is equivalent to a mere sale without an express warranty, but there remains the implied warranty, among others, that there is no legal defense growing out of the assignor's own connection with its origin (*Smith* v. *Corege*, 53 Ark. 295, 14 S. W. 93), and that the assignor has no knowledge which would impair the validity of the instrument or render it valueless. Crawford & Moses' Digest, § 7831. Therefore, since the validity of the note is warranted by the indorser where the note is not valid because of usury, because of the implied warranty, the indorser becomes liable for its payment. 8 C. J., pages 369 and 392; *Challis* v. *McCrum,* 22 Kan. 157, 31 Am. Rep. 181.

It follows that J. M. Whitlow is liable for the payment of the note by reason of the implied warranty contained in his indorsement, and that the court erred in contrary judgment.

The decree of the trial court is correct, and will be affirmed except as to the appellee, J. M. Whitlow. As to him, it is reversed, and the cause remanded with directions to enter judgment against him in favor of the appellant for the amount due on the note according to its tenor and effect.

ARKANSAS GENERAL UTILITIES COMPANY *v.* SMITH.

4-3261

Opinion delivered December 11, 1933.

W. E. Patterson and *Cockrill, Armistead & Rector,* for appellant.

Surrey E. Gilliam, for appellee.

MEHAFFY, J. On April 19, 1932, Hopkins Wade, of El Dorado, Arkansas, filed his complaint in the Union Cir-

cuit Court against the Arkansas General Utilities Company, and S. R. Morgan, E. L. Pye, Jesse J. Craig, Citizens' Light & Power Company, and Republic Power & Service Company. The plaintiff in the case alleged that there was a certain amount of indebtedness due him on a contract, and also alleged several assignments of the contract, but the complaint as filed was a suit at law on contract.

The Arkansas General Utilities Company, one of the defendants in said suit, filed a motion to require plaintiff to make his complaint more definite and certain. The plaintiff thereupon filed his response, and amended his complaint, and again prayed for judgment for the amount set out in the original complaint.

The contract, and several assignments, were filed as exhibits to plaintiff's complaint. Thereafter, the plaintiff filed, in vacation, an amendment to his complaint, asking that certain other parties be made defendant, and that summons issue against them.

Thereafter, on September 17, 1932, the defendant, Arkansas General Utilities Company, filed a general demurrer, which, however, was never submitted to nor acted upon by the court. On December 31st, the defendant, Arkansas General Utilities Company, filed its answer, setting up certain equitable defenses, together with its motion to transfer the cause to equity, and Baylor House, receiver, and Perry County, filed an intervention, asking that the cause be transferred to equity.

On January 10, 1933, the cause was transferred to equity, as requested by defendant and interveners.

On March 23, 1933, the plaintiff filed his motion to transfer the cause back to the law court, and alleged that, on March 17, 1933, a stipulation was entered into between Baylor House, receiver, and Dean, Moore & Brazil, attorneys for the receiver, and S. E. Gilliam, attorney for the plaintiff, that consent judgment should go in favor of Wade, and against Baylor House, receiver, on said intervention. On the same day, the chancery court of Perry County authorized and directed said Baylor House to enter into such stipulation. The stipulation provided that consent judgment should be entered; that Baylor

House should take nothing by reason of intervention, and that the same shall be dismissed for want of equity.

On April 11, 1933, the defendant, Arkansas General Utilities Company, filed a cross-complaint against plaintiff and six other persons, all of whom, except Maude W. Morgan, were plaintiffs in the original suit, and moved to transfer the cause, and asked for an accounting. On April 11, 1933, James G. Barr filed an intervention as a minority stockholder in defendant, Arkansas General Utilities Company, and also as holder of bonds of the holding company, and asked for equitable relief. On April 28, Neill C. Marsh filed his separate answer to the complaint, and to the cross-complaint of defendant, Arkansas General Utilities Company.

Thereafter, the chancery court made an order remanding the cause to the circuit court for trial. The Arkansas General Utilities Company and James G. Barr both objected and excepted to the cause being remanded. Thereupon, the Arkansas General Utilities Company and James G. Barr filed their petition for a writ of mandamus, commanding, requiring and directing the Honorable Walker Smith, chancellor of the seventh chancery circuit of Arkansas, to take and assume jurisdiction of said cause, and for other relief.

A response to said petition was filed, alleging that no grounds were stated in the petition entitling any of the parties to equitable relief, and also stated that they had a complete and adequate remedy at law; that the plaintiff, Hopkins Wade, is entitled to a trial by jury, and that said cause was transferred to the chancery court solely on the petition of Baylor House, receiver, wherein said Baylor House was an intervener in said cause, and prayed for a cancellation and rescission of the assignment of the contract sued on. Respondent also alleged that, before petitioners were entitled to a writ of any kind, they must first show that both the Union Circuit Court and Union Chancery Court refused to try the case.

The petitioners first contended that the general rule is that, where a judge declines to proceed with the trial of a case properly within the jurisdiction of the court over which he presides, he may be compelled to exercise that

jurisdiction by mandamus, except where the right exists to review the action by appeal or writ of error. The petitioners contend that a case squarely in point is the case of *Gilbert* v. *Shaver,* 91 Ark. 231, 120 S. W. 833. As to whether the chancery court or circuit court has jurisdiction to try this case depends upon the statement of facts in the pleadings, and this court stated in the case relied on by petitioners that, where the jurisdiction of the superior court to try a cause or hear an appeal depends on the evidence of certain facts, and that court has, upon the evidence consisting either of affidavits or of the record, made its determination as to the facts, although erroneously, this court cannot, in mandamus proceedings, go behind this determination, and itself consider from the evidence, whether or not the jurisdiction existed.

There were no facts stated in the pleadings in the original cause that justified a transfer of the case from the law court to equity. The original suit was simply a suit on contract, and everything pleaded by the defendant as a defense could properly be tried in a law court. The intervention of Baylor House, receiver, stated no facts that justified a transfer to the chancery court; but, even if it did, if the issues raised by the intervener were purely equitable, the intervener would have no right to say in what court it should be tried; he could intervene and try his case in court where the original suit was pending, or, if he wanted to go to equity, he could bring an independent suit. But in this case the issues raised by the intervener could have been properly tried by a law court. In addition to this, before the chancery court ever met and assumed jurisdiction, the intervener and his pleadings passed out of the case, and there was therefore nothing left but the original suit. It is true that J. G. Barr intervened as a minority stockholder, but he had no right to intervene and ask for a transfer of the cause; as a matter of fact, the corporation was representing him and all other stockholders. If the chancery court, in refusing to exercise jurisdiction, had thereby deprived the petitioners of a right to try their cause, this court would issue a writ of mandamus compelling it to try it.

In the case of *Automatic Weighing Co.* v. *Carter*, 95 Ark. 118, 128 S. W. 557, this court said: "We do not deem it necessary to set forth the allegations of said answer and cross-complaint, or to determine whether or not any equitable defense is therein set forth, or whether or not the circuit court erred in transferring the case to the chancery court, or whether or not in the present status of the case such order of the circuit court was an exercise of judicial discretion which should not be controlled by mandamus; because the petitioner has not shown that he has no other adequate remedy, and that he cannot secure such remedy by following said case to the chancery court to which it has been transferred. The writ of mandamus is only employed in unusual cases, and where no other remedy is available."

The court, in the same case, also said: "It is believed to be well settled that the writ of mandamus is not to be considered as a writ of right, but it is understood to be within the discretion of the court to grant it, and it is held to be a general rule that the party applying for this writ must show a specific legal right, and the absence of any specific remedy to induce the court to grant it."

Either the chancery court or the circuit court may, within its judicial discretion, determine whether it has jurisdiction, and this judicial discretion will not be controlled by mandamus. Of course, if neither the chancery court nor the circuit court would assume jurisdiction, then the writ will be issued to compel either the chancery court or the circuit court to assume jurisdiction, but where either court, in the exercise of judicial discretion, transfers a case to the other court, the exercise of such judicial discretion will not be controlled by mandamus.

The petitioners in this case have a complete and adequate remedy, and the writ will therefore be denied. It is so ordered.

SHIMEK *v.* JANESKO.

4-3315

Opinion delivered December 11, 1933.

[redacted]

J. F. Holtzendorff and *John D. Thweatt,* for appellant.

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

MEHAFFY, J. An election was held on May 20, 1933, for the purpose of electing three school directors for School District No. 55, Prairie County, Arkansas, a rural school district, which was required to elect three school directors. The returns of said election were filed with the county clerk of Prairie County on May 23, 1933, which returns included the oath of office of judges and clerks, poll book, ballots and certificate of election.

On June 20, the county court met and canvassed the returns, and, by its order declared and certified that Steve Shimek, Harry Seidenschwarz and Paul Lorinc received the highest number of votes, respectively, for the offices of directors for the three, two and one-year terms, and declaring Steve Shimek elected for the three-year term, Harry Seidenschwarz for the two-year term, and Paul Lorinc for the one-year term.

The appellees, J. F. Janesko and Joe Bednar, each received votes for the office of director, and were present at the canvass of the returns, and appealed from the order of the county court to the circuit court.

When the cause was called in the circuit court, a motion was filed to dismiss the cause. The ground stated

in the motion to dismiss was that the county court had no jurisdiction to declare the results of the election. The circuit court rendered its judgment, sustaining appellees' motion, and ordered the cause dismissed for want of jurisdiction in the county court. From this order, an appeal is prosecuted.

Appellant first contends that the county court had jurisdiction to canvass the vote and certify the results.

Act 169 of the Acts of 1931, in § 30, provides that the returns of annual school elections shall be made to the county superintendent of schools immediately after the election, and that the county superintendent shall call a meeting of the county board of education within 15 days after the election, and that said board of education shall canvass the returns and make proper record of the vote, and certify the results to the county clerk for permanent record in his office. The same section also provides that any contest of any results in any election in any school district shall be brought within 15 days after such election, if the results thereof shall have been certified to the county clerk five days previously, or within 5 days after such results have been certified, and not thereafter. The section further provides that the county board of education shall hear and decide all contests, make their findings thereon, and that such findings shall be conclusive subject to appeal to the circuit court within 10 days.

It will be observed that the appeal is from the findings and order where there is a contest, and no appeal is allowed otherwise. Therefore, under act 169, the board of education canvassed the vote and declared the result. If any person who had been voted for for director desired to contest the election, he might do so within 15 days after such election, or within 5 days after such result had been certified. If the result was not certified until 15 days had expired, the contestant would have 5 days thereafter in which to contest the result.

Act 247 of the Acts of 1933 abolished county boards of education, and transferred the powers and duties of said boards to the county courts. Therefore the county court had the same power and the same duty, with refer-

ence to canvassing the vote and declaring the results, as the county board of education had prior to the passage of act 247 of 1933. Prior to the passage of that act, the returns were made to the county superintendent, but the county board of education canvassed the vote and certified the result. Under act 247 of 1933, it became the duty of the county court to canvass the returns and declare the result.

This action on the part of the county court was conclusive, unless, within the time allowed by law, a contest was filed. The court, in canvassing the vote and declaring the results, was not acting in a judicial capacity, but in the same capacity that the board of education formerly acted, and the findings of the county court are as conclusive as the findings of the board of education under the former law. No appeal could be taken from this order, but any person who had been voted for for school director might file a contest, and it was the duty of the court to hear the contest, make its findings, and render its decision, and from this order an appeal could be prosecuted to circuit court.

In the instant case, the county court, as a canvassing board, found that Steve Shimek, Harry Seidenschwarz and Paul Lorinc received the highest number of votes, and were elected; Shimek for three years, Seidenschwarz for two years, and Lorinc for one year.

This finding and declaration of result could only be changed by contesting the election, and, as no contest was filed within the time allowed by law, the parties above named are directors of said district, and the judgment is reversed, and the cause dismissed.

CITY NATIONAL BANK *v.* RIGGS.

4-3315

Opinion delivered December 11, 1933.

[redacted]

James B. McDonough and *Joseph R. Brown,* for appellant.

Watts & Wall, Daily & Woods, G. L. Grant, and *Hill, Brizzolara & Fitzhugh,* for appellee.

McHaney, J. On July 29, 1927, C. B. Johnson and appellee, Jessie Johnson, his wife, executed and delivered to appellant, City National Bank, agent, hereinafter called the bank, twenty-five $1,000 notes, due and payable three years after date, and, to secure same, the Johnsons also executed and delivered their mortgage to the bank (which was duly recorded) covering four separate pieces of real property in the city of Fort Smith, one piece being a garage building on North Eighth Street, described as lot 9, block 30, city. The bank, from August 1st to the 6th, 1927, sold said notes to the appellees as follows: To J. A. and P. L. Riggs, $7,000; to E. N. King, $2,000; to Mrs. D. B. Taylor, $8,000; and to appellant, Mrs. Jessie A. Bracht, $8,000. No assignment of said notes nor of the lien of said mortgage was made of record, but the notes were indorsed to the purchasers without recourse. The mortgage, after describing the above-mentioned notes, contained this clause: "It is further agreed that this mortgage is made to secure any and all other indebtedness that may be due and owing to the mortgagee by the mortgagors."

On August 16, 1928, the mortgagor, Johnson, sold the North Eighth Street garage property for $12,300, and the bank released on the margin of the record the property from the lien of the mortgage without the knowledge or consent of any of the note-holders. The $12,300 was deposited in the bank to Johnson's credit, and he shortly thereafter, or at the same time, paid to the bank for one of the note-holders (Mrs. Bracht) $4,000, and to it on a debt due by Johnson subsequently incurred and due it on separate note the sum of $7,500, leaving a balance to his own credit from this source of $800 less a small amount of interest paid on the Bracht notes.

When the remainder of the notes fell due in July, 1930, Johnson was unable to pay them, and sought a renewal. The bank negotiated with the note-holders to this end, and some, or at least one, of whom demanded

additional security on account of the depressed condition of property values, not knowing that a portion of the security had been released by the bank. Johnson had no additional property to include in the new mortgage, but his wife was induced to include her homestead therein. The new mortgage was executed by Mr. and Mrs. Johnson, not for $21,000, the balance due on the old mortgage, but for $25,000, which included an additional $4,000 debt Johnson owed the bank, and the notes for which were sold to other investors.

Default having been made in the payment of interest and taxes in 1932, this action was instituted to foreclose under an acceleration clause in the mortgage by appellees, J. A. and P. L. Riggs, who made the mortgagors, the bank and the other note-holders, defendants therein. Judgment was prayed against the Johnsons, and a receiver was asked. Appellee, Mary Parke Taylor, a resident of St. Louis, filed answer and cross-complaint. She admitted the allegations of the complaint, and, in her cross-complaint, set up her ownership of $8,000 of the notes, for which she prayed judgment. She also charged the bank with having wrongfully and unlawfully satisfied the original mortgage as to the garage, as above set out, and with having wrongfully diverted the proceeds of the sale to itself and others, and prayed judgment against it for 8/25ths of the purchase price of said lot. Thereupon, the Riggs amended their complaint, and prayed judgment against the bank for 7/25ths of the $12,300, making similar allegations to those of Mrs. Taylor. C. B. Johnson and Jessie M. Johnson filed an answer and cross-complaint. The answer was a general denial, but the cross-complaint charged that Mrs. Johnson was induced to permit the inclusion of her homestead in the new mortgage of 1930 through the representations of the bank's president, I. H. Nakdimen, that it was merely a matter of form, and that he and the bank "would personally save them harmless by reason of the inclusion of the homestead, and would personally guarantee the payment of the new note issue without resort to said homestead." The prayer was for judgment against the bank and Nak-

dimen in the event they lost their homestead. Appellants made answer denying the wrongful diversion of the $12,-300 and the cross-complaint of the Johnsons. They also filed numerous demurrers and motions, all of which were overruled.

Trial resulted in a decree in favor of appellees. Mrs. Taylor was awarded judgment for 8/25ths of said $12,-300, and the Riggs 7/25ths, against the bank, for an unlawful and unauthorized diversion. The court found that the inclusion of the homestead of Mrs. Johnson in the new mortgage of 1930 was accomplished by the false and fraudulent representations made to her by the bank and its president, for which they are personally liable to her for whatever loss she may sustain by reason thereof, but that, as to the Riggs and Mrs. Taylor, their rights to resort to said homestead for the collection of their notes are not affected by the transaction between Mrs. Johnson and the bank. As to Mrs. Bracht, the court found that she had been paid the sum of $76.67 in excess of her proportionate share of the sale price of the garage property, and that, as to such excess, her claim in foreclosure proceedings shall be subordinated to that of Riggs and Taylor; that E. N. King had sold his notes to the bank, and that the equities of Riggs and Taylor in the foreclosure were superior to that of the bank. The bank, Nakdimen and Mrs. Bracht have appealed.

Many errors are assigned in an extensive brief for a reversal of the judgment. We cannot argue them all in detail. It is first contended that the court erred in permitting the Riggs and Mrs. Taylor to change their action from one of contract to one of tort. We think not. Primarily the action was one to foreclose a mortgage. It continued to be such, and was one cognizable in a court of equity. When Mrs. Taylor filed her cross-complaint against the bank for the wrongful satisfaction of the mortgage as to the garage property and the wrongful diversion of the sale price thereof, the action was not converted into one on tort wholly, as she still sought the foreclosure of the mortgage, even though other relief was asked. The general rule is that, when a court of equity acquires jurisdiction for one purpose, it will re-

tain it for all purposes, and will grant all the relief, both legal and equitable, to which the parties may be entitled. *Merchants' & Farmers' Bank* v. *Harris,* 113 Ark. 100, 167 S. W. 706; *Taylor* v. *Harris,* 186 Ark. 580, 54 S. W. (2d) 701.

It is next said the unlawful diversion of the $12,300 was not done by the bank or Nakdimen, but by C. B. Johnson. But Johnson could not have sold lot 9, block 30, and could not have unlawfully diverted the money, but for the act of the bank in satisfying the mortgage as to said lot. Assuming, for the sake of argument, that Johnson did it, still the bank wrongfully put it in his power to do it by satisfying the record of the mortgage. It is true the bank assigned the notes without recourse, and it should have noted the assignment on the margin of the record of the mortgage, it being the only one that could have legally done so. The note-holders could not do so, and the mortgagor could not. The note-holders could have required it to do so. The record showed the bank, agent, to be the owner of the notes. If the assignment had been made of record, then the bank could not have released the mortgage legally. The necessary result is that the satisfaction of the mortgage and the misapplication of the proceeds of the sale to its own uses and purposes worked a legal fraud on the rights of the note-holders, whether intended to be such or not. Nor does it help the matter for the bank that the notes and mortgage were renewed. The undisputed proof is that neither the Riggs nor Mrs. Taylor had any actual knowledge of the transaction until long after the renewal in 1932. Constructive notice, the record of the satisfaction, was not sufficient, as "the general rule is," as stated in *Bank of Hoxie* v. *Woollen,* 181 Ark. 843, 28 S. W. (2d) 61, "that, in order that a ratification of an unauthorized transaction of an agent may be valid and binding, it is essential that the principal have full knowledge of all the material facts." *Ark. Valley Bank* v. *Kelley,* 176 Ark. 387, 3 S. W. (2d) 53; *Haines* v. *Rumph,* 147 Ark. 425, 228 S. W. 46; *DeCamp* v. *Graupner,* 157 Ark. 578, 249 S. W. 6; *Martin* v. *Hickman,* 64 Ark. 217, 41 S. W. 852—all cited in *Bank of Hoxie* v. *Woollen, supra.* Moreover, the bank was the

agent of these note-holders, assumed to act as such by collecting the interest and by negotiating a renewal, in addition to designating itself agent in the mortgage, and it was under the legal duty to act for its principals in the utmost good faith and not for its own benefit. If the proposed sale of lot 9, block 30, had been communicated to the note-holders, and they had consented to the satisfaction, or if the proceeds of the sale had been applied *pro rata* to the satisfaction of all the notes, then there would be a wholly different situation, and there would be some force to the argument of ratification and estoppel. We cannot agree that a mortgagee, who has sold the notes secured by the mortgage without making an assignment thereof of record, may satisfy the record of the mortgage without the knowledge or consent of the assignees without making himself personally liable for the loss sustained. Neither does the general "other indebtedness" clause above quoted authorize the bank to satisfy the record and appropriate the proceeds to the payment of another debt due it by Johnson. *Berger* v. *Fuller,* 180 Ark. 372, 21 S. W. (2d) 419; *American Bank & Trust Co.* v. *First Nat. Bank,* 184 Ark. 689, 43 S. W. (2d) 248; *State Nat. Bank* v. *Temple Oil Co.,* 185 Ark. 1011, 50 S. W. (2d) 980.

The next assignment for discussion relates to the rights of Mrs. Jessie M. Johnson, whose homestead was included in the second or renewal mortgage. A number of grounds are argued under this heading—some of them being that the evidence is insufficient to support the decree; that the certificate of acknowledgment contradicts Mrs. Johnson; that Nakdimen was without power to make the agreement regarding the homestead; that she is estopped from so claiming; that her testimony contradicts a written instrument in violation of the parol evidence rule; and that she and her husband ratified the mortgage. We think the evidence is sufficient to support the decree, even under the clear and convincing rule. Mrs. Johnson and her son testified very positively that it was agreed between her and the bank that the inclusion of the homestead was a mere formality, and that she would be protected from foreclosure on it. This was

denied by the bank's president. When we consider what the bank did in releasing the mortgage, and in taking the renewal mortgage without advising the note-holders of the true facts, and by misrepresenting to them it had required a lot of additional security when, in fact, it had not required any additional security, but had substituted a lot of substantially less value for the lot wrongfully released, we cannot say the evidence is not sufficient to support the court's finding. On the contrary, we agree with the trial court. It is argued that the bank loaned Johnson $4,000 in new money when the renewal mortgage was taken. What the bank really did was to take up $4,000 of Johnson's unsecured debt to it. We think the evidence sufficient to show that an actionable fraud was perpetrated upon Mrs. Johnson, and that the agreement to protect the homestead does not fall within the statute of frauds, nor is it violative of the parol evidence rule. In *Pierce* v. *Sicard,* 176 Ark. 511, 3 S. W. (2d) 337, this court said: "It is conceded that the general rule in nearly all the States is that fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on promises or statements as to what will be done in the future." It then cites *Lilly* v. *Barron,* 144 Ark. 422, 222 S. W. 712, for the exception to the general rule that, "if the promise is accompanied with an intention not to perform it, and is made for the purpose of deceiving the person to whom it was made, and induces him to act in the premises, the same constitute fraud." Under the evidence in this case the court was justified in finding fraud in this connection. It is also the general rule that the statute of frauds does not apply if a new consideration passes between the promiser and the promisee. Here there is no controversy between Mrs. Johnson and the note-holders. She concedes they are protected by her homestead if the remaining property is insufficient to satisfy the debt. The trial court found that the additional security was sought by the bank and Nakdimen for their benefit, and that it was included for their benefit. In such case the statute of frauds does not apply. *Gale* v. *Harp,* 64 Ark. 462, 43 S. W. 144; *Spear Mining Co.* v. *Shinn,* 93 Ark. 346, 124 S. W. 1045; *United Walnut*

Co. v. *Courtney,* 96 Ark. 46, 130 S. W. 566. Nor is the parol evidence rule violated. This court has many times held that parol testimony is admissible to show what the real contract is where the writing does not evidence the entire contract. *Kelly* v. *Carter,* 55 Ark. 112, 17 S. W. 706; *Graham* v. *Remmel,* 76 Ark. 140, 88 S. W. 899; *New Home Sewing Machine Co.* v. *Westmoreland,* 173 Ark. 769, 293 S. W. 1030.

We think it unnecessary to further discuss the arguments made by counsel for appellants, all of which we have examined and find them without substantial merit. The decree is correct, and must be affirmed. It is so ordered.

ORR *v.* GRIFFITH.

4-3240

Opinion delivered December 11, 1933.

W. G. Dinning, for appellant.

A. M. Coates and *Brewer & Cracraft,* for appellee.

McHaney, J. Appellant is the administrator, with the will annexed, of the estate of James Howard, who died in Phillips County, July 22, 1930. He brought this suit in the Phillips Chancery Court against all the devisees and legatees named in will to obtain a construction thereof by the chancery court. The will, omitting formal parts, is as follows:

"1st. It is my desire that my funeral expenses and all of my just debts be fully paid and discharged and given preference in the settlement of my estate.

"2nd. It is my desire to be buried on the Shelton lot in Maplelawn Cemetery, located in Paducah, Kentucky.

"3rd. I will and bequeath the sum of three hundred dollars to the following friends, to be divided as follows: One hundred dollars to the infant son, James Howard Griffith, of Mr. and Mrs. John Griffith, of Helena, Arkansas; fifty dollars each to the two infant children of Mr. and Mrs. J. J. Billingsley, of Helena, Arkansas; one hundred dollars to Joe Willie Smith (col.), of Helena, Arkansas.

"4th. Of my personal effects, I will and bequeath my watch to Mr. Jas. E. Shelton, of Paducah, Ky., and my ring to Mr. Slavie Mall, of Paducah, Ky.

"5th. I will and bequeath a $2,500 life insurance policy, said policy being payable to my estate, to Mrs. Kathren Shelton Ward, daughter of Mrs. Birtie E. Shelton, of Evansville, Ind., said bequest being made solely for the benefit of Mrs. Birtie E. Shelton, and to be paid to her daughter, Mrs. Ward, as custodian, to be used by her as she sees fit.

"6th. Of the balance of my personal property, consisting of Gulf Oil Corporation certificates of stock; U. S. Government bonds; banking account in the Interestate Bank, and the Merchants' & Planters' Bank, both of Helena, Arkansas; a sick and accident policy in the sum of $5,000, Business Men's Assurance Company of America, of Kansas City; and all other real or personal property of which I may die seized, I will and bequeath to the following relatives, to be divided equally, share and share alike, said relatives being the children of Mr. and Mrs.

Joe Shelton, of Evansville, Ind., and the children of Mrs. Mollie Shelton (widow), of Paducah, Ky."

The particular construction of this will desired was of the 3d, 5th and 6th paragraphs, the administrator being in doubt as to whether the bequests made in these paragraphs are specific, demonstrative, or general bequests.

The court construed the will as follows: That the bequests made in section 3 were general bequests and that the amount specified to be paid to the devisees therein named were to be paid out of the general assets after the payment of costs of the administration and prior claims against said estate made so by said will or by law; that section 5 of the will is a specific bequest, and that the devisee named therein is entitled to receive the full amount of the proceeds of the insurance policy without being required to contribute *pro rata* with the devisees named in section 3; and that the bequests contained in the 6th paragraph of the will are residuary and should be paid out of the remainder of the general assets of said estate after payment of the costs of administration, the claims of said estate made prior by the will or by law and the payment of the legacies named in the 3d paragraph of said will. The administrator has appealed.

Assuming, without deciding, that the administrator may prosecute this appeal when the legatees themselves are not complaining, we are of the opinion that the court correctly construed the will. It is conceded by appellant that the construction as to the 5th paragraph of the will is correct, that the bequest there made is a specific one, but it is contended that the construction as to paragraph 6 is incorrect, and that the bequests there made are likewise specific; and that the legatees mentioned in both paragraphs 5 and 6 should be required to bear *pro rata* the cost of administration, and to pay *pro rata* the claims probated against the estate, in accordance with the rule announced in *Holcomb* v. *Mullin,* 167 Ark. 622, 268 S. W. 32. It will be noticed that the 6th paragraph of the will starts out by saying "of the balance of my personal property, consisting," enumerating certain stocks, bonds, deposits and insurance. It then continues, "and all other

real or personal property of which I may die seized," etc. This is undoubtedly a residuary clause. The residue of an estate is that which remains after the payment of all costs, debts and particular legacies. 28 R. C. L., p. 296. In 28 R. C. L., p. 297, it is said: "The general rule is that an enumeration of specific articles in a residuary clause will not make the bequest specific as to such articles, unless they are designated in such a way as to differentiate them from the residue."

So the fact that the testator in section 6 of his will named the kind of personal property he was bequeathing does not change the clause from a residuary to a specific bequest.

The court having correctly construed the will, its judgment must be affirmed.

PHILLIPS PETROLEUM COMPANY *v.* BERRY.

4-3229

Opinion delivered December 11, 1933.

R. H. Hudson, Cecil Hunt and *Basil Baker,* for appellant.

J. C. Young, Jr., and *Gladish & Young,* for appellee.

BUTLER, J. Mrs. Lila Berry, the appellee, was the owner of a frame dwelling house with a garage and barn adjoining, located on lot No. 38 in Lake City. The appellant Phillips Petroleum Company occupied a part of lot No. 38, adjacent to Mrs. Berry's property as a "bulk sales station" for the storing and distribution of petroleum oil products. On that part of the lot owned by the appellant was a frame building, part of which was used for storing motor oil and other lubricants and a part was used for the purpose of driving trucks into it and loading them with gasoline and coal oil from tanks situated nearby. In an open space adjacent to the warehouse there were three tanks, two used for gasoline and one for kerosene. The two gasoline tanks stood nearest to the building and the kerosene tank some further distance away. On the 29th of October, 1932, there

was placed upon a railroad side track which ran near the building a tank car of kerosene which was unloaded by means of a pump with a line of pipe extending from the tank car to the kerosene tank. This tank car was unloaded, and when this was done there were about 8,000 gallons of kerosene in the kerosene tank. After this operation, another tank car containing gasoline was placed on the side track in the position for unloading, and, while appellant's agent was emptying it into one of the gasoline tanks a fire was discovered in that part of the warehouse used for the purpose of permitting trucks to enter and from there to be loaded.

Clyde Sanders was the appellant's agent engaged in unloading the tank cars, and when the fire was discovered he went to its point of origin but found that it had made such headway and increased to such an extent he was unable to enter. He returned immediately to the tank car and cut off the flow of gasoline therefrom, and attempted to close the valve which entered the gasoline tank, but was unable to completely close it before he was driven away by the flames which had by that time spread into that part of the building where the lubricants were stored and which began to burn fiercely. The flames from the burning warehouse extended to the tank car and enveloped the storage tanks, melting the connection and allowing the gasoline and kerosene to flow out and causing the fire to burn with increasing fierceness. One of the gasoline tanks was empty at that time, but the other contained about 6,000 gallons of gasoline. During the progress of the fire the tank containing the kerosene exploded so that its contents were thrown out into the fire which spread to, and destroyed, the buildings of Mrs. Berry.

Mrs. Berry brought this suit to recover damages, alleging that the fire was occasioned by the negligence of the appellant in the maintenance and operation of its plant, in that it permitted inflammable substances to remain on and around the premises, and permitted the interior of the warehouse to become saturated with oil and gasoline, and to remain in that condition; that appellant was negligent in failing to safeguard its prem-

ises; that the storage tanks were provided with valves so constructed as to release gas accumulated therein; and that these valves failed to function by reason of their defective condition which resulted in the explosion of the kerosene tank. It was further alleged that the doors of the warehouse were permitted to remain open and unguarded, and that on account of this a mentally defective boy gained entrance to the warehouse where conditions were such that a fire might easily be started, and it was appellee's belief that the fire originated from a lighted match handled by the said defective boy, or from some other act of his unknown. Appellee alleged that the fire resulted in the loss of her dwelling house and personal property in the sum of $4,116.30, for which she prayed damages.

An answer was filed, admitting the fire and the destruction of appellee's property, but denying that the same was occasioned by any negligence on the part of the appellant and denying specifically all the allegations of the complaint charging negligence.

There was a trial which resulted in a verdict in favor of the appellee in the sum of $1,250.

Numerous grounds of error are assigned on appeal, the principal one of which is that no negligence was proved and that the court erred in giving to the jury instruction No. 1, for the appellee, which is (quoting from appellant's brief): "To the effect that if the defendants had large storage tanks, which contained large quantities of gasoline and kerosene, and had a warehouse near to the storage tanks, and if they negligently permitted their premises to be in an inflammable condition and they negligently failed to fence the property or provide guard or safeguard for the same, or that they negligently permitted the safety valves on the kerosene tank to become defective and in an unsafe condition, and if the jury found that such negligence on the part of the defendant, if any, was the approximate cause of the injury to plaintiff's property, then the verdict should be for the plaintiff; otherwise for the defendants."

Complaint is also made of the court's refusal to grant a number of instructions requested by the ap-

pellant, which, for the sake of brevity, will be grouped and disposed of under one head. It is also the contention of the appellant that the court erred in permitting Mrs. Berry to testify to the destruction of her household goods, that element of damage not having been alleged in her complaint, and that evidence was erroneously admitted over appellant's objection to the effect that there was no fire department maintained in Lake City. It is also contended that, since the evidence shows that Mrs. Berry sold the premises occupied by the appellant with knowledge that it was to be used for storing petroleum products and for their distribution therefrom and that she assumed the risks incident to such operation, one of which was the danger from fire breaking out therein.

The evidence regarding the nature of the construction of the warehouse, the erection of the storage tanks, and how the business of the appellant was conducted, is practically undisputed. It was shown that at all times large quantities of highly inflammable substances were kept in storage, and that in the necessary conduct of the business small quantities of gasoline and other oils would fall upon the ground within the warehouse and were suffered to remain there; that the agent of appellant and his helpers took care of the plant and were engaged in conveying gasoline and other petroleum products to various retailers, leaving the property unprotected in their absence, but that when they did leave, the doors of the warehouse would be closed. It was shown that there was no fence erected, or other means taken, to keep intruders from the premises and that at the time of the fire in question the double doors on the east side of the building were open, and that the defective boy had been discovered there some time before the fire and had been driven away.

There is some evidence to the effect that at times children would play upon the premises, and that the premises were not kept free from trash and weeds. It was also proved that at the time of, and just preceding, the discovery of the fire the double doors on the west side were closed but those on the east were open and un-

guarded. When Mr. Sanders discovered the fire it was necessary for him to pass around the building to the east side in order to enter, and when he reached the east doors he saw the defective boy standing there, and he told Mr. Sanders that it was he who had started the fire. It is evident that when Sanders found that a fire had started he did everything possible to prevent its spread and to save the property, and whatever negligence there was had occurred before this time. It may be admitted, as claimed by the appellant, that it was engaged in a lawful business, although the proof shows, and we take judicial knowledge of the fact, that it was one attended by more than ordinary dangers. The plant was used for the storing of petroleum products, all of which are highly inflammable, and it is well known that gasoline and kerosene are not only inflammable, but explosive, and, while we have held in the case of *Waters-Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342, that those engaged in the business of the appellant are clothed only with the duty of exercising ordinary care in its conduct, such care must be measured by the nature of the substances handled and the danger, according to the common experience of men, which might ordinarily result, so that, where a substance is inherently dangerous, ordinary care would be a much higher degree of care than if it were in its nature innocuous. It was therefore a question for the jury to determine whether, considering the nature of the business in which appellant was engaged and the place at which it was located, the appellant was negligent in failing to fence the premises or to take some other precaution to prevent the entrance of those who by some careless act might cause a fire to be started. *Waters-Pierce Oil Co.* v. *Knisel, supra; Gibson Oil Co.* v. *Sherry,* 172 Ark. 947, 291 S. W. 66; *Wright* v. *Chicago, etc.,* 27 Ill. App. 200; *Judson* v. *Giant Power Co.,* 107 Cal. 547, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. 146; *Beal* v. *Seattle,* 28 Wash. 593, 69 Pac. 12, 92 Am. St. 892, 61 L. R. A. 583; *Sedita* v. *Steinberg,* 105 Conn. 1, 134 Atl. 243, 49 A. L. R. 154; *Stone* v. *Texas Co.,* 180 N. C. 546, 105 S. E. 425, 12 A. L. R. 1304, 11 R. C. L. 660; *Quaker*

Oats Co. v. *Grice,* 195 Fed. 441; *Van Fleet* v. *N. Y. & C. & H. R. R. Co.,* 77 N. Y. Supp. 636.

It was argued that the evidence shows that the kerosene tank was in perfect condition, and that therefore its explosion could not have been caused by any negligence on the part of the appellant, and that the submission to the jury of the question as to whether the appellant was guilty of negligence in the setting up and maintenance of this tank was error. On this phase of the case the evidence before us tending to support appellant's contention is that of the agent, Sanders. He did not testify of any inspection he had made just prior to the fire or at any other time, but contented himself with the statement that the valves at the top of the kerosene tank were in good condition; that they were the same kind of equipment as used on all storage tanks and so constructed that they could not help but properly function. The valve about which he was testifying was located at the top of the storage tank, and was intended to work automatically so that when gas formed in the reservoir it would push the valve upward according to the degree of pressure and where the pressure was sufficient it would give as much as a space two inches in width. According to the witness this valve worked on the same principle as a safety valve on a steam boiler. The gasoline tank was equipped with the same kind of valve, and also the tank car, and neither of these exploded, although the gasoline tank contained a great quantity of gasoline as did the tank car on the railroad track, both of which were nearer the fire than the kerosene tank, and it was observed that on this car the vaporized gasoline burned for several hours at the safety valve. The appellant gave no explanation why the kerosene tank exploded and that containing gasoline did not. An explosion did occur, the real cause being unexplained, and inference is allowable that it was caused by lack of proper care. *Judson* v. *Giant Power Co., supra; Biddle* v. *Riley,* 118 Ark. 218, 176 S. W. 134, L. R. A. 1915F, 902.

On the question of the instructions refused, some were grounded on the contention that the negligence of

appellant in maintaining the plant, if any, was not the proximate cause of the destruction of appellee's residence, and that the act of the intruder, whoever it was, who set the fire was the efficient intervening cause of the resulting damage. These instructions were properly refused, for the act of the child in starting the fire was a contributing cause, and had a direct causal connection with the original negligence. Where several causes combine to produce an injury, one is not relieved from liability because he is responsible for only one of these causes. It is sufficient to fix liability on him if, without his negligent act, the injury would not have occurred. *Ark. L., etc., Co.* v. *Cook,* 157 Ark. 245, 247 S. W. 1071; *St. Louis, I. M. & S. R. Co.* v. *Steel,* 129 Ark. 520, 197 S. W. 228; *McDonald* v. *Snelling,* 92 Am. Dec. 768. We think the jury might well have found that the condition in which appellant kept and maintained its property was one from which a person of ordinary experience and intelligence might have foreseen that the result complained of might ensue, and that therefore such was the proximate cause of the destruction of appellee's property, and that there was no intervening efficient cause, but one which contributed only to the result. *Wis. & Ark. Lbr. Co.* v. *Scott,* 153 Ark. 65, 239 S. W. 391; *St. Louis-S. F. R. Co.* v. *Williams,* 98 Ark. 72, 135 S. W. 804; *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647.

Other of the instructions requested and refused told the jury as a matter of law that it was not the duty of the appellant to anticipate the presence of trespassers on its premises, and that there was no negligence in permitting the doors to remain open while the plant was in operation or while the manager or other employees were present or in failing to keep a guard to protect the property, and that as a matter of law children might not reasonably be expected to trespass on the property. These instructions were properly refused because all of them presented questions for the jury to be determined from the evidence in the case.

Instruction No. 5, requested by the appellant, presented no issue in the case and was properly refused. It

dealt with the question of the location of the plant, and by it the jury were told that it could not find against the defendant because the sales plant was located in Lake City. The question for the determination of the jury was not where the plant was located as fixing liability of the appellant, and certainly had no place among the instructions given.

Appellant complains of the modification by the court of instruction No. 4 requested by it. The instruction as requested is as follows: "Even if you believe that there may have been some unknown or undiscovered fault or defect causing the explosion of the tank, not discoverable in the exercise of ordinary care, then there could be no recovery by the plaintiff by reason thereof." The court modified this instruction by adding the words, "and the burden is on the defendants to show by a preponderance of the evidence that they exercised ordinary care to discover such fault or defect, if you find there was such fault or defect." The court had previously given an instruction placing upon the appellee the burden in the whole case to show by preponderance of the evidence that the defendants were negligent in some of the particulars mentioned in the complaint, and that such negligence, if any, was the proximate cause of the injury complained of, and, unless such burden was met by the plaintiff, the verdict of the jury should be for the defendant. What we have said regarding instruction No. 1, and the inference arising from the fact of the explosion, disposes of appellants' contention as to the modification made by the court, and since the jury were instructed that the burden on the whole case rested upon the appellee, there was no error in the modification.

On the question as to the admission of Mrs. Berry's testimony regarding the value of her personal property destroyed, we are of the opinion that the appellant is in error in assuming that there was no allegation upon which to ground this evidence. In paragraph No. 12 of the complaint, there is the following allegation: "That, as a result of the loss of the dwelling house, furniture, personal property, etc., * * *; that the plaintiff was the

owner of certain household goods and personal property of the total value of $562, etc.''

The testimony also as to the fact that there was no fire-fighting department in Lake City was admissible, as a circumstance tending to show whether or not appellant was negligent in the way it maintained and operated its plant.

It is true, as contended by the appellant, that the evidence establishes the fact that appellee sold the parcel of ground on which the appellant's plant is located to its predecessors in title about twelve years before the destruction of her property, and that she knew that it was to be used in connection with the operation of a business for the dispensing of petroleum products, but it does not appear that she knew the extent of these operations or the manner in which they were to be conducted. Even if the appellee knew all this at the time she first sold the property, it by no means follows that the maxim *''volenti non fit injuria''* applies. It must be conclusively presumed that in making the sale to the predecessors in title of appellant, Mrs. Berry had the right to assume that proper care would be exercised in the conduct of the business, and she undoubtedly had a right to demand that such care be exercised.

We are of the opinion on the whole case that there was some substantial evidence to warrant the verdict of the jury, and, as no error appears in the conduct of the trial, the judgment of the trial court is correct, and it is therefore affirmed.

WASSON *v.* LIGHTLE.

4-3239

Opinion delivered December 18, 1933.

Brundidge & Neelly, W. H. Gregory and *Frauenthal & Johnson,* for appellant.

John E. Miller, C. E. Yingling and *Roland H. Lindsey*, for appellees.

JOHNSON, C. J., (after stating the facts). The foregoing statement of facts demonstrates that all the conveyances here in controversy were made solely for the purpose of putting the property of J. E. Lightle and wife, Margaret Lightle, beyond the reach of Arkansas creditors. It is granted, of course, that J. E. Lightle and wife had the right, under the law, to prefer their kinfolks as creditors, but, before such conveyances are finally sustained, it must be shown that they were supported by valuable considerations. We are not unmindful of the

established rule that fraud is never presumed—neither are we unmindful that the burden is upon the party who alleges fraud to prove it. These rules are so permanently and definitely planted in our jurisprudence it is not necessary to refer to cases in support thereof.

Sections 4874 and 4878, Crawford & Moses' Digest, provide:

"Section 4874. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void.

"Section 4878. No conveyance required by the provisions of this act to be recorded shall be valid or binding, except between the parties and their legal representatives, until the same shall have been deposited in the recorder's office for record; nor even then if shown to be made with intent to defraud prior creditors or purchasers, but shall be void against such prior creditors or purchasers."

With these cardinal rules in mind, we have here the following outstanding facts: That prior to June 10, 1930, J. E. Lightle held himself out, and was considered a very rich man in the vicinity of Searcy; he owned and possessed very valuable properties, both real estate and personal property. On June 10, 1930, he executed a deed to his father-in-law, J. W. McKinney, conveying valuable real properties in White County; this conveyance was purposely held off the record for several months. J. W. McKinney was not advised of its execution for several months thereafter. After the execution of this deed others were executed that practically denuded J. E. Lightle and wife of all real property situated in the State of Arkansas. After these properties passed to the kinsfolk of the

Lightles, they were tossed about by the grantee similar to a cat playing with a mouse. During all this period of time, J. E. Lightle and wife remained in possession and control of this property as if their own. This court has repeatedly held that, where a deed is executed but the vendor remains in possession, it is within itself a badge of fraud. *Godfrey* v. *Herring,* 74 Ark. 186, 85 S. W. 232; *Dennie* v. *Ball-Warren Commission Co.,* 72 Ark. 58, 77 S. W. 903; *Little Rock & F. S. R. Co.* v. *Page,* 35 Ark. 304; *Puckett* v. *Reed,* 31 Ark. 136.

It has long been the settled doctrine of this court that a conveyance from an insolvent debtor to his near relatives, while not sufficient of itself to establish fraud, yet, when added to other suspicious circumstances, may be sufficient evidence of fraud to justify the court in setting aside such conveyance. *Melton* v. *State, etc.,* 177 Ark. 1194, 10 S. W. (2d) 500.

In addition to what we have just said, the learned chancellor found from the testimony in this case that all the deeds passed and exchanged between the appellees were executed to secure debts and were intended for security, and not to irrevocably pass the fee simple title to these lands. This was an affirmative finding that the deeds were not what they purported to be.

The manipulations of the appellees in the transferring and retransferring of the title to the lands contained in the conveyances here in controversy, a number of which were without consideration, were potent circumstances indicating that appellees were endeavoring to place their property beyond the reach of creditors. We are convinced from all the facts and circumstances appearing in this record that appellants made out a *prima facie* case of fraud against appellees, and that the onus of proof then shifted to appellees, to establish the *bona fides* of the recited considerations appearing in these conveyances.

In the discharge of this burden, none of the grantees, other than J. W. McKinney, endeavored to defend these conveyances. J. W. McKinney did appear as a witness, but his testimony is such that we cannot attach any

weight thereto. He testified that he could, and would, furnish voucher proof in support of his claimed indebtedness against J. E. Lightle, but has never done so. From this we necessarily conclude that he had no such vouchers. Therefore, notwithstanding J. W. McKinney appeared as a witness, his debts stand upon the same footing as all others with no testimony to support the consideration therein stated other than as hereinafter recited.

It will thus be seen that the *bona fides* of all these transactions stand wholly and squarely upon the testimony of J. E. Lightle. It must be remembered that J. E. Lightle is the party who has manipulated all these conveyances. Likewise, he is the person who has denuded himself of all available property in this State, leaving an indebtedness of more than $60,000. It is true he testified to the *bona fides* of all the considerations in the conveyances here in controversy, but we cannot, and should not, attach any great weight to his testimony. It is the imperative duty of courts in weighing testimony to take in consideration the interest of the witness in the matter in controversy. When this is done, in reference to the testimony of J. E. Lightle, we conclude that his testimony was entirely insufficient to overturn the *prima facie* case made in behalf of appellants.

For the reasons aforesaid, the decree of the White County Chancery Court is reversed, in so far as the real estate conveyances are concerned, which are set out in the statement of facts, with directions to enter a decree canceling same; otherwise, the decree is affirmed.

JOLLY *v.* SMITH.

4-3259

Opinion delivered December 18, 1933.

[redacted]

[redacted]

Brewer & Cracraft, for appellant.

W. G. Dinning, for appellee.

JOHNSON, C. J., (after stating the facts). The principal contention of appellant for reversal is that Newton G. Smith was a fellow-servant with James Surman, the driver of the delivery truck, and thereby assumed the risk of his negligence. A number of cases are called to our attention in support of this contention. We cannot agree that any case cited is decisive of the question here presented. The fellow-servant doctrine, and the doctrine of vice-principal, are wholly dependent upon the facts and circumstances in each particular case. We understand the fellow-servant doctrine to be: "Those engaged under the control of the same master, in the same common business, the purpose of which is to accomplish a single result." Those servants who did not come within the letter of the rule are not bound by its consequences. In *Haraway* v. *Mance,* 186 Ark. 971, 56 S. W. (2d) 1023, this court had occasion to discuss in detail the many cases theretofore decided by this court, and courts of other jurisdictions. As applied by us in that case, the fellow-servant doctrine is: "That one to be a fellow-servant

must be engaged in a common business, for a common master, the purpose of which is to accomplish a single result." As appears from the statement of facts hereinbefore recited, the minor, Newton G. Smith, was not, as a matter of law, a fellow-servant with James Surman, the driver of the truck, and the trial court was correct in submitting this question to the jury. *Dellinger* v. *Tilghmon, ante* p. 146.

It is next insisted by appellant that young Smith was at the time of the injury a mere volunteer assisting James Surman, the driver of the truck, in making wholesale deliveries of the dairy products. On this question, the testimony was amply sufficient for the jury to conclude that young Smith was not a volunteer in the assistance which he was rendering to the driver of the truck in making the deliveries on the wholesale route. The fact is, the driver of the truck testified in no uncertain terms that the delivery boys assisted him until 8:30 or 9:00 A. M. each day, on both the wholesale and retail routes alike.

Likewise, this question was submitted to the jury on proper instructions by the trial court, and it has determined the question adversely to appellant. The assignment here discussed also disposes of appellant's contention that young Smith was merely an invitee of the driver, James Surman, at the time of the injury. The testimony warranted the jury in finding that, at the time of the injury, young Smith was performing services for appellant, not as a fellow-servant with James Surman, but was injured through the negligent act of the driver of the truck, a vice-principal. The case of *Thomas* v. *Magnolia Petroleum Co.,* 177 Ark. 963, 9 S. W. (2d) 1, cited and relied upon by appellant, has no application to the facts of this case.

Appellant complains about certain instructions given by the trial court, but we deem it unnecessary to here set out the instructions given or to discuss in detail the principles of law therein stated. It suffices to say that we have considered all the instructions given, and that they, and each of them, appear to conform to the previous holdings of this court.

Neither can we agree that the trial court erred in refusing appellant's request for a mistrial, based upon the fact that appellee's attorney asked the panel of the jury on *voir dire* examination the following question: "Would the fact that some insurance company might be interested in the outcome of the litigation affect your verdict?" The record discloses that the trial court promptly sustained appellant's objection to the question, and directed the jury not to consider it. Even if the question were determined to be erroneous—which we do not here decide—the court's ruling thereon removes any vestige of prejudice.

Lastly, it is insisted that the verdict of the jury awarding appellee, the mother and next friend of young Smith, $250, and the verdict of the jury awarding young Smith $1,000, aggregating $1,250, as compensation for the injury sustained, is greatly excessive. In reference to the contention but little need be said. Young Smith received a broken arm and collarbone, and was otherwise seriously injured; he was confined to a hospital for several days; a physician testified that he was probably permanently injured. This testimony warranted the jury in returning a verdict in his behalf for $1,000. Neither can we say that the jury was not warranted in awarding his mother and next friend $250 as compensatory damages. Young Smith, at the time of the injury, was approximately 17 years of age. His mother and next friend was entitled to his earnings until he reached majority. At the time of the injury he was employed, and certainly had expectations of greatly increasing his earning capacity. We therefore conclude that the judgment is not excessive.

No error appearing, the judgment is affirmed.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* DUPINS.

4-3248

Opinion delivered December 18, 1933.

Owens & Ehrman and *John M. Lofton, Jr.,* for appellant.

Emmet Vaughan, Sam T. & Tom Poe and *McDonald Poe,* for appellee.

JOHNSON, C. J., (after stating the facts). It is first contended on behalf of appellant that the uncontradicted facts show that appellee was not totally and permanently disabled within the lifetime of the policy. We cannot agree with this contention. The testimony tended to show, and the jury was warranted in finding that, at the time the policy was issued to appellee, he was a strong able-bodied negro man, weighing about 185 pounds, enjoying good health and able to perform any kind of labor. After the execution and delivery of the policy, he contracted shortness in his breath, his heart action weakened, and a general decline in his health, to the extent that on July 24, 1931, he became totally exhausted. The physical tests applied to appellee on August 7, 1931, by his physician disclosed that appellee was suffering from active tuber-

culosis. From this very short summary of the evidence, it is perfectly apparent that the jury was warranted in finding that appellee contracted tuberculosis after the issuance of the policy of insurance, and prior to its date of expiration. Also, the jury was fully warranted in finding that appellee was totally and permanently disabled within the purview of the policy prior to July 15, 1931.

Appellant insists, however, that the testimony does not show a total disability prior to July 15, 1931, because appellee was engaged in light work in the railroad shops on and prior to that date. This is not a conclusive test of total and permanent disability, as has many times been held by this court.

We held in *Industrial Mutual Ind. Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457, that: "Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation."

Again we held in *Mutual Benefit H. & A. Association* v. *Bird,* 185 Ark. 445, 47 S. W. (2d) 812, that, although the insured endeavored to do some work, this was not the exclusive test to be applied. The true test seems to be that total disability exists where the injuries are of such character and degree as to wholly disable the insured from doing all the substantial and material acts necessary to be done in the prosecution of his business, and when common care and prudence would require a man in his condition to desist from the kind of labor he had performed prior to his injury. When the rule is thus stated and analyzed, it will be seen that the mere fact that the insured performs certain labor, when common care and prudence require otherwise, does not of itself demonstrate a lack of total disability. This exact question was again before this court in *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 522, 54 S. W. (2d) 407, wherein the doctrine, as heretofore stated, was reannounced and approved.

The next insistance for reversal is that appellee did not furnish to appellant notice of his total disability within the time specified in the policy of insurance. The requirements of the policy appear in the statement of

facts. By reference thereto, it will be seen that "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." The question as to whether or not appellee gave the notice as soon as was reasonably possible was submitted to the jury as a question of fact, and its findings in behalf of appellee should be sustained, if supported by substantial testimony. On this question appellee testified that he did not know that he had tuberculosis until immediately prior to the institution of this suit; that the first information he had came from his physician at that time.

On the question here under consideration, appellant insists that this case is governed by *Business Men's Assurance Co.* v. *Selvidge,* 187 Ark. 1040, 63 S. W. (2d) 640. The Selvidge case is easily distinguishable from the instant case. There the insured lost one of his eyes on August 12, 1932, and gave no notice to the insurance company until the 12th of November, 1932. Selvidge well knew on August 12, 1932, that he had lost an eye. In the instant case, the insured did not know that he was suffering from tuberculosis until immediately prior to the filing of this suit. Thus it will be seen that there is a broad difference between the Selvidge case and the one here under consideration.

We think this case is controlled by the doctrine announced in *Pacific Mutual Life Insurance Co.* v. *Smith,* 166 Ark. 403, 266 S. W. 279. In the Smith case, the appellant there was the same appellant as here. Also, in that case, similar, if not identical, provisions of the policies appear. There, as here, it was contended that notice was necessary within a certain number of days, and a prerequisite to recovery. This court, in disposing of the contention there, said, "That the requirement for immediate notice is sufficient, if notice be given as soon as is reasonably possible to give it."

It is self-evident that appellee could not notify appellant of something he did not know. At no time within the specified period did appellee know that he was suffering from the disastrous disease afterwards made

known to him by his physician. This is the reason for the exception contained in the policy, which requires notice as soon as is reasonably possible to give it. *Employers' Liability Assur. Corp.* v. *Roehm,* 99 Ohio St. 343, 124 N. E. 223, 7 A. L. R. 182.

We conclude that the trial court was correct in submitting the reasonable possibility of giving notice in the instant case, and that no error was committed in so doing. It is next contended that the court erred in giving to the jury certain instructions relative to the execution of the application for the policy of insurance.

Appellant interposed the defense that appellee had made false statements in his application for insurance. This was denied by appellee. Therefore it became a question of fact for the jury to determine. After a careful consideration of all the instructions given on this issue, we conclude that the question was properly submitted and under correct instructions. In the main, the instructions here given followed the doctrine of this court announced in *Missouri State Life Ins. Co.* v. *Witt,* 152 Ark. 153, 237 S. W. 698; *American Life & Accident Association* v. *Walton,* 133 Ark. 348, 202 S. W. 20.

No reversal error appearing, the judgment is affirmed.

McHaney, J. I dissent. It is a strange doctrine that a sane person may be totally and permanently disabled and not be aware of that fact. The policy had lapsed long before any notice of disability was given, and there does not appear to be shown any good reason for failure to give the notice within the time provided in the policy. Mr. Justice Smith agrees with this dissent.

Metropolitan Life Insurance Company *v.* Minton.

4-3243

Opinion delivered December 18, 1933.

Daily & Woods, for appellant.

Holland & Holland, for appellee.

SMITH, J. Tom Minton, the plaintiff below, sued the Metropolitan Life Insurance Company, appellant herein, to recover $1,000, alleged to be due him on account of total and permanent disability, resulting from an injury which he received while employed by, and working for, the R. A. Young & Sons Coal Company at Jenny Lind, Arkansas. The insurance company issued a group insurance policy to the coal company, which received what is called the master policy, and each employee taking the insurance received a certificate or policy of insurance referring to the master policy. These certificates or policies issued to the employees all contained the following provision: "Under the terms of the group policy mentioned on page 1 of this certificate, any employee shall be considered totally and permanently disabled who furnishes due proof to the company that, while insured thereunder, and prior to his 60th birthday, he has become so disabled, as a result of bodily injury or disease, as to be prevented permanently from engaging in any occupation and performing any work for compensation or profit."

These certificates contained a recital of the number and amount of the installments of benefits to be paid in case of disability, the amount of the installments being

dependent on the amount of insurance taken by the respective employees. The certificate contained a table showing the number and amount of these payments of disability benefits.

There were two disputed questions of fact in the case. The first was whether the plaintiff had become totally and permanently disabled. The second was whether the plaintiff, being more than sixty years of age at the time of the issuance of the certificate, was entitled to the disability benefits. Upon this last-named issue of fact, the testimony shows, without dispute, that the plaintiff was then sixty-five years of age, that fact being stated in his application for the insurance. Plaintiff's testimony shows, however, that the agent of the insurance company, who was sent to the mine by the company to install the insurance, and to explain the plan of its operation, represented to the plaintiff that his age would not prevent him from receiving the disability benefits in case of injury. We do not review the testimony upon either of these issues, as it suffices to say that they are concluded by the verdict of the jury in plaintiff's favor, the testimony being legally sufficient to support that finding. From the judgment rendered upon this verdict is this appeal.

The plan of the insurance was to the following effect: Each employee received the amount of life insurance for which he applied. The plaintiff applied for, and received, a life insurance certificate for a thousand dollars, payable to his wife at his death. This certificate contained the clause as to disability set out above. All employees paid the same rate per thousand for their insurance, which appears to have cost the employees eighty cents per month per thousand. The balance of the premium was paid by the coal company. Employees over sixty years of age paid the same rate for their life insurance as was paid by employees under that age, but the latter had the compensating advantage of the disability coverage. However, we must assume, in view of the verdict of the jury, that it was represented to plaintiff by the company's agent that he, too, would have the advantage of the disability coverage, notwithstanding his age.

Upon the issue stated, the court charged the jury as follows: "2. If you find from the evidence that Minton was more than 60 years of age at the time the application for the insurance was made, and that this fact was disclosed by him, and that the Metropolitan Life Insurance Company thereafter, with knowledge that he was more than 60 years of age, issued him the policy containing the provisions relating to total and permanent disability, then, in that event, you are instructed that the insurance company waived the 60-year age limitation, and Minton would be entitled to recover, provided you should also find that he is totally and permanently disabled as defined to you in other instructions."

The instruction presents the exact issue decided by the Supreme Court of Tennessee in the case of *McLain v. American Glanzstoff Corporation,* 166 Tenn. 1, 57 S. W. (2d) 554. The plaintiff in that case had a group insurance certificate containing identical provisions in regard to life and disability insurance as the one here sued on. In holding that the employee could not recover the disability benefits on account of his age, the Supreme Court of Tennessee said: "If the policy had insured against total disability alone, and the insurer knew that complainant was 61 years old at the time the contract was written, the insurer, under this rule, would be estopped to rely on a provision of the policy excepting from total disability benefits any insured over 60 years of age. Here, however, the contract of insurance covers the life of the insured for the benefit of his wife, is a valid contract in that respect, not void from its inception. The contract merely excludes from its total disability benefits employees over 60 years of age."

It is true, the opinion in the Tennessee case recites that no fraud or misrepresentation was alleged; but it will be observed that the instruction above quoted did not require that finding before a recovery on the certificate here sued on could be had. The instruction does require a finding that the plaintiff had disclosed his true age to the insurer, but that knowledge would not alter the case. Nor would the terms of the certificate be altered, even though the jury had been required to find,

and had found, that the insurer's agent had represented that effect would not be given to the plain and unambiguous language of the certificate, excluding a person over sixty years of age from the disability benefits.

The general rule appears to be that, where the insurer has knowledge, at the time of issuing a policy of insurance, of existing facts which, if insisted on, would invalidate the contract of insurance from its inception and render it void, such knowledge constitutes a waiver of the condition in the contract inconsistent with these known facts, and the insurer is estopped thereafter from asserting that these facts constituted a breach of the contract. The theory of the law upon which such decisions are based is that, in the absence of a showing to the contrary, it will be presumed that the insurer intended to execute a valid contract in return for the premium received; and, when the policy contains a condition which, if enforced, renders it void from its inception, and the insurer knows that such will be its result, the law presumes that the insurer intended to waive the condition, thereby executing a binding contract, rather than to have deceived the insured into the belief that he had insurance, when, in fact, he had none. It is not to be presumed that the insurer will accept, or has accepted, the premium on an insurance contract knowing at the time it will not perform the contract when called upon to do so, because of the existence of facts of which it had knowledge before issuing the policy. The law is so declared at § 346 of the Chapter on Insurance in 14 R. C. L., at page 1166. This court has decided numerous cases to that effect, and we do not mean by this opinion to say anything impairing their authority. Here, however, the insurer does not claim the policy was void from its inception, or void at all. It concedes the validity of the certificate as a life insurance contract, and merely contends that the doctrines of waiver or estoppel cannot be invoked to alter a valid and unambiguous contract.

Now, of course, the rule is well settled that all doubtful or ambiguous provisions of an insurance contract are to be resolved against the insurer, and in favor of the insured. This is true, as many cases have explained,

because the insurer has carefully chosen the language with which it expresses or limits its liability, but, in other respects, these contracts are construed as other written contracts would be, and the rule against varying written contracts by parol evidence applies to insurance contracts, as well as to other contracts which have been reduced to writing.

At volume 8 of Cyclopedia of Insurance Law (Couch), § 2182, page 7052, it is said: "No rule of evidence is better settled than that, in the absence of fraud or error, parol evidence is inadmissible to vary or control the plain and unambiguous terms of a complete written contract of insurance, or to aid in its interpretation, unless the contract is incomplete in itself, or is ambiguous, either as to construction or application of the terms, or the subject, since when a policy of insurance, properly executed, is delivered and accepted, it must be conclusively presumed to contain all the terms of the agreement for insurance by which the parties intended to be bound, and, therefore, to be the final form of their binding agreement."

Among the cases cited in support of the text just quoted is our own case of *Harrower* v. *Insurance Co. of N. Am.*, 144 Ark. 279, 222 S. W. 39.

A case involving the principle which is decisive of the instant case is that of *Wheeler* v. *Fidelity & Casualty Co. of New York*, 129 Ga. 237, 58 S. E. 709. That case was a suit upon an accident policy, which insured against the injury while insured was "riding as a passenger in, or on, a public conveyance propelled by steam, electricity, compressed air or cable, and provided for passenger service, including a passenger elevator." The conductor of a passing street car had an altercation with a passenger, at whom he shot, and the bullet struck the insured "while she was going up the front steps of her home on the street along which the car was passing." It was alleged in the complaint—to which a demurrer was sustained—that the agent of the insurer represented, at the time the policy was sold, that the insured would be indemnified in the sum named in the policy in the event she should die as the result of an external, violent or accidental means,

whether received on a car or otherwise. In sustaining the demurrer to this complaint, the Supreme Court of Georgia said: "While we recognize the rule that a policy of insurance must be construed most strongly against the insurer, still the words of the policy must be given the meaning which they ordinarily bear; and, where it is manifest that it was the intention of the insurer that liability should attach only in given circumstances, the law will uphold the contract according to its true intent and import. We do not think there is any ambiguity whatever in the clause of the policy providing for indemnity resulting from death or disability of the beneficiary. Nor do we think there is any stipulation in the policy which can be properly held to vary or alter the plain and evident meaning of the terms in this clause. The writing being unambiguous, parol evidence as to what was said by the parties at the time it was executed will not be admitted to vary or alter the terms of the writing. The petition set forth no cause of action, and was properly dismissed on demurrer." See also *Kelsey* v. *Continental Casualty Co.*, 108 N. W. 221.

We conclude therefore that, while parol evidence may be received to show, by way of waiver or estoppel, that a contract for insurance, or for any other purpose, was not void from its inception, such testimony is not admissible to vary the terms of an unambiguous written contract. As was said by the Supreme Court of Tennessee in the McLain case, *supra,* if the policy had insured against disability only, parol evidence would have been admissible to estop the insurer from asserting that the policy was void when written. But parol evidence is not admissible to show that plaintiff had, not life insurance merely, as he had without dispute, but that he had disability insurance also, when the unambiguous language of the certificate or policy plainly provides to the contrary.

The judgment must therefore be reversed, and, as the cause appears to have been fully developed, it will be dismissed.

HUMPHREYS, J., dissents.

SHARP *v.* NORWOOD.

4-3251

Opinion delivered December 18, 1933.

Duty & Duty, for appellant.

Rice & Rice, for appellee.

SMITH, J. We copy from appellant's brief the following statement of facts, out of which this litigation arose: "The First National Bank of Rogers, Arkansas, became insolvent, and was taken over by the Comptroller of the Currency of the United States for the purpose of liquidation, about the 1st of January, 1931.

"The Bank of Lowell, Arkansas, was a State banking corporation, and became insolvent and was taken over by the State Banking Department for the purpose of liquidation about the 25th of January, 1931.

"On July 31, 1930, the appellees, T. W. Norwood and A. H. Lightner, borrowed $600 from the Bank of Lowell, and executed to the bank their promissory note in that sum, due and payable six months after date. Some time after the execution of the note, and some time before the First National Bank of Rogers failed, the Bank of Lowell borrowed $7,500 from the First National Bank of Rogers, and placed the appellee's note, together with other notes, with the First National Bank as collateral for the loan, and, at the time of the institution of this suit and the trial thereof, and, at the present time, the indebtedness of the Bank of Lowell to the First National Bank of Rogers has not been paid, there being about $1,000 yet due and unpaid, and the

appellees' note is still held by the receiver of the First National Bank, E. G. Sharp, as collateral to that loan.

"At the time the First National Bank of Rogers failed, one of the appellees, A. H. Lightner, was doing business with that bank, and had on deposit $683.61, which he seeks to offset against the collateral note due the Bank of Lowell, and held by the First National Bank of Rogers. On January 29, 1932, Walter E. Taylor, as Bank Commissioner of the State of Arkansas, filed suit against the appellees for the full amount of the face of the note and interest. The appellees answered, and set up substantially the above state of facts, claiming that the defendant, Lightner, had a deposit in the First National Bank, and that he was entitled to offset, but did not allege at any time or place that the other defendant, T. W. Norwood, was insolvent, neither did the defendant, Norwood, make such allegation in his answer, but Norwood adopted the answer of Lightner.

"The case came on for final hearing on March 23, 1933, after, on proper motion, the appellant, E. G. Sharp, as receiver of the First National Bank of Rogers, had been made a party to the proceedings, and, after hearing the evidence, the court found that the note in question was made to the Bank of Lowell, and was thereafter transferred and assigned by the Bank of Lowell to the First National Bank as collateral to secure the loan, and that at all times subsequent thereto, and, at the time of the rendition of the judgment, that the First National Bank of Rogers was the holder of said note as collateral security.

"The court further found that, at the time the First National Bank closed, the defendant, Lightner, had on deposit in said bank the sum of $583.67, and that he was entitled to offset that amount against the amount due on the note, leaving a balance due on the note of $56.39, and for which the court rendered judgment in favor of E. G. Sharp, as receiver of the First National Bank, against Lightner and Norwood. The appellant Sharp duly filed his motion for new trial, which was by the court overruled, and an appeal was taken to this court and a bill of exceptions filed within the time allowed by the court,

and the question now before the court is whether or not, under the facts as set forth above and supported by the evidence, the appellee, Lightner, is entitled to offset his deposit in the First National Bank of Rogers, against his note due the Bank of Lowell, by reason of the fact that the First National Bank was the holder of said note for collateral, and that the other defendant, T. W. Norwood, is not shown to be insolvent.''

This is an appeal from a judgment under which no one appears to have been prejudiced. The makers of the note have obtained the relief which they prayed, and they will no doubt adjust their accounts with each other; at any rate, we are not asked to make the adjustment. The Bank Commissioner, as liquidator of the Lowell Bank, makes no complaint of the judgment. He has obtained full credit on the note of the Bank of Lowell to the First National Bank. No one complains of the judgment except the receiver of the First National Bank, and his complaint appears to be without merit. The First National Bank's liability to Lightner as a depositor has been extinguished, and, in addition, the receiver has judgment against two apparently solvent makers for the difference between Lightner's deposit and the Lightner and Norwood date. If the First National Bank had been the absolute owner of the Lightner and Norwood note, it could not have asked for more than it has received under the judgment of which its receiver complains.

This just judgment will not be reversed for lack of mutuality of the demands set off against each other.

It was held, in the early case of *Trammell* v. *Harrell,* 4 Ark. 602, that a debt or demand, to be set off, must be due from the sole plaintiff, or all the plaintiffs, to the sole defendant, or all the defendants. But this case was overruled by the case of *Leach* v. *Lambeth,* 14 Ark. 668, where the court held that a debt due from the sole plaintiff to one of several defendants may be pleaded, under the statute, as a set off by the defendant to whom such debt is due.

In the case of *Rush* v. *Citizens' National Bank,* 114 Ark. 170, 169 S. W. 777, the facts were that Rush and Bryan executed a joint note to a bank in which Rush had an individual deposit. It was held, the note maturing

and remaining unpaid, that the bank had the right to apply Rush's individual deposit to the payment of the note upon which he was liable as a joint maker.

In the case of *Taylor* v. *Cox,* 183 Ark. 1117, 40 S. W. (2d) 444, the facts were that Mrs. Cox was liable as joint maker on a note to a bank in which she carried an individual deposit. Upon the bank becoming insolvent, it was held that she had the right to have her individual deposit credited upon the note on which she was liable as a joint maker, and upon paying the difference between her deposit and the joint note she was allowed to withdraw from the hands of the Bank Commissioner, as liquidating agent for the bank, the collateral which had been pledged to the bank to secure the note. See also *Leonard* v. *Taylor,* 183 Ark. 933, 39 S. W. (2d) 704.

It is insisted, however, that the right of set off should not have been accorded, because the First National Bank held the note of Lightner and Norwood as pledge by way of collateral, and not as owner. It is true a bank holding a note as collateral to secure a loan which it has made does not, because of default in the payment of the debt due it, become the owner of the collateral which it held, but must acquire the title thereto in the manner authorized by the contract of pledge. *Union & Mercantile Trust Co.* v. *Harnwell,* 158 Ark. 295, 250 S. W. 321. But, even so, the collateral note would not be worth, or could not be sold for more than its face with interest, (and the bank would not be entitled to the excess if it did) and it has had credit for that amount under the judgment from which its receiver has appealed.

Here the judgment has arrived at a true balance where mutual demands existed, and it must therefore be affirmed. It is so ordered.

AMERICAN NATIONAL INSURANCE COMPANY *v.* CHASTAIN.

4-3241

Opinion delivered December 18, 1933.

Coleman & Riddick, for appellant.

John L. Sullivan, for appellee.

HUMPHREYS, J. The issues involved on this appeal are: first, whether the group policy issued by appellant to the city of Little Rock protecting her firemen from total disability expired as total disability protection to appellee when he was placed on a pension by the city, or whether it continued in full force and effect thereafter; second, whether the evidence was sufficient to warrant the jury in finding appellee was totally disabled within the meaning of the policy; and, third, whether sufficient notice of total disability was given to appellant by appellee.

The first two issues were submitted to the jury under instructions the correctness of which is not questioned by appellant, and the last under an instruction which appellant claims was erroneous.

The policy in the instant case insured the lives of the firemen and policemen of the city of Little Rock for five years beginning December 1, 1927, premiums payable annually, the first annual premium being $4,249 with a provision therein providing for the payment of $2,000 to appellee if said appellee: "(1) has suffered subsequent to the date of the issuance of the policy for a period of at least 6 months total disability and that due proof is furnished the company; (2) and that the said

disablement began before the person injured had attained the age of 60 years; (3) and that, if proof of total disablement is furnished, the said total disablement must be shown to be such as to justify the presumption that it would continue throughout the entire subsequent lifetime of the said person and during that time wholly prevent the said person from pursuing any occupation for wages, compensation, or profit."

It also contained the following provision: "It is agreed that employees otherwise eligible but who are not working for full time and for full pay on the effective date of the policy applied for are to be excluded from insurance coverage until the date on which they return to service for full time and for full pay."

The application contained the names of at least four firemen who had been retired on a pension, and who were not working full time and on full pay, but they were included in the group policies as beneficiaries.

(1) It appears from the record herein that, on March 1, 1930, appellee was retired on a pension by the city. Appellant argues that, under the terms of the policy set out above, its liability to appellee on account of total disability terminated when he ceased to work full time on full pay, or, to be more exact, on the date he was retired on a pension. It is disclosed by the record herein that appellant, in making out its claim for premiums due December 1, 1931, on the group policy, included appellee's name with the notation that he had been retired on pension, and it also appears that in remitting the premium due on that date by the city, appellee's name was included among those covered by the policy, although on a pension roll. This testimony was sufficient to sustain the finding of the jury that appellant had waived the provisions of the policy protecting only those who were working full time and for full wages.

(2) We cannot agree with learned counsel for appellant in their view that the evidence is insufficient to sustain the verdict of the jury to the effect that appellee was and is totally disabled within the meaning of that term as used in the policy. The construction placed

upon the term "total disability" as used in the policy means such disability as renders the policyholder "unable to perform all the substantial and material acts of his business or the execution of them in the usual or customary way." *Ætna Life Insurance Company* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Mo. State Life Insurance Co.* v. *Barron,* 186 Ark. 46, 52 S. W. (2d) 733.

According to the testimony introduced by appellee, he has been unable to do any work since August 3, 1929, on account of tuberculosis. The jury found this to be the fact from conflicting testimony under correct instructions submitting the issue, and their finding is conclusive on appellant. It was a jury question and not one for the court. *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. (2d) 407; *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520.

(3) The group policy contained conditions to the effect that due proof must be furnished appellant of total disability on the part of appellee. Appellee filed his proof of total disability on December 26, 1932, on account of having tuberculosis, which he contracted in 1929, during the life of the policy. As appears from the condition in the policy above referred to, no time was specified in which proof was required to be made. Based upon this fact, appellant contends that the proof should have been made within a reasonable time, and requested an instruction to that effect, which the court refused to give, over its objection and exception. The court modified the instruction so as to follow the language of the policy providing that due proof should be made of the disability by appellee before he could recover. Appellant objected and excepted to the court giving the instruction as modified. The court was within the law in modifying the instruction and in refusing to give it in the form requested by appellant. It was said by this court in the case of *Sovereign Woodmen of the World* v. *Meek,* 185 Ark. 419, 47 S. W. (2d) 567, that "under a benefit certificate providing for a recovery if insured should suffer bodily injury and furnish satisfactory proof of total disability, held the right to recover depended upon insured's total disability during the life of

the certificate, and not upon the receipt of the proof of total disability, no time being fixed in the policy for making such proof."

Appellant has called our attention to certain testimony which it alleges was inadmissible, but we cannot agree with it. We think the evidence referred to was material to the issues involved.

No error appearing, the judgment is affirmed.

TURNER *v.* RICHARDSON.

4-3263

Opinion delivered December 18, 1933.

W. A. Jackson and *Beloate & Beloate,* for appellant.

W. P. Smith, for appellee.

HUMPHREYS, J. Appellee brought suit in replevin against appellant before a justice of the peace in Boas Township in Lawrence County to recover possession of a red Irish setter bitch. The case found its way by appeal to the eastern district of the circuit court of said county, where it was tried to a jury under proper instructions, resulting in a verdict and judgment against appellant, from which is this appeal.

According to the evidence introduced by appellant, the bitch in controversy was given to him when she was about nine months old by Everett Webb, who had bought her early in December, 1931, from Tom Nokes, whose son had gotten her from Will Berry, who lived near the Less farm.

According to the evidence introduced by appellee, the bitch in controversy was bought by him when she was about nine months old from Jim Perkins for $10 the

latter part of 1930, and that, after she had pups and weaned them, she disappeared in the fall of 1931, and that she was not seen by him until November, 1932, when he found her in the possession of appellant.

After the trial, appellant filed a motion for a new trial on account of newly-discovered evidence, which was overruled by the trial court, over his objection and exception. Appellant insists that the court committed reversible error in overruling his motion.

The newly-discovered evidence was contained in the affidavits of Cecil Nokes, Will Berry and T. R. Jones.

Affiant, Cecil Nokes, said he was the son of Tom Nokes, who got the bitch from Will Berry in May or June, 1931, and sold her to Everett Webb for $5, at which time she was six or seven months old.

Affiant Will Berry, said the bitch in question came to his home in May or June, 1931, when she was about seven months old, and that he let Tom Nokes take her home, and that Nokes kept her until in the fall, when he said he sold her to Everett Webb for $5.

Affiant J. R. Jones, who was related to Will Berry and Tom Nokes, said he visited them in June, and again in the fall of 1931, and that on both visits he remembers to have seen an Irish female red setter at Tom Nokes' that was about six months old.

Had appellant gone to Tom Nokes, from whom Webb got the bitch, and made inquiry before the trial, he most probably could have obtained all the information the three affiants disclosed in their respective affidavits. Just to say he did not know what the affiants knew until they voluntarily told him after the trial does not show diligence on his part in procuring the evidence. The law is that one who relies on newly-discovered evidence to obtain a new trial must show that he used due diligence in discovering the evidence before the trial. *Medlock* v. *Jones,* 152 Ark. 57, 237 S. W. 438.

Appellant failed to show due diligence in procuring the evidence before the trial; so the court, in the exercise of a sound discretion, was justified in overruling his motion.

No error appearing, the judgment is affirmed.

DILLARD & COFFIN COMPANY *v.* CHAPMAN.

4-3253

Opinion delivered December 18, 1933.

[redacted]

Hughes & Davis, for appellant.

W. B. Scott, for appellee.

KIRBY, J., (after stating the facts). There was no error committed in refusing to give the requested instruction No. 1 for appellant, as there was no testimony warranting the submission of the question of a guarantee to the jury, and the court properly stated in instruction No. 4, given on its own motion, "There is no question of guarantee in this lawsuit."

The whole question is one of fact as to the contract or agreement about the sale of the cotton when it was delivered by the appellees to the appellant; and the jury was warranted in finding that appellant was instructed that it might hold the cotton for a rise, but, if the price should go down, they must sell it while the price was still high enough to realize the amount of money which had been advanced thereon by the cotton factors; and, also, that they violated their instructions, and did not make the disposition of the cotton as directed, and were not entitled to recover any further sum for loss in the sale of the cotton than the sum already advanced, and for which they were instructed to sell.

The jury was properly instructed, and the verdict is amply supported by the evidence.

The judgment is affirmed.

SMITH and BUTLER, JJ., dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* S. L. ROBINSON & COMPANY.

4-3256

Opinion delivered December 18, 1933.

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

Partain & Agee and *Ralph W. Robinson*, for appellee.

MEHAFFY, J. The appellee brought suit in the Crawford Circuit Court for $260.94 for delay in transporting and delivering a car of strawberry crates fom Paducah, Kentucky, to Van Buren, Arkansas. It was alleged that the car of strawberry crates, including 4,000 extra quarts, was ordered on April 29, 1932, and that the Paducah Box & Basket Company loaded said crates and received from the Chicago, Burlington & Quincy Railroad Company at Paducah, Kentucky, on the 30th day of April, 1932, a bill of lading; that said car of crates was thereafter shipped and handled over the lines of the Chicago, Burlington & Quincy Railroad Company and the Missouri Pacific Rail-

road Company; that, at the time the car was ordered, appellees were engaged in handling and the sale of strawberry crates, and the strawberry season, which was short, was on in Van Buren and vicinity; that said crates were ordered for immediate use and resale, and were needed and required by appellee for that purpose; that, if said car had been handled and transported without delay, it would have, in the ordinary course of transportation, arrived and been delivered to appellee in the city of Van Buren, Arkansas, on May 3d, but that it did not arrive in said city of Van Buren until 5 P. M. on May 5th; that, by reason of the delay in transporting and delivering said car by appellant and its connecting carrier, appellee was deprived of having said strawberry crates on hand for retail sale to its customers, who were demanding same, and, by reason of the delay, appellee lost the sale during said season of the amount of one carload of crates, which, if they had had, as they would, had they been delivered to them promptly in the ordinary course of transportation, they would have sold to their trade at a net profit of $260.94; that appellee had customers for the purchase and taking up of said crates, at the profit above mentioned, and, by reason of the failure to deliver the car, appellee was compelled to buy its crates from other dealers, and, as a direct result of the failure to deliver said crates within the time, it lost said profit, and the sale of that amount of crates; that, within the time provided in the bill of lading, appellee filed claim with the appellant for damages in the amount above named, which claim was by the appellant denied.

The appellant filed answer, in which it denied all the material allegations in the complaint.

The evidence shows that appellee ordered the car, which it is alleged was delayed for two days, from the Chicago, Burlington & Quincy Railroad Company, at Paducah, Kentucky. Appellee had ordered from the Paducah Box & Basket Company four or five cars of strawberry crates, to be shipped, as ordered by appellee, from time to time during the strawberry season. When it ordered the first car of crates, it came from Paducah to Van Buren in three days. Knowing the time that was

required to transport the crates from Paducah to Van Buren, appellee, when it began to run low on crates, ordered another car to arrive in time to sell—by the time all of the crates in the first car were gone; that is, they ordered it four days before they would be out of crates. The same day it ordered this car shipped, it notified the agent of the appellant at Van Buren of the order, and had him start tracing the car, so that it would not be delayed. Appellee sold the last of the first car of crates, the night before the day that the car should have arrived. If the crates had come in three days, as the first car did, appellee would have had crates to supply their trade for the next two days, but the car was delayed for two days, and appellees were out of crates. Instead of getting there in three days, it took the car in question five days to come from Paducah to Van Buren.

Appellee had ordered another car to be shipped to it, intending for it to arrive at the time it sold the crates in the car that was delayed, but, this car being delayed, the appellee canceled the order for the next car. If the car had arrived on time, appellee would have sold the crates at a net profit of $260.94. When the car did arrive, appellee sold the crates at a net profit of $260.94. There is therefore no damage claimed because of a loss on this particular car, but the damage is claimed because the negligent delay in shipping this car left the appellee without crates to sell for two days, thereby losing the profit it claims they would have made. It bought crates elsewhere, nearer home, but the record does not show where, and does not show at what time they bought them. This, however, is immaterial, since the only claim for damages is for loss of profits that appellee would have made during the two days they were out of crates.

Usually, the measure of damages for delay in shipment is the difference in the price of the freight when it should have arrived and the price at the time it actually did arrive. But the claim here is not that it sold the car when it finally came for a lower price and were thereby damaged, because the evidence of appellee itself shows that they received the same price they would have received, if the car had not been delayed.

Appellees do not claim that they had already made a contract for the sale of the crates, but they claim that, if they had received them, they would have sold them at the profit named. Appellee contends that there is no element of special damages, but the damages complained of are as real and actual, and the result of the contract, as any damages could be.

A statement of the law in 10 C. J. 72 is as follows: "In accordance with well-settled principles, only such damages as are in the contemplation of the parties when they make their contract, and which result as a breach of it, are properly recoverable. Hence the fact that the shipper, at the time he made the contract with the carrier, informed its agent that he wished to make contracts with third persons for the sale of the goods to them, and the further fact that he did make such contract afterward, do not entitle a recovery from the carrier of profits which would have been made but for the breach of the contract of carriage."

In this case, there is no evidence tending to show either that appellee had already made contracts to sell the crates, or that it gave any notice to the carrier, at the time of the shipment, of the fact that the crates were desired for immediate sale, or that there would be any special damages because of delay. There is no claim that any notice of special damages was given. Such notice must be given in order to recover special damages, or the evidence must show that the carrier had knowledge of the special circumstances, and this notice or knowledge must be at, or before, the shipment is made.

The measure of damages for negligent delay in the transportation of freight by a carrier is the difference between the value of the freight at the time it was delivered and its value at the time it should have been delivered, unless the carrier had notice that special damages would result from a failure to deliver in time. *Chicago, R. I. & P. Ry. Co.* v. *Newhouse Mill & Lbr. Co.*, 90 Ark. 452, 119 S. W. 646.

Of course, if the carrier had knowledge that the crates were ordered for immediate resale, knew the purpose for which they were bought and shipped, knew that

the sale was for a special purpose; in other words, if the carrier knew the facts about the necessity to have the crates for immediate resale, and knew that the strawberry season was a very short one, it would have been bound by this knowledge, but these facts would have to be shown by the evidence.

This court said: "Appellant had notice of the day of sale, and of all the circumstances in detail, as to why the sale was planned and fixed for that day. Appellant, according to the evidence of appellee, had notice of all of this, and made its contract with full knowledge that it was necessary to get the cattle from Brady for the sale on that day, if appellee was to secure the benefit of that sale. Appellant had no right to assume that the sale would continue from day to day, or would be as profitable to appellee if made on some other day. * * * Having notice of the special damage that would result to appellee if he failed to get his cattle to that auction sale, and having contracted with appellee after such notice to deliver them for that sale, appellee cannot be heard to say that the damages that appellee sustained by reason of the loss of that particular sale were not in contemplation of the parties to the contract" *Chicago, R. I. & P. Ry. Co.* v. *Miles,* 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; *Chicago, R. I. & P. Ry. Co.* v. *Thomas,* 118 Ark. 406, 176 S. W. 681.

This court recently said: "It has long been the rule in this State that special damages are not recoverable for breach of contract, in the absence of notice to the party in default that more than ordinary damages will be sustained in the event of failure to perform, nor unless such knowledge 'be brought home to the party sought to be charged under such circumstances that he must know that the party he contracts with reasonably believes that he accepts the contract with the special condition attached to it'." *S. W. Bell Tel. Co.* v. *Carter,* 181 Ark. 209, 25 S. W. (2d) 448. See also *Chicago, R. I. & P. Ry. Co.* v. *Thomas,* 118 Ark. 406, 176 S. W. 681; *Chicago, R. I. & P. Ry. Co.* v. *Newhouse Mill & Lbr. Co., supra.* If the appellant knew all the facts, it would, of course, not be necessary to inform it as to facts it already knew.

"Generally a person can be said to have notice of a fact only when it is actually communicated to him in such a way that his mind could, and did, take cognizance of it. And, of course, when a person knows of a thing, he has notice thereof, as no one needs notice of what he already knows. While extra judicial proceedings, or proceedings without jurisdiction, do not operate as constructive notice, yet express notice obtained from such proceedings operates the same as notice obtained in any other manner." *St. Louis-San Francisco R. Co.* v. *State,* 179 Ark. 1128, 20 S. W. (2d) 878.

There is no evidence that the appellant had knowledge of all the facts necessary to make it liable in special damages. Even if it knew that the strawberry season was short, there is no evidence that it knew that appellee wanted the crates for resale, or that it had made contracts for resale, or that it had customers who would buy the crates.

Appellee requested, and the court gave to the jury, the following instruction: "You are instructed that the railroad company is held to know facts familiar to ordinary people, and that, when a shipment of merchandise is placed in its hand and care, which merchandise has only a seasonable use, it is held by the law to reasonable care in knowing the time in which same is to be and can be used."

Under the facts in this case, this instruction should not have been given. There is no evidence that either ordinary people, or the appellant, knew that the crates were ordered for resale, or that appellee had customers who would repurchase them.

If the appellant had knowledge of the facts necessary to make it liable for special damages, it may be shown in evidence. If it did not have this knowledge, and no notice was given, then special damages cannot be recovered.

It follows from what we have said that the judgment must be reversed, and the cause remanded for a new trial.

McHaney, J., Mr. Justice Smith, Mr. Justice Butler and I concur in the judgment of reversal, but think the cause should be dismissed. No notice of special damages

was given, as held by the majority, and no showing was made that the crates could not have been obtained elsewhere. Also, the damages claimed are purely speculative.

STRINGER *v.* CONWAY COUNTY BRIDGE DISTRICT.

4-3270

Opinion delivered December 18, 1933.

Edward Gordon, for appellant.

E. A. Williams, for appellee.

MEHAFFY, J. The appellee filed, in the Conway Chancery Court, a complaint against delinquent lands, alleging that the Conway County Bridge District was duly organized, and the assessment of benefits was duly made and extended against the real estate and lands within the district, and annual tax levied thereon, for the purpose of paying and retiring the bonds and other indebtedness incurred in the construction and completion of said improvement. It is alleged that the lands described were duly assessed for taxes for the years 1925 to 1930,

inclusive, and that the assessments are past-due and unpaid, and that the bridge district, appellee, is entitled to recover the taxes, together with the 25 per cent. penalty, interest, and cost and reasonable attorney's fee, all of which constitute a valid, subsisting lien upon said lands, lying and being situated in the county of Conway, State of Arkansas. Then follows a description of the lands, and prayer for taxes, interest and cost; that the lien of the said district be declared, decreed and enforced, and that the lands be sold as provided by law for the payment of said taxes, interest, penalty, attorney's fee, and cost and all other proper and equitable relief. Summons was issued and published as required by law.

The appellant, W. H. Stringer, filed intervention, answer, and plea of *res judicata*. In his plea, appellant claimed to be the owner and in possession of certain lots, describing them, and alleging that he had purchased the property from the State of Arkansas under the provisions of act 296 of the Acts of 1929. Appellant further alleged that on March 23, 1933, the chancery court of Conway County entered a decree confirming the title in the State, in and to the lands purchased by the intervener, and vesting the absolute title in the intervener, free from any liens or claims by the Conway County Bridge District. A copy of said decree was attached to, and exhibited with, the intervention, and made part thereof. The appellant pleaded this decree as a complete bar to appellees' right to judgment against the property owned by the intervener.

The appellees filed a reply to the answer and plea of *res judicata* of appellant, stating numerous reasons why the sale to the State was illegal. Appellant demurred to the reply, and asked that his title to the property described be quieted and confirmed. The chancery court dismissed, for want of equity, the pleas filed by appellant, and overruled his demurrer, and dismissed appellant's petition, and granted the relief prayed for by the appellees, and sustained the lien.

It is the contention of the appellant that when he received a deed from the State, it was free from all liens of improvement district assessments.

When lands are forfeited to the State for nonpayment of taxes, and confirmation is had under act 296 of 1929, all irregularities and informalities connected with the forfeiture and sale for taxes are cured, and in all cases where the State had the power to sell, the title may be confirmed in the State. If the State did not have the power to sell for taxes, then, of course, the sale would be absolutely void, and a confirmation would be void. If taxes on a tract of land had already been paid, the sale would be void, or if the property was not subject to taxation; but in all cases where the State has power to sell, and a decree has been entered in accordance with the provisions of act 296 of 1929, although the sale may be void for irregularities and informalities, all persons are barred by the decree of confirmation, and cannot thereafter take advantage of any informality or irregularity.

The decree, however, does not relieve a purchaser from the State of payment of assessments, because the sale to the State does not extinguish the lien, it merely suspends the lien while the title is in the State.

This court, in referring to the act of March 27, 1925, said that the statute, of course, had no application to the present litigation, but that § 5433 of Crawford & Moses' Digest was equally potential in continuing the lien of the improvement district, and in preventing its extinguishment by a sale for general taxes. The court further said: "The words, 'all demands, executions, incumbrances or liens whatsoever created,' have no reference to the State's paramount lien for taxes. But the words which follow unmistakably carry the meaning that the special taxes of the improvement district shall continue until fully paid, and are not extinguished. Of course, the forfeiture to the State of lands for general taxes necessarily suspends the enforcement of the special tax lien, as long as the title remains in the State, but, as the lien, under the terms of the statute, is not extinguished, and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership." *Turley* v. *St. Francis County Rd. Imp. Dist. No. 4*, 171 Ark. 939, 287 S. W. 196.

Act 71 of the Acts of 1917, creating the Conway County Bridge District, expressly provides that the assessments shall be a lien against all real estate in said district from the date of said resolution, and entitled to preference over all judgments, executions, incumbrances, or other liens whatever, and shall continue until such assessment, with any penalty and cost which may accrue thereon, shall be paid.

There is nothing in act 296 of the Acts of 1929 that changes this rule announced by this court, or repeals or modifies the law creating the lien. It is true that § 8 of act 296 provides that the improvement district may be made a party, and, if it wishes to do so, it may pay the taxes, penalty and cost, and be subrogated to State's lien for the amount so paid, and said improvement district may include the amount due the district for taxes, and have the right to foreclose for such amount, as though the same had been assessed against such lands in favor of the improvement district.

Section 9 of the act provides that the decree of confirmation shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of any informality or illegality in the proceedings, and the title to land shall be considered as confirmed and complete in the State forever. There is, however, no intimation in the act that improvement district taxes shall be extinguished.

We again held that forfeiture to the State of lands for general taxes necessarily suspends the enforcement of the special tax lien, as long as the title remains in the State, but, as the lien under the terms of the statute is not extinguished, and continues until the special taxes are paid, the same can be enforced when the land goes back to private ownership. *Hopper* v. *Chandler,* 183 Ark. 469, 36 S. W. (2d) 398.

We have repeatedly held that forfeitures to the State for general taxes suspends the enforcement of the lien for improvement district taxes, but it does not extinguish the lien. Therefore, when the appellant purchased the land in question from the State, the lien for bridge improvement districts attached, and, unless the assessments

were paid, the lands could be sold to enforce the lien. There is nothing in act 296, *supra,* that changes the law on this subject.

The failure of the clerk to post the delinquent list was an irregularity which was cured by the confirmation under act 296; and while the enforcement of the lien for improvement taxes was suspended while the title was in the State, no penalties attached during this time.

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

WATSON *v.* TROTTER.

4-3257

Opinion delivered December 18, 1933.

J. D. Benson and *G. C. Carter,* for appellant.

Cochran, Arnett & Woolsey, for appellee.

McHANEY, J. On May 20, 1933, the annual school election was held in School District No. 20, Ozark District, Franklin County, for the purpose of electing three directors, for the one, two and three-year terms. There were six candidates, two being rival candidates for the one-year, two for the two-year and two for the three-year terms. Their names were placed on the blackboard in the school house where the election was held, showing them to be candidates for directorships for the respective terms of one, two and three years, and all the electors voting were so advised, but in casting their

ballots, the voters failed to designate thereon the term of office of the candidate for whom they voted. The election officials made and certified the returns of the election to the county court, as follows: For Cartwright and Crowell, candidates for the one-year term, 14 votes each; for Powell and Riddle, candidates for the two-year term, 13 and 18 votes respectively; for Trotter and Alston, candidates for the three-year term, 15 votes each. Upon the returns so made and canvassed, the county court found that Riddle was elected for the two-year term, and that for the one and three-year terms, no person had been elected, and he thereupon (June 8, 1933) made an order calling a special election in said district to elect two directors, for the one and three-year terms, to be held July 5, 1933, and, on the same date, caused a notice of such election to be published in a newspaper published in said county and district. The order was not filed with the county clerk until June 23, 1933.

On June 20, 1933, this action was instituted in the circuit court against the county judge, and others, for certiorari to bring up the record from the county court, for a writ of prohibition against the latter to prevent the holding of the special election, and to enjoin its being held. The circuit court granted the relief prayed, and this appeal followed.

We think the circuit court was without jurisdiction to hear and determine the matter complained of, and in this respect the case is ruled by the decision of this court in the recent case of *Shimek* v. *Janesko, ante* p. 418, and in some other respects by the case of *Watson* v. *Gattis, ante* p. 376.

The duties formerly devolving upon county boards of education are now transferred to the county courts. Section 3, act 26 of 1933, and § 2, act 247 of 1933. The returns of this election were made to the county court, who canvassed same and made the finding hereinbefore set out. There was no contest instituted before the court. It may be well to repeat in this connection what we said in the Gattis case, *supra*: "The law does not require that the ballots used in a school election be printed, but it does require that they be either printed or written,

There is no such thing as voting orally or conditionally. Section 3 of article 3 of the Constitution requires that, 'All elections by the people shall be by ballot,' and the ballot itself must express the elector's will. The elector himself would not be permitted to testify that, having failed to vote specifically for any candidate for any particular term, he nevertheless intended that his ballot should express his assent that when his ballot had been counted it should be treated as having been cast for the highest candidate for the longest term,'' etc. This election was therefore invalid under the holding in this case. The county court ascertained from the returns made that neither of the candidates for the one and three-year terms was elected.

We are also of the opinion that the county court had the power, and properly exercised it, to call a special election. Section 78 of act 169 of 1931, so provides. It reads as follows: ''Special elections shall be held in school districts when called by the county board of education (now county court), and shall be held by the same officials at the same polling places, and the return shall be made, canvassed and published in the same manner as is provided by law for annual school elections in such district. At such special elections shall be submitted any question that needs to be, or may be, submitted to the electors of the school district.''

Section 93 of the same act provides that, ''Vacancies on the board of directors shall be filled by the remaining directors;'' and it is argued by appellees that this method is exclusive, and shows that the election of directors is not one of the purposes of a special election provided for in § 78. We cannot agree with this argument. Section 93 first provides for six directors for each school district, who shall each serve for three years, or until his successor is elected and qualified. It then provides that vacancies may be filled by the remaining directors. This provision was made for vacancies caused by death, resignation or removal from the district, and not for vacancies caused by a failure of any candidate to receive the highest number of votes for the term for which he was a candidate at any annual school election.

We do not think the lawmakers intended, in case of a tie vote, as is the situation here, that the candidate who was elected could appoint the other two. Moreover § 93 was repealed by § 3, Acts 1933, p. 156. Section 78 is broad enough to cover special elections for school directors, and we hold the county court had the power to call the election in this case, and properly did so, because no candidate for the one or three-year terms was elected at the regular election.

The judgment will be reversed, and the cause dismissed.

HOME INSURANCE COMPANY *v.* BOYCE.

4-3258

Opinion delivered December 18, 1933.

W. K. Ruddell, for appellant.

D. L. King and *Gus Causbie,* for appellee.

BUTLER, J. E. A. Boyce, the appellee, began to work for the appellant company as its agent about the year 1921. The business of the appellant was writing fire insurance, and the appellee represented it in several counties. On the 25th day of October, 1929, the appellant required the appellee to give bond, upon which the other appellees in this case became sureties. Boyce continued as the agent of the appellant until November 8, 1930, when he entered into a contract with Cuthbert Pickren, by which Pickren took over his business as insurance agent, and became obligated to perform serv-

ices as such for the appellant on the same terms and conditions as Boyce had previously worked, and by which contract Boyce was relieved from all liability under policies which had been written after the date of his contract with Pickren.

It is conceded that this contract was made with the assent of the appellant, and that from then on the liability of the sureties on the bond of Boyce was terminated. The appellant brought this suit on November 20, 1931, alleging that Boyce was due it, under the terms of his contract, the sum of $2,100, and that the sureties on his bond were liable therefor in the sum of $1,000, that being the amount named in the bond for which they might be liable because of the default of Boyce. It alleged that the account was complicated, running over a period of years, and prayed that a master be appointed to state the account, and that it have judgment against Boyce in the sum alleged to be due, and judgment against the bondsmen in the sum of $1,000. A master was appointed, testimony was taken, and an account was stated by the master in which he found that there was due the appellant from Boyce the sum of $1,063.80, of which amount the bondsmen were liable in the sum of $70.36, on the theory that the bond was only liable for sums collected by the agent on policies issued after its date.

The court approved the finding of fact of the master, and his conclusions of law, and, among other things, decreed that "the bond is not liable for any policies written before the bond was given, although the notes matured and were not paid until after bond was given, and the agent became liable by reason of the notes maturing and not being paid after the bond was written."

It is our opinion that the question presented is whether or not the declaration of law above quoted is correct. It is well settled that bonds must be construed like any other contract, and the liability of the sureties is to be determined from the language of the bond alone, where the same is not ambiguous. The obligation of the bond pertinent to the question involved is, that the principal "shall duly and properly account for, and pay over to the said company, all premiums, premium notes

and proceeds of such notes coming into his or their hands on or for policies of insurance, and shall pay back to the said company the commission and fees advanced to him, or them, by the said company on all notes which are not paid at maturity; and shall also refund to the said company the unearned commissions on the premiums returned under cancelled policies; and all moneys of the company which may at any time come into his or their hands, or pass under his or their control, from any source whatsoever."

It will be observed that the liability is predicated, not upon the date when any given policy might have been written, but upon the fact that the principal should account to the company for moneys coming into his hands due the company at the time they were received, or for commissions and fees advanced on notes where the same were not paid at maturity, and for unearned commissions on premiums returned where policies had been cancelled. We are of the opinion, therefore, that the court erroneously construed the bond, and that the liability of the sureties depends on whether or not the money due the company came into the hands of the agent, or fees advanced on notes were due to be returned because the notes were not paid at maturity, and unearned commissions were due to be refunded on cancelled policies within the time between the execution of the bond and the date the sureties were relieved from any further liability by reason of the contract made with Pickren, without respect to the date of the policies, as it would be immaterial whether they were issued before or after the date of the execution of the bond.

The judgment of the trial court will therefore be reversed, and the cause remanded with directions to ascertain what notes, if any, came into the hands of the agent within the dates last above mentioned, and it is decreed that such as are still within his hands, if any, be delivered to the appellant company; also, to ascertain what commissions and fees the company advanced to appellee within said dates on notes which were not paid; also, the amount of the unearned commissions on premiums, if any, returned to policyholders by reason of

cancellation of policies, and such other moneys as may be found to have come into the hands of the principal belonging to the appellant company during the life of the bond; and to render judgment against the principal and the sureties for such of said items as have not been paid by the principal, the liability of the sureties in no event to be more than the amount stipulated in the bond.

STANDARD PIPE LINE COMPANY *v.* BURNETT.

4-3245

Opinion delivered December 18, 1933.

T. M. Milling and *Gaughan, Sifford, Godwin & Gaughan,* for appellant.

T. P. Oliver and *McNalley & Sellers,* for appellee.

BUTLER, J. The appellant is a corporation organized under the laws of the State of Louisiana. The appellee is a resident of the State of Arkansas, and the alleged injury out of which this litigation arose was sustained in Union County, Arkansas, on the 19th day of May, 1930.

The appellee alleged in substance that he was in the employ of the appellant company on the 19th day of May, 1930, and on that day was directed by his foreman to go into an oil pumping station of the appellant to assist in cleaning the same; that the station had been flooded by overflow waters which brought and deposited within the station, acids, caustics and other poisonous substances; that appellee was inexperienced and unaware of any danger to be apprehended from the fluids in the pumping station coming in contact with his body, and that he was assured by the foreman, when he inquired if it was necessary to use boots, that there was no danger in removing the water and slush from the basement of the pumping station, whereas appellant knew, or in the exercise of ordinary care ought to have known, that the water and the sediment was dangerous, and would result harmfully to those working therein unless their bodies were protected, and that appellant was negligent in directing appellee to work therein without affording him some means by which he might be

protected from the deleterious fluids; that, because of his working in the pumping station in removing the accumulated water and deposits, the same came in contact with his skin, and that he contracted oil poisoning on his hands and arms, totally and permanently disabling him, to recover damages for which his suit was instituted.

The defense tendered by the answer was a general denial of the allegations of the complaint, and the affirmative defenses of assumed risk and contributory negligence. As a further defense, it was alleged that the appellee had entered into a written contract with the appellant, whereby it was agreed that, in the event of any injury occurring during the course of his employment, compensation should be made under the provisions of the Workmen's Compensation Act of the State of Louisiana. This contract was pleaded as a complete defense to the action, to which a special demurrer was interposed, and sustained over the objections of appellant. From a verdict and judgment in favor of the appellee, the appellant has appealed.

I.

It is insisted that the court erred in refusing to direct a verdict in favor of the appellant; first, because the evidence, viewed in its most favorable light, does not warrant the submission of the case to the jury, as there was no evidence showing negligence on the part of the appellant, or that the water coming in contact with appellee's body while he was engaged in cleaning out the pumping station was the proximate cause of the injury alleged to have been sustained, and that he was aware of whatever danger existed, and was able to judge the probable consequences, as well as his foreman.

The evidence relating to the negligence of the appellant complained of, and as to whether or not, if established, it was the cause of the injury, is in conflict. Without discussing this evidence in detail, suffice it to say that viewed in its most favorable light it tended to establish the fact that, before the date of the alleged injury, the appellee was a healthy man, and had never had any disease of the skin; that he had been in the employ

of oil companies for a number of years engaged in doing general work in the oil fields, which included that of fitting pipes and carpenter work, but that he had never had occasion to work where the conditions were similar to those which existed at the pumping station on the date of his injury, and that he did not know that chemicals from refining plants were likely to pollute the water within the pumping station. There was evidence also to the effect that the appellant's foreman knew of refining plants situated a short distance above this pumping station, and that ordinarily the waste from the same would drain through a depression, but that he also knew that about the time of the injury complained of there had been a good deal of complaint of oil poisoning, and that the waters from the depression through which the waste would usually flow spread out over the territory nearby, and over the pumping station; that the appellee was directed to work in the station and to bale out the accumulation of water and sediment therein, and was assured there was no danger in doing this; that he was engaged in this work for perhaps two days; that within a short time after completing this work his hand and arm began to itch and burn, and in about two or three weeks broke out in small pustules, the infection continuing to spread and increase in intensity until it became such that he made complaint, and was directed to go to a physician who diagnosed his trouble as oil poisoning.

It was also in proof that some persons were not as susceptible to oil poisoning as others, and that one part of a person's skin would be more susceptible to oil poisoning than another part, and that the condition from which the appellee suffered would be produced by contact with caustic chemicals coming from refining stations. Several employees of the appellant, who worked in the station with the appellee, also contracted oil poisoning, while others did not. There is no evidence to show that, between the time of the baling operations and the discovery of the irritation on the hand and arm of the appellee, he worked at any place where he would have been likely to contract oil poisoning, but

that for a time after the date of his alleged injury he worked around the station doing odd jobs, such as cutting grass, fitting pipes, etc., from which there was nothing likely to create the condition to his skin. This evidence is legally sufficient to sustain the verdict of the jury, both on the question of negligence on the part of the appellant, and the lack of contributory negligence of the appellee, and warrants the submission to the jury of the question of assumption of risk.

We recognize, and adhere to the rule announced in *Railway Co.* v. *Henderson,* 57 Ark. 402, 21 S. W. 578, and in *Biddle* v. *Jacobs,* 116 Ark. 82, 172 S. W. 258, that where evidence tends equally to sustan two inconsistent propositions, a verdict in favor of the party bound to maintain one of them against the other is necessarily wrong, and that verdicts cannot be predicated upon conjecture, but that the causal connection between the alleged cause, and the injury said to arise therefrom, must be proved by evidence, and not left to mere speculation. We are of the opinion that these doctrines are not applicable in the instant case, for, while there is no direct proof of the cause of the injury, the evidence establishes circumstances from which these facts may be inferred.

II.

1. To the defense that appellee was precluded from a recovery because of the contract entered into between him and the appellant by which any injury was to be compensated in the manner and in the amounts fixed by the Workmen's Compensation Act of Louisiana, the appellee interposed a special demurrer which was sustained by the court. This ruling, it is strongly insisted, was erroneous on the theory that the contract was a voluntary mutual agreement, fair in its provisions, and which in no way attempted to limit the liability for the injury, and therefore was not against the policy of this State as expressed by the Constitution and § 7147 of Crawford & Moses' Digest, and that to construe the statute last cited as prohibiting the appellant from making a contract of the nature pleaded would be unconstitutional as denying it equal protection of the law, and that it denies

freedom of contract and conflicts with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

This argument is advanced because § 7147, *supra,* limits its application to corporations, except those engaged in interstate commerce, and does not apply to individuals or partnerships. To sustain its contention, the appellant cites *Chicago, etc., Ry. Co.* v. *State,* 86 Ark. 412, 111 S. W. 456, and *Prudential Insurance Co.* v. *Cheek,* 259 U. S. 530, but those cases recognize the fundamental difference between natural and artificial persons and that those provisions in our own Constitution and the Constitution of the United States, by which laws are forbidden denying any person equal protection, or which do not secure equal privileges and immunities, do not relate to corporations, because these do not exist naturally, but are the creatures of law, possessing only such powers as are granted them, and making only such contracts as they are authorized to enter into, and that wherever an act is general and uniform in its operation upon all persons coming within the class to which it applies, it does not come within the prohibition of the Constitution. We have many times upheld the validity of acts relating to corporations, limiting their rights beyond those of natural persons for the reason that a citizen or natural person has the inherent right, independent of any legislation, to contract, while the corporation is clothed only with such power as may be given it by the legislative will, and this may be altered, revoked, or annulled at the pleasure of the Legislature, and terms prescribed under which they may conduct their business, the only limitation upon its power being that it may not interfere with any vested right of the corporation or its incorporators, or violate any fundamental principle of natural justice. On this principle, the Supreme Court of the United States and this court have often upheld the validity of such legislation. *Little Rock & Ft. Smith Rd.* v. *Eubanks,* 48 Ark. 460, 3 S. W. 808; *Leep* v. *Ry. Co.,* 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *McKee* v. *American Trust Co.,* 166 Ark. 480, 266 S. W. 293; *Pru-*

dential Ins. Co. v. *Cheek,* 259 N. S. 530, 42 S. Ct. 516, 66 L. Ed. 1044.

2. We next consider the question as to whether or not the contract relied upon is against the public policy of this State and whether for that reason it is or is not void. As a part of the preamble to the contract the following language is employed: "Employee wishes to be employed by employer, for service in the State of Arkansas as laborer at the rate of 56½ cents per hour, and to continue in said employment as long as is mutually agreeable. Employer *consents to engage employee under the terms, conditions and stipulations hereinafter set out.*"

Section 1 of the preamble recites that the appellant is a Louisiana corporation with its domicile in that State, and that it maintains offices in certain cities situated therein, at one of which the appellee was engaged for services in the State of Arkansas.

Section 2 recites that the corporation is subject in the State of Louisiana to the operation of an act of the General Assembly of that State known as the Workmen's Compensation Act.

Section 3 recites that the corporation has secured permission to do business in Arkansas and voluntarily extends to its employees therein all of the rights and benefits of the Louisiana law.

Section 4 recites that the corporation gives and has given injured employees in Arkansas necessary medical and hospital treatment and has paid the employees compensation in accordance with the terms of the Louisiana law regardless of the question of negligence, or the legal defenses the corporation might have had. By § 5 the corporation says it has paid compensation to injured employees when there was no legal liability under the laws of the State of Arkansas.

Section 7 recognizes that, while extending the benefits of the Louisiana law to its employees in Arkansas, the corporation is liable under the laws of Arkansas to employees injured by the negligence of the agents and employees of the corporation.

Section 8 states that when an employee is injured through negligence of the corporation, in many instances such employee brought suit in the courts of Arkansas for amounts in excess of the amounts allowed by the Louisiana law.

Section 9 states that when the employees were injured through their own fault, they accepted compensation under the Louisiana act.

Section 10 complains that the corporation pays its employees under the Louisiana act when injured through their own fault, yet when injured as a result of its negligence the employees bring suit in Arkansas.

Section 11 concludes that the corporation is paying all injured employees and is not deriving the benefit under the Louisiana act, and § 12 argues that this is unfair.

Section 13 is as follows: "That the employee herein named has been offered the option of working for the Standard Oil Company of Louisiana under the terms, conditions and stipulations of the Louisiana Workmen's Compensation Act, which act requires the payment of certain fixed amounts regardless of legal liability for negligence, and the payment of doctor's bills and hospital fees, up to a stipulated amount; or of working under the laws of the State of Arkansas, which do not require the payment of any damages or the furnishing of medical or hospital services, except in cases of negligence on the part of the employer, and said employee does now voluntarily elect to work for the said Standard Oil Company of Louisiana under the terms, conditions and stipulations of the Louisiana Workmen's Compensation Act, a copy of which is attached hereto and made a part hereof."

Section 14 provides "that in the State of Arkansas no Workmen's Compensation Law is in effect, and the employer is not liable to the employee for injuries sustained by the employee while engaged in his employment, except on account of negligence on the part of the employer, its agents or employees, and that the defenses of contributory negligence, assumed risk, with other de-

fenses, when applicable, may be pleaded by the employer to defeat the claim of the employee for such injuries."

The contract then provides that, in consideration of the things mentioned in the sections noted, and for the mutual benefit accruing to the respective parties, it is agreed "that, should the employee, while in the service of the employer, receive an injury or injuries, compensation therefor shall only be claimed by the employee, and recognized and paid by the employer, in the same amount and in the same manner as is now fixed and determined by the Workmen's Compensation Law of the State of Louisiana, which law, it is agreed, in its entirety, as it now exists, is a part of, and embraced in, this contract."

The remainder of the contract relates to contingencies which may arise in the event the agreement is not binding on the next of kin or the estate of the employee in the event of his death, and concludes with the request to his next of kin, or his personal representative in the event of his death, to make settlement with the employer on the basis of the Workmen's Compensation Act.

It is clear from the sections of the preamble quoted and the recitals of the various sections that, while § 13 professes to offer the employee an option, which he has voluntarily accepted, that is, a free choice of conditions under which he works, there is in reality no alternative, but that he shall work under the provisions of the Workmen's Compensation Act of Louisiana. It does not give him the right of choice between the benefits of the Workmen's Compensation Act of Louisiana and the laws of Arkansas, and it is manifest that, if the prospective employee hopes to secure work, the contract must be signed. This interpretation, we think, is justified by a consideration of the contract in its entirety, and the phrasing of that part of the preamble first quoted, "Employee wishes to be employed. * * * Employer consents to employ employee under the terms * * * hereinafter set out." As we view it, there is nothing voluntary about it. This view is strengthened by the language of the opening paragraph of the contract, quoted *supra*. By that agreement, in the event of injury, the employee is not given the right to

elect to receive compensation under the laws of Louisiana, or to have his rights determined and his compensation fixed by the laws of Arkansas, but those rights must be determined, and compensation fixed, by the laws of Louisiana, without regard to what the employee may desire.

3. It is next contended that the contract in no way attempts to limit liability for injury. To sustain this contention, appellant argues that the fixing of the amount of compensation in no way limits liability for injury, and that to bring it within the inhibition of our laws it must have been such as to have defeated all liability, whereas it fixes a reasonable amount to be paid, if an injury occurs. For these reasons, appellant contends that the doctrine announced in *Pine Belt Lbr. Co.* v. *Riggs,* 80 Okla. 28, 193 Pac. 991; *Little Rock R. Co.* v. *Eubanks,* 48 Ark. 460, 3 S. W. 808; and *Rosener* v. *Hermann,* 8 Fed. Rep. 782, have no application.

The Workmen's Compensation Act, which was made a part of the contract, is an involved and voluminous piece of legislation. Its provisions bearing on the question for our determination are to be found in the sections which relate to the amount of compensation and the procedure to be taken in the event of dispute and failure to agree upon a claim for compensation between the employer and employee. By § 8, the amount of compensation is fixed for an injury causing total disability to do work of any reasonable character at 65 per cent. of the wages, during the period of disability, not beyond 300 weeks; for injury producing permanent total disability, 65 per cent. of the wages previously earned, to extend not beyond a period of 400 weeks, and, where there is partial disability, 65 per cent. of the difference between wages at the time of the injury and wages which the injured employee may be able to earn thereafter, to extend not beyond 300 weeks. Provision is made for certain specific injuries, as for loss of thumb, first finger, toe, hand, arm, etc. We call attention, however, only to the disability allowed for loss of both hands, or both feet, or both eyes, or one hand and one foot, which is 65 per cent. of the wages previously earned, for a period of 400 weeks.

The argument that it was not the purpose of the contract to limit the liability, but to limit the recovery, and therefore was not offensive to the provisions of the act, is well answered by the appellee thus: "What is liability in personal injury cases? Is it not simply the obligation to respond in damages, and is not an attempt to exempt the master from his obligation to so respond, an attempt to exempt him from a portion of his liability?" The answer to the question is obvious. When the remedy is lessened, the liability to that extent is destroyed.

4. Section 18 provides for the procedure in the event of dispute and failure to agree upon the amount of compensation, and that the case be submitted to a single judge who shall hear and determine all of the questions in dispute and render his judgment without the intervention of a jury.

This contract deprives a citizen of this State of an appeal to its courts and remits him for the establishment of his rights and a remedy for his wrongs to a foreign jurisdiction, to be determined by procedure unknown here, and contrary to our traditional policy. Article 2, § 7, of our Constitution preserves in all cases triable in a court of law the right to a trial by jury, without regard to the amount in controversy. No declaration of a settled policy could be clearer than the language there used, and any shift to thwart or nullify the fundamental law cannot be upheld. It is apparent, whatever the argument may be, that the making of the contract was not the voluntary act of the appellee. The practical interpretation of the contract is, no contract, no job. By the contract, an employee's remedy for injury suffered for a negligent act of the employer, while not wholly taken away, is seriously impaired; first, as has been observed, by the necessity of his having to resort to a foreign forum, and, second, by limitation of the amount to be recovered in a sum in many cases which might well be supposed little short of a complete denial of redress. Without regard to the culpability of the employer, the age of the employee, the number of his dependents, or the reasonable expectation of greatly increased earning

power, or of the length of time he may be expected to live, yet, if totally and permanently disabled, his compensation is limited to 65 per cent. of the wages he was earning at the very time of the injury, and can in no event continue beyond a period of 400 weeks, or seven and one-seventh years. This is an arbitrary fixing of compensation, which, in many instances, would be so much less than the damages to which the employee is justly entitled as to amount to a denial of liability. Our Constitution, by § 32, art. 5, has asserted as basic law, and as further declaratory of our settled policy, that "no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or injuries to persons or property"; and by § 6 of art. 12, power is reserved to alter or amend any general laws existing at the time corporations are formed; by § 11, art. 12, foreign corporations are authorized to transact business in this State under such limitations and restrictions as may be prescribed by law. Those limitations and restrictions (§ 1828, Crawford & Moses' Digest) are such as are imposed by law upon domestic corporations. If, then, the General Assembly could not limit the amount to be recovered for personal injuries received, it follows that a creature which owes its existence to a legal birth and operates within the State by its permission, under legal restrictions, may not do that which the law-making body itself cannot do. To leave no doubt regarding the policy of this State, the General Assembly, by act No. 175, *supra,* of which §§ 7144 and 7147 of Crawford & Moses' Digest are a part, provided for liability for injury suffered by an employee of any corporation except those engaged in interstate commerce. The exception was made because corporations of the last-named class, with respect to liability for injuries to its employees, was fixed by the Federal Employers' Liability Act. Section 4 of act No. 175 (now § 7147, Crawford & Moses' Digest) provides that any contract, etc., seeking to exempt corporations from any liability imposed should be to that extent void. The contract, then, being, as we hold, a shift to evade the laws of this State, and in conflict with public policy, the

court correctly sustained the demurrer to that part of appellant's answer which pleaded said contract as a defense to plaintiff's suit. *Little Rock, etc., Ry.* v. *Eubanks,* and *Leep* v. *Ry. Co., supra; Liverpool, etc.,* v. *Phoenix Ins. Co.,* 129 U. S. 397, 9 S. Ct. 469; The Kensington, 263 U. S. 263, 22 S. Ct. 102.

To sum up our conclusions: (a) Act No. 175 of the Acts of the General Assembly of 1913, is not within any inhibition of the National or State Constitutions; (b) the contract pleaded in bar was not voluntarily entered into; (c) it gives the employee no right of election in the event of injury, between the Workmen's Compensation Act of Louisiana and the rights accorded by the laws of this State in which the cause of action arose; (d) it remits the employee to a foreign jurisdiction for the enforcement of his rights; (e) and deprives him of his constitutional right of trial by jury; (f) its practical effect is to exempt the employer of a part of his liability by limiting the amount of recovery, without regard to any except an arbitrary measure of damages; (g) it is not fair in its terms or fairly entered into; (h) the contract contravenes the public policy of this State as expressed by the Constitution, and is void within the meaning of § 7147 of Crawford & Moses' Digest.

It follows from the views expressed that the judgment of the trial court is correct, and it is therefore affirmed.

SWINDLE *v.* ROGERS.

4-3208

Opinion delivered January 8, 1934.

J. C. Brookfield, for appellant.

Walter Killough, for Arkansas Power & Light Company, appellee.

SMITH, J. Appellant says, in her statement of the case, that: "This is primarily an action to recover for damages for personal injuries to a minor, caused by his coming in contact with a live wire" owned and operated by the defendant, Arkansas Power & Light Company. The complaint alleges that the plaintiff is the mother, guardian and next friend of John Henry Donnahoe, her minor child. That she was divorced from her husband, the father of the infant, under a decree of the Crittenden Chancery Court rendered at the January, 1919, term thereof, and that, by the terms of this decree, she was awarded the custody of the child.

She further alleged that the minor was injured by the negligence of the defendant power and light company. Her son and another boy of about the same age were climbing up a tree to get a bird's nest, and there came in contact with a live wire, from which contact her son sustained serious injuries; that her divorced husband took out letters of guardianship in Cross County, where he resided, without notice to her or to the infant. The defendant, Union Indemnity Company, became surety upon the guardian's bond, and was sued in that capacity.

Thereafter, her husband filed suit in the White Circuit Court, the Cross Circuit Court not then being in session, to recover damages for injuries to the boy. An answer was filed, and the cause was heard on the day the complaint was filed.

A judgment was rendered, which recites the appearance of the parties by their respective attorneys, and that "a jury is waived herein, and this cause is submitted to the court sitting as a jury for its consideration and judgment. And the court, having heard the complaint and the answer of the defendant thereto, and the testimony of witnesses introduced in open court, and, being well and sufficiently advised as to all matters of fact and law arising herein, doth find that Jim Donnahoe has been duly appointed, and is, the acting guardian of the said John Donnahoe; that he was duly appointed by the probate court of Cross County, and has given bond as required by law, which has been duly approved. The court further finds for the plaintiff, Jim Donnahoe, in the sum of $1,800 in his own right, and the plaintiff, Jim Donnahoe, as guardian of John Donnahoe, a minor, in the sum of $1,700.

"It is therefore by the court considered, ordered and adjudged that the plaintiff, Jim Donnahoe, in his own right, do have and recover of and from the Arkansas Power & Light Company the sum of $1,800, together with his costs herein; and it is further ordered and adjudged that the said Jim Donnahoe, as guardian of John Donnahoe, a minor, do have and recover for said minor the sum of $1,700 of and from the Arkansas Power & Light Company, together with all costs of suit."

The complaint in the instant case further alleged that the plaintiff in the suit brought in the White Circuit Court had appropriated to his own use the eighteen hundred dollars recovered for his own benefit, and that he had loaned, upon inadequate security, the seventeen hundred dollars recovered for the benefit of the minor to one W. R. Rogers, who was also made a party defendant to the instant suit.

It was alleged that the judgment of the White Circuit Court was collusive and fraudulent, and judgment was prayed against all parties, including the surety on the guardian's bond, for $3,500. It was prayed also that the deed of trust securing the loan which the guardian had made to the defendant Rogers be foreclosed, the debt having matured and being unpaid.

The testimony taken at the trial from which this appeal comes shows that, after being divorced, Mr. Donnahoe married again, as did Mrs. Donnahoe, and no further order of court was made concerning the custody of their child. She regarded herself as the legal custodian of the child under the terms of the divorce decree, although she did not take out letters of guardianship until after the judgment of the White Circuit Court had been rendered.

The testimony was to the further effect that the child was living with his father in Parkin, Arkansas, where he had removed, and had been attending school there from December, 1927, until June 11, 1928, the date of the injury. Mr. Donnahoe paid out of the money which he recovered under the judgment of the White Circuit Court the expenses incident to his child's treatment in the hospital, and the fee also of the attorney who brought the suit for him. Mr. Donnahoe had removed to Arizona on account of the ill health of his present wife, and was made party to this proceeding by the publication of a warning order.

The attorney who brought the suit for the plaintiff in the White Circuit Court testified that he had no knowledge that the wife with whom Mr. Donnahoe was living when the original suit was brought was not the mother of the child, and that he had no intimation that there was any question about Mr. Donnahoe's right to maintain the suit.

Testimony was also offered as to the adequacy of the security which Mr. Donnahoe had taken for the loan of the seventeen hundred dollars, which we do not set out, as we regard this as immaterial in the present litigation.

The plaintiff in the instant case prayed judgment upon the original cause of action against the defendant power and light company, and apparently asks that she be given the proceeds of the former judgment against that defendant.

The boy was thirteen at the time his father was appointed as his guardian, and was eighteen at the time of the trial from which this appeal comes. He testified that he had no notice of the suit brought in the White County Circuit Court, or of his father's application for letters of guardianship. He does not now live with either his father or his mother, but is making his own living. The boy's mother, the plaintiff in the instant case, made application for letters of guardianship in succession in the Cross County Probate Court, and, when that application was refused, she applied for and obtained letters of guardianship in the Crittenden County Probate Court.

After hearing the testimony set out above, together with other testimony, which is not regarded as important in this litigation, the court rendered judgment for all the defendants, upon the theory that the judgment of the White County Circuit Court was conclusive of the rights of the parties, and that the plaintiff's case was without equity, and this appeal is from that decree. The power and light company is the only defendant which has filed a brief upon this appeal.

It is true the judgment of the Crittenden Chancery Court awarding the plaintiff the custody of the child has not been modified, and the mother therefore continues to have that right under that decree. But this decree did not purport to give, and did not give, her control of her son's estate.

Act 257 of the Acts of 1921, page 317, is entitled, "An act to provide for the joint guardianship of minor children by husband and wife," but provides that "nothing herein contained shall be construed to authorize either the father or mother to have the management of the property of any minor not derived from such parent until appointed by proper probate court and duly qualified as now required by law." *Sparkman* v. *Roberts*, 61

Ark. 26, 31 S. W. 742; *Rhea* v. *Bagley,* 63 Ark. 374, 38 S. W. 1039.

The decree for divorce awarded the custody of the child to its mother; but this did not absolve the father from his paternal obligation to support it, nor did it render him ineligible to be appointed guardian of his estate, if that action was deemed to be for the child's best interest. *Shue* v. *Shue,* 162 Ark. 216, 258 S. W. 128; *McWilliams* v. *Kinney,* 180 Ark. 836, 22 S. W. (2d) 1003.

The father appears to have recognized this obligation and to have discharged it by paying the expenses of the child's treatment; indeed, the testimony on this issue is to the effect that this expense and the fee of the attorney, all of which were paid by the father out of the sum recovered for his benefit, exceeded the amount of the recovery on his behalf.

The child not being fourteen years old when the father was appointed guardian, no notice to the child of that application was essential to the validity of the appointment. Section 5010, Crawford & Moses' Digest. However, the validity of the appointment of the guardian may not be collaterally attacked. *Shumard* v. *Phillips,* 53 Ark. 37, 13 S. W. 510; *Hare* v. *Shaw,* 84 Ark. 32, 104 S. W. 931; *Day* v. *Johnston,* 158 Ark. 478, 250 S. W. 532.

Appellant insists that the judgment of the White Circuit Court was collusive, and is void for that reason, and cites as her authority for that contention the cases of *Rankin* v. *Schofield,* 70 Ark. 83, 66 S. W. 197, and *Frazier* v. *Frazier,* 137 Ark. 63, 207 S. W. 215. Such, however, is not the effect of those cases as applied to the facts of this case.

The Frazier case, *supra,* was reviewed in the case of *Kuykendall* v. *Zachary,* 179 Ark. 478, 16 S. W. (2d) 575. It was there held that, where, in a suit on behalf of a minor, it affirmatively appears, from the judgment or decree, that no investigation and determination was made by the court as to whether the minor's interest had been sacrificed by a compromise and settlement of the minor's cause of action, but the court's only action was to embody the settlement in the judgment or decree, such judgment

or decree was void on its face. But the judgment of the White Circuit Court is not open to that objection. On the contrary, it appears from the face of the judgment that the court, before rendering judgment, heard testimony, upon which testimony the judgment was rendered, thus implying that the minor's rights had been protected.

It has never been held that the legal representative of a minor may not effect a binding compromise and settlement of a cause of action accruing to the minor; indeed, the contrary was held in the Kuykendall case, *supra,* where it was said: "This opinion is not to be interpreted as denying the right of the representatives of a minor litigant to effect a compromise of his litigation, for a compromise might in many cases be entirely proper and highly advantageous to the minor; but it does mean that a compromise cannot be effective unless it is first approved by the court as being fair to the minor, and the approval would, of course, imply such investigation on the part of the court as made the fact appear that the minor's interest had not been sacrificed. But in a case, as in the Rankin case and in this, where it affirmatively appears that no investigation and determination were made, and the court's only action was to embody the settlement in the decree, making the settlement the decree of the court, it is void."

The judgment of the White Circuit Court is not void upon its face, and it may not therefore be collaterally attacked in the manner here attempted. If it be a fact that the judgment was fraudulent, the statute provides the remedy whereby it may be vacated, and that remedy must be pursued to obtain the relief. See subdivision 4 of § 6290, Crawford & Moses' Digest. Whether appellant has made a case entitling her to relief under the statute cited is a question which we are not now called upon to decide, as no such proceeding is here involved, this appeal being from the decree of the chancery court of Cross County.

Upon the case made, we think the chancellor was correct in dismissing it as being without equity, and that decree is affirmed.

BARRETT *v.* STATE.

Crim. 3867.

Opinion delivered January 8, 1934.

[redacted]

M. F. Elms, for appellant.

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

SMITH, J. Appellant was tried under an indictment containing two counts, and was convicted upon each of them. The first charged him with the commission of the crime of burglary; the second with that of grand larceny. It is insisted that the testimony is insufficient to sustain either charge, and it is especially urged that the conviction for grand larceny must be reversed for the reason that the property obtained upon entering the house broken into did not exceed ten dollars in value.

The stolen property consisted principally of wearing apparel and a leather hand bag, and the owner stated the aggregate value of all the stolen property was between thirty-five and forty dollars. He was asked the value of the hand bag, as well as that of other articles stolen, and stated that the bag cost $25, but he was not asked, and did not state, what its value was at the time it was stolen. He was asked about the shirts which had been stolen, and stated there were four of these, and that they were worth a dollar each. The owner stated that nine pairs of socks were stolen, worth fifty cents a pair. He also testified that some handkerchiefs and some underwear were taken, but did not state the quantity or value of these articles. Appellant testified that he had one suit of the underwear, and, when asked its value, stated that it was worth "about a dollar or a dollar and a half."

In the case of *Cush* v. *State,* 180 Ark. 451, 21 S. W. (2d) 616, the accused was charged with having stolen cotton worth from five to seven cents per pound, and it was there said that the jury was at liberty to accept any figure between the minimum and maximum value of the property as shown by the testimony. And the jury was warranted here in finding that the value of the underwear was $1.50, it being unlikely that appellant would have overvalued it, in view of the importance of this testimony and its consequences to him. This makes a value of $10, and, if any value is given to the handkerchiefs and the hand bag, an aggregate value in excess of ten dollars was shown, and this is sufficient to sustain the charge of grand larceny. Section 2488, Crawford & Moses' Digest; *Jackson* v. *State,* 73 Ark. 101, 83 S. W. 651.

What we have said about the value of the property stolen is sufficient to dispose of the insistence that the testimony failed to show that a dwelling house was broken into and entered with the intention of committing a felony.

However, the crime of burglary might be complete even though the value of the stolen property did not exceed ten dollars; indeed, it might be complete when the intended felony was not committed at all, as, for instance, in the case of a burglar who, having broken and entered, fled upon having his presence discovered before he had consummated his intention. It is true, of course, that to constitute burglary a breaking and entering must have been done "with the intent to commit a felony." Section 2432, Crawford & Moses' Digest. But it was not insisted at the trial from which this appeal comes that appellant broke into and entered the house with the intention of committing only the offense of petit larceny, which is not a felony.

In the case of *Shaeffer* v. *State,* 61 Ark. 241, 32 S. W. 679, it was held to be error to refuse an instruction upon the trial of an accused for burglary, that if "the defendant did in fact break and enter the house of B. C. Black, with intent to commit petit larceny only," he was not guilty of burglary.

In the instant case, no such instruction was asked, nor does there appear to have been any testimony upon which it could have been based, as appellant made no contention that he intended only to commit the crime of petit larceny. His contention is that he did not commit burglary because the value of the stolen property did not exceed ten dollars.

In the case of *Harvick* v. *State,* 49 Ark. 514, 6 S. W. 19, a burglary conviction was sustained although the property stolen was stated in the opinion to be of a value less than ten dollars. It was there said that: "It was not necessary, in order to complete the crime of burglary, that his anterior intent" (to steal) "should have been consummated." In that case the burglar broke into a barber shop and carried off five or six dollars which he found in a small safe. It was insisted that this money, together with other articles stolen, did not exceed ten dollars in value, and that the crime of burglary had not been committed for that reason. In overruling this contention it was said: "But if there had been no other property" (in the shop) "except that taken, the case would not be altered. The prisoner intended to take all the money there was in the safe. He testified to that fact upon the stand. He did not know that it contained less than ten dollars. His intent was to take more than that sum if he could find it, hence the intent to commit a felony."

The clear implication of that opinion is that the burglar, who has broken and entered with the general intent to steal, may not escape the consequences of his act because of the fortuitous circumstance that his loot was not as valuable as he anticipated it would be. See *Duren* v. *State,* 156 Ark. 252, 245 S. W. 823, and cases there cited.

We conclude therefore that the testimony was sufficient to sustain the conviction upon each count, and the judgment must therefore be affirmed. It is so ordered.

ARKANSAS POWER & LIGHT COMPANY *v.* CROOKS.

4-3269

Opinion delivered January 8, 1934.

Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron,* for appellant.

Tom J. Terral, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant, in the circuit court of Calhoun County, to recover damages on account of personal injuries received by him in a collision between an automobile he was driving and one of appellant's street cars on East 14th Street, in Little Rock, near the intersection of said street with Welch Street, through the alleged negligence of appellant's motorman in running into the automobile he was operating.

Appellant filed an answer, denying any negligence on the part of its motorman in the operation of the street car at the time of the collision, and alleging that the injuries received resulted from the contributory negligence of appellee.

The cause was submitted to the jury upon the pleadings, testimony and instructions of the court, resulting in a verdict and consequent judgment against appellant for $20,000, from which is this appeal.

The issues of negligence and contributory negligence were submitted to the jury on instructions requested by appellant, which were given by the court, and upon instructions requested by appellee and given by the court,

over the objections and exceptions of appellant. We have carefully read the instructions assailed by appellant, and have concluded that the objections and exceptions thereto are not tenable. There are no material conflicts in the instructions given, and, when read as a whole, they present the law applicable to the divergent theories and facts in the case.

The refusal of the court to instruct a verdict for appellant presents the only real issue on this appeal, and that is whether, under the evidence, considered in its most favorable light to appellee, he was guilty of contributory negligence causing the injury.

A summary of the evidence, viewed in the most favorable light to appellee, reflects that he was traveling west on 14th Street in Little Rock in the nighttime, in a borrowed car, in company with his brother and a neighbor, when it became necessary for him to turn south onto the street car track to avoid striking cars which were parked on the north side of said street; that, while on the track, the automobile stalled, or stopped, on account of the engine or motor failing to work; that, while engaged in trying to start same, he saw a street car about a half block away, and beyond the intersection of a cross street, coming toward him at a rapid rate of speed; whereupon he signaled to the motorman by throwing out his arm, holloing and blowing his horn while continuing to start his engine, and, when thus engaged, the street car ran into his automobile and injured the occupants, including himself.

Appellant's contention and argument is that, when appellee discovered the street car approaching rapidly within the distance of one-half block, he should have, as a reasonable prudent man, abandoned the automobile and prevented the injury to his person. It cannot be said, as a matter of law, that this was his duty. It is true that he was in a perilous position, and one from which he might have extricated himself, had he known he could not start his engine and remove the automobile, and had he been able to anticipate that the motorman would ignore his signals and run through the cross street; but

it cannot be said as a matter of law that he knew he could not start his engine, or could have anticipated that the motorman would not heed his signals and slow down or stop. It must not be forgotten that appellee owed a duty to his passengers to protect them by moving his automobile out of the danger zone if possible and prevent injury to the borrowed automobile, as well as a duty to appellant and its passengers to prevent a collision and wreck. Under all the circumstances and facts surrounding the situation, the question of whether appellee acted as an ordinary prudent man would have done was a question for the jury, and not for the court. The following quotation from a Massachusetts court, in case styled *Barnes* v. *Birkshire Street Ry. Co.,* reported in 281 Mass. 47, 183 N. E. 416, is applicable to the facts and circumstances in the case at bar:

"The plaintiff had a right to place some reliance upon the probability of care on the part of the operator of any street car that might come. When the plaintiff took his position in an attempt to move the automobile, its situation was fraught with possible peril to the automobile, to Reynolds and to the motorman and passengers in any such street car. The man of ordinary prudence, by whose supposed conduct under similar circumstances the case of litigants is measured (*LaBrecque* v. *Donham,* 236 Mass. 10, 127 N. E. 537), is not devoid of human instincts and emotions numb to the promptings of friendship and humanity, and anxious only for the safety of his person at all costs. On the contrary, great risk taken to save persons in dire peril had been held consistent with good care (citing cases). Lesser risks may be justified by lesser occasions. There is no absolute safety in life, and the most ordinary acts involve possible danger, and one is not negligent unless he takes greater risks than a man of ordinary prudence would take in a like situation. Mere knowledge that some danger exists is not conclusive of the negligence of one who fails to avoid it. (Citing cases.)"

The facts in the instant case bring it within the general rule announced in Berry on Automobiles, Sixth Edition, vol. 1, page 165, as follows:

"The driver of an automobile or other vehicle stopped for any temporary cause in front of a street car cannot be held guilty of contributory negligence as a matter of law if he does not desert his vehicle, at least until it is reasonably certain that an impact is unavoidable. He has a right to assume that those in charge of the operation of the approaching street car, seeing his predicament, will not recklessly run him down. He has a right to make a reasonable effort to start his vehicle, if it is susceptible of being started, and so save it and its occupants from injury. Whether his acts in so doing or attempting to do were unreasonable and negligent would be a question of fact, which it would be the province of the jury to determine, in view of all of the circumstances of the particular case."

The only question remaining is whether the verdict is excessive. Before the injury, appellee had an earning capacity of from $200 to $300 a month, with an expectancy of 33.2 years. His earning capacity was totally destroyed on account of his injury. His collar bone and three ribs were fractured, resulting in traumatic pleurisy. He suffered the loss of an arm. He suffered great pain as a result of the injury, and was compelled to expend large sums for hospital and doctor's bills.

The sum awarded him was not excessive, but, on the contrary, was a very reasonable amount in view of the actual injuries, and the great pain and suffering endured incident thereto.

No error appearing, the judgment is affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* GREGORY.

4-3255

Opinion delivered January 8, 1934.

Leroy A. Lincoln and *Streett & Streett,* for appellant.

J. F. Quillin and *T. B. Vance,* for appellee.

MEHAFFY, J. On September 4, 1926, the appellant issued its group policy No. 3112-G, insuring the lives of certain employees of the Ft. Worth Stockyards Company of Ft. Worth, Texas, upon certain terms, limitations and conditions therein provided. On the same date it caused to be issued certificate No. 66, which certified that appellee, W. L. Gregory, was insured under the group policy.

This suit was begun in the Miller Circuit Court for $1,050, the appellee alleging that the certificate contained the following:

"This is to certify that, under and subject to the terms and conditions of group policy No. 3112-G, W. L. Gregory, an employee of Fort Worth Stock Yards Company (herein called the employer), is insured for one thousand dollars."

The complaint also alleged that the certificate contained the following:

"The group policy provides total and permanent disability benefits as provided on the last page hereof.

"Total and Permanent Disability Benefits.

"Under the terms of the group policy mentioned on page one of this certificate, any employee shall be con-

sidered totally and permanently disabled who furnished due proof to the company that, while insured thereunder, and prior to his 60th birthday, he has become so disabled, as a result of bodily injury or disease as to be prevented permanently from engaging in any occupation and performing any work for compensation or profit.

"Three months after receipt of such proof, the Metropolitan Life Insurance Company will commence to pay to such employee, in lieu of the payment of the insurance under said policy at his death, equal monthly installments, the number and amount of such installments to depend upon the amount of insurance in force on the life of such employee at such date, as shown in the following table:

"Amt. of Ins.	Number of Installments	Amt. of Each Installment
"$1,000.00	40	$26.25

"Such installment payments shall be made only during the continuance of such disability."

It was further alleged that appellee attained the age of 60 years on August 28, 1931; that from September 4, 1926, to January 25, 1931 he was in the employ of the Ft. Worth Stock Yards Company, and that the certificate was in full force and effect during that time; that, prior to January 25, 1931, his colon became infected; that he was suffering from colitis on January 25, 1931; has continued to suffer from said disease, and will continue to suffer for the balance of his life; that on January 25, 1931, he sustained a rupture in his right side, and that he was totally and permanently disabled within the meaning of the certificate from and after January 25, 1931; and that he was entitled to recover $1,050. He further alleged that he notified appellant of said disability, and made proof thereof during November, 1932, and demanded payment, which was refused. The certificate was attached to, and made part of his complaint.

Appellant filed a motion to make complaint more definite and certain by stating the date that he furnished proof, and by requiring him to attach a copy of said

notice or proof, and the appellee thereupon amended his complaint by interlienation, giving the date of the proof.

The appellant then filed answer, in which it denied all the allegations of the complaint, and alleged in its answer that it issued the group policy and certificate, and that appellee was insured under the group policy. It also alleged that the group policy provided that installments were payable only from three months after the receipt of proof of total and permanent disability, and that appellee was seeking to recover from the date of the injury rather than for the benefits which had accrued from three months after the date of proof. The group policy was introduced in evidence by agreement.

The appellee, W. L. Gregory, testified that he became totally and permanently disabled prior to his 60th birthday. Appellee's application and other written instruments were introduced, which showed that he was a year older than he claimed. The application card showed that he was born August 28, 1870, instead of 1871, but his age was written in the application as 55. Lines were drawn through the 55, and 56 was inserted. Appellee testified that this was done after he signed the application, and without his knowledge or consent; that he knew nothing about it.

Appellant suggests numerous errors, but the principal ground urged for a reversal is the insufficiency of the evidence. It first contends that the evidence is not sufficient to support the verdict of the jury, and that the verdict is contrary to law and evidence. The evidence is ample to show that appellee's disability began on January 25, 1931, and, if appellee was 55 when the policy was issued, this disability, if it began on January 25, 1931, would be before he reached the age of 60 years. It is, however, earnestly insisted that, because the written application showed that appellee's birth was August 28, 1870, and because the report of the physician and letter written by appellee's attorney show that he was more than 60 years of age at the time of the injury, the evidence is insufficient to support the verdict. In other words, it is contended that the written statements made by appel-

lee, and others representing him show that he was more than 60 years of age at the time he claims to have been injured.

The appellant concedes that the jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, but it is contended that in this case the court should consider the testimony and weight in the light of reason, common sense and justice.

The rule is well established that it is the province of the jury, and not the court, to pass upon the credibility of witnesses and the weight to be given to their testimony. A verdict of a jury, based on substantial evidence, must be upheld by this court, although we might think it was contrary to the preponderance of the evidence.

Appellant, however, says that, while it recognizes the rule and the precedents, it is still of opinion that this court has not adopted the scintilla of evidence rule. This court has not adopted the scintilla of evidence rule, but it has adopted the rule that, if there is any substantial evidence to support the verdict, it will be permitted to stand, although it might appear to us to be against the preponderance of the evidence.

The appellee testified positively as to his age, and testified that the figures 55, showing his age, were in the application when he signed it, and that lines had been drawn through the figures 55, and 56 had been inserted. The application itself shows that this had been done, and appellee testifies that it was done after he signed the application.

It is true that in the application the date of his birth was given as 1870. He testifies that this was a mistake, and that it should have been 1871. Nobody disputes this, and the only contradiction of this evidence is other written statements signed by appellee. He could have been mistaken if he gave the date of his birth as 1870. At any rate, this was a question of fact for the jury to determine. It cannot be said that the positive testimony of the appellee and the explanations given by him are not substantial evidence.

The following are some of the cases supporting the rule as to conclusiveness of the verdict of juries: *B. & O. Rd. Co.* v. *McGill Bros. Rice Mill Company,* 185 Ark. 108, 46 S. W. (2d) 651; *White Co.* v. *J. E. Thompson Motor Express Co.,* 182 Ark. 71, 29 S. W. (2d) 674; *K. C. S. Ry. Co.* v. *Sanford,* 182 Ark. 484, 31 S. W. (2d) 963; *S. L.-S. F. Ry. Co.* v. *Bishop,* 182 Ark. 763, 33 S. W. (2d) 383; *St. L. S. W. Ry. Co.* v. *Burford,* 180 Ark. 562, 22 S. W. (2d) 378; *Consolidated School Dist. No. 1* v. *Fitzgerald,* 180 Ark. 840, 23 S. W. (2d) 263; *Walloch* v. *Heiden,* 180 Ark. 844, 22 S. W. (2d) 1020; *Boddy* v. *Thompson,* 179 Ark. 71, 14 S. W. (2d) 240; *Gurdin* v. *Fisher,* 179 Ark. 722, 18 S. W. (2d) 362.

The Supreme Court of Utah announced the rule as follows: "Under our system of jurisprudence it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. * * * When there is a total defect of evidence as to any essential fact, or a spark, a 'scintilla,' as it is termed, the case should be withdrawn from the consideration of the jury." *Cunningham* v. *Union Pac. Ry Co.,* 4 Utah 206, 7 Pac. 795. It will be observed that the court calls the "scintilla" of evidence a spark.

The Illinois court said: " 'A mere scintilla of evidence,' if it means anything, means the least particle of evidence, evidence which, without further evidence, is a mere trifle; and, as the law does not regard trifles, we see no reason why, on such a motion, the court may not adjudge such evidence insufficient in law, and direct a verdict as in cases where there is no evidence." *Offutt* v. *World's Columbian Exposition Co.,* 175 Ill. 472, 51 N. E. 651.

Webster's dictionary defines scintilla, "a spark; glimmer; gleam." It will hardly be contended that the evidence of appellee is a mere scintilla.

The appellant contends that the court should have directed a verdict for it because the cause of action had not accrued. We do not agree with appellant in this contention. The appellant repudiated the contract and denied all liability, and in its answer denied that appellee was employed by the Ft. Worth Stock Yards Company; denied all the allegations about disability; denied that it ever received proof of disability; and, if the action was prematurely brought, as contended by appellant, this fact appeared from the face of the complaint. In appellee's complaint, he alleged the date of his birth, the time that he worked for the Ft. Worth Stock Yards Company, and the date of his disability.

It is true that in the answer appellant admits that it issued the group policy and certificate, but it denies that it was ever in effect, because it says that he was not employed by the Ft. Worth Stock Yards Company.

It is next contended that the court erred in giving and refusing to give certain instructions. We deem it unnecessary to set out the instructions, but, after a careful examination and consideration of the instructions requested and those given and refused, we have reached the conclusion that there was no error either in giving or refusing to give instructions.

The chief objection to the instructions is that the court should have told the jury that he could only recover the amount of installments beginning three months after proof of disability. The suit was for the full amount of the assessments, and we think it was a suit for damages for breach of the contract.

The appellant also contends that the verdict is excessive, but the group policy was introduced in evidence by agreement, and it shows that the number of installments to be paid is 40, and the amount of the installments is $26.25, which aggregates $1,050.

We deem it unnecessary to review the authorities as to what constitutes total and permanent disability. This

court had decided these questions many times, and there is no controversy about what constitutes total and permanent disability.

The measure of damages in cases of this kind would ordinarily be the present worth of the installments. However, in this case, the disability began in January, 1931, and suit was not filed until March, 1933, so that there were already installments from January, 1931 to March, 1933, before suit was filed.

It therefore appears that the judgment as rendered was at least approximately correct; that the difference between the amount of the installments that were not due at the time of the judgment and the present worth of such installments would be less than the interest on the past-due installments.

We therefore think the direction of the court to return a verdict for the $1,050 was not reversible error.

We find no error, and the judgment is affirmed.

DAVIS *v.* GILLIN.

4-3218

Opinion delivered January 8, 1934.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Sam T. & Tom Poe, McDonald Poe, for appellee.

McHaney, J. Appellee, as administrator of the estate of his six-year-old son, Michael Joseph Gillin, sued appellants for the death of his son, caused by being run over by a truck owned by appellant, Johnson, but operated in the business of Johnson by appellant Davis. The accident occurred at 11th and Pike Avenue in North Little Rock, and it is conceded, under such circumstances shown in evidence, as to support the jury's finding of negligence on the part of Davis in the operation of the truck. Trial resulted in a verdict and judgment for $12,500.

For a reversal of the judgment, it is first argued that the court erred in giving appellee's instruction No. 7 on the measure of damages. This instruction, after enumerating various elements of damage which the jury might consider, concludes as follows: "And also for the loss of such sum of money which you may find from the evidence Michael Joseph Gillin, deceased, after he reached his majority, would have contributed to his father or mother during their lifetime, if any." This part of the instruction was objected to specifically, because it permitted a recovery for contributions the infant might make to both the father and mother after he became of age. The court erred in giving said instruction with that clause in it. In *Railway Co.* v. *Davis,* 55 Ark. 462, 18 S. W. 628, this court held that: "In estimating the 'pecuniary injuries' of a father as next of kin, resulting from the death of a minor son eighteen years old, caused by another's negligence, * * * the jury are not bound to confine their consideration to the son's minority, but may take into account the father's expectation of pecuniary benefit from the continuance of the son's life after his majority, where he had manifested an intent to aid his father after that time." Syllabus. But the court further said: "When confined to the case of a child of such tender years as to be unable to maintain itself beyond the parental roof, the argument (that there can be no recovery for contributions after majority) is doubtless sound. It seems to have received the sanction to that extent of this court in two cases which arose under the act of 1875, which, so far as the award of damages in a case like this goes, the court assimilated in those cases to acts like Lord

Campbell's. But, in each of those cases, the child killed was an infant of such tender years that it was incapable of rendering any service or of affording evidence of an intent to render pecuniary aid after majority to its parents. The cases are not authority therefore upon the question in hand. *Little Rock, etc., R. Co.* v. *Barker,* 33 Ark. 350; *St. L., etc., R. Co.* v. *Freeman,* 36 Ark. 41." In the more recent case of *Interurban Ry. Co.* v. *Trainer,* 150 Ark. 19, 233 S. W. 816, this court held that probable contributions of a girl eleven years of age to her parents after her majority could not be considered, the court saying: "She had not reached the age where she had shown herself 'able and willing to make her own living and to contribute out of her earnings to the support of her parents.' Therefore, a recovery for probable future pecuniary contributions to them beyond her minority could not be taken into consideration." The holding in *Ry. Co.* v. *Davis, supra; Memphis, D. & G. Rd. Co.* v. *Buckley,* 99 Ark. 422, 138 S. W. 965; and *St. L., I. M. & S. R. Co.* v. *Jacks,* 105 Ark. 347, 151 S. W. 706, that probable future contributions after majority might be considered, was discussed in the Trainer case, where the court said: "The reason for this holding is bottomed expressly upon the testimony in each of the cases showing that the minor was able and willing to make his own living, and to contribute out of his earnings to the support of his parents. In the last two cases the minors were contributing all their earnings—quite substantial sums—to their parents, and expected to continue to support them as long as they lived. But there is no testimony in this record to warrant an inference that there would be any pecuniary benefit to the parents of this child beyond her minority, and the rule as announced in *Little Rock & F. S. R. Co.* v. *Barker* and *St. L., I. M. & S. R. Co.* v. *Freeman, supra,* must govern."

We think this case in this respect is ruled by those above cited. The little boy was only six years of age, unable to earn anything or to maintain himself beyond the parental roof, and, while he expressed himself as intending to help his parents, the facts do not bring the case within the rule announced in the Davis, Buckley

and Jacks cases. The court therefore erred in giving said instruction, but the error does not necessarily call for a reversal. This question will be further discussed in connection with another assignment of error.

It is said the verdict is excessive. We agree with appellant in this contention. The child was struck by a heavy truck, and the rear wheel passed over the child's body and head. It received a crushing injury to the skull, a fracture at the base of the skull, and other severe and deathly injuries, from which it died a short time afterwards. It was taken to the hospital, but was dead when examined. The physician said it could not have suffered any conscious pain. There was other evidence tending to show some possible conscious suffering, and we are unwilling to say there is no substantial evidence that it did consciously suffer. The jury has evidently found that it did, from the size of the verdict, but the evidence thereof is so uncertain and weak that we are unwilling to sustain it for the full amount. We think we can cure the error in instruction No. 7, heretofore discussed, by limiting recovery for probable pecuniary contributions to such as might have been made during minority and limit them to $2,500 under the rule stated in *Morel* v. *Lee,* 182 Ark. 985, 33 S. W. (2d) 1110. We are also of the opinion that $2,500 for pain and suffering is the maximum substantially supported by the evidence. Other questions are argued in the briefs, but we think these are the only ones to be discussed in view of the disposition of the case.

If the appellee will, within fifteen judicial days from this date, enter a remittitur down to the sum herein indicated, the judgment will be affirmed. Otherwise the cause will be reversed, and remanded for a new trial.

JOHNSON, C. J. I concur in the affirmance of this case, but in none of the reasoning set forth in the opinion of the majority reaching the conclusion. The majority opinion holds that the trial court erred in giving to the jury an instruction on the measure of damages which embodied the idea that appellee could recover for the loss of such sum of money, which the jury might find from the evidence the deceased might contribute to the parents after

he reached his majority, if any. The opinion says: "The court erred in giving said instruction with that clause in it." In support of this statement of the law, the majority cites, *Railway Company* v. *Davis,* 55 Ark. 462, 18 S. W. 628, and *Interurban* v. *Trainer,* 150 Ark. 19, 233 S. W. 816. Neither of these cases lend any support whatever to the opinion. In the Davis case the syllabus reads as follows:

"In estimating the 'pecuniary injuries' of a father as next of kin, resulting from the death of a minor son eighteen years old, caused by another's negligence, under § 5226, Mansfield's Digest, the jury are not bound to confine their consideration to the son's minority but may take into account the father's expectation of pecuniary benefit from the continuance of the son's life after his majority, where he had manifested an intent to aid his father after that time."

It will thus be seen, from the above quotation, that the majority opinion is not supported by the text, because this court squarely held in the Davis case that the jury might take into consideration contributions of the deceased minor to his parents even after his majority. The majority opinion quotes at great length certain language found in the opinion in the Davis case, but it is not necessary to even pause, in reading the opinion in the Davis case, to determine that the language therein used was mere dictum and not at all necessary to the opinion. After all the arguments and reasoning set forth in the Davis case, the court finally reached the definite conclusion that such expected contributions might be considered by the jury in determining the amount of damages to be awarded.

I therefore assert with full confidence that the Davis case is not authority for the position now taken by the court, but on the contrary is full authority for my position in this dissent.

In the case of *Interurban R. Co.* v. *Trainer,* cited by the majority, the opinion expressly holds: "But there is no testimony in the record to warrant the inference that there would be any pecuniary benefit to the parents of the child beyond her minority." In the instant case,

the record reflects that the deceased child, on many occasions, expressed his expectations of taking care of his parents, after his majority. This was testified to by both his father and mother. The testimony further shows that the deceased was a child much above the average for intelligence. His intelligence was such as to attract the attention of Mr. Miller, an executive officer in one of the principal banks of Little Rock. This testimony, together with other facts and circumstances adduced before the jury, warranted it in determining that this little boy would have made contributions to his parents, after he reached his majority, had he lived.

It suffices to say that this testimony definitely distinguishes this case from the Trainer case.

The majority opinion further recites: "The little boy was only six years of age, unable to earn anything or to maintain himself beyond the parental roof, and, while he expressed himself as intending to help his parents, the facts do not bring the case within the rule announced in the Davis, Buckley and Jacks cases."

In the Davis, Buckley and Jacks cases, referred to in the majority opinion, this court expressly approved the doctrine that the jury might take into consideration contributions which might be made by a deceased minor to his parents after he reached his majority. The only difference between the instant case and the three cases, just referred to, is the fact that the deceased had not actually made contributions to his parents prior to his death. Evidently, if the deceased in the instant case had sold a few newspapers prior to his death and had surrendered the proceeds thereof to his parents, the rule would be announced differently.

I cannot agree with such logic. It is and should be a question for the jury to determine, in each and every case, as to whether or not the deceased minor can reasonably be expected to render contributions to his parents after he reaches his majority.

This action was instituted under §§ 1074 and 1075 of Crawford & Moses' Digest. Section 1075, in part, expressly provides, "In every such action, the jury may

give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, etc." It will thus be seen that under the plain terms of the statute no limitation is found limiting the damages to contributions by the minor during minority. This court is now, by judicial construction, doing something that the Legislature never intended. I cannot agree that this court should perform such functions. Neither can I agree that the judgment in this case awarding damages for pain and suffering of the deceased should be reduced to $2,500. Section 31 of article 5 of the Constitution of 1874 provides:

"No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property (c), and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted."

It will thus be seen that, by constitutional mandate, the Legislature is prohibited limiting the amount of recovery in actions wherein death ensues. I heartily agree, of course, that in cases where this court can say that the jury's award of damages is so excessive as to demonstrate prejudice or passion a reduction may be effected, but such are not the facts of this case. This court has many times permitted awards to stand for pain and suffering in excess of the amount here awarded. In the very recent case of *Missouri & North Arkansas Rd. Co.* v. *Robinson, ante* p. 334, this court sustained an award for pain and suffering in the sum of $5,000. In the case referred to, the brakeman suffered pain for only a short interval of time—no greater than was suffered by the child in the instant case. It occurs to me that a child six years of age can and would suffer pain as poignantly as an adult. I can see no line of demarcation. If Robinson suffered pain to the extent of $5,000, then certainly the child in the instant case suffered pain in a like amount.

There are no extenuating facts or circumstances in behalf of appellant in this record. The testimony reflected and the jury so found that the driver of the death

truck could and should have seen the approaching street-car for a distance of five or six blocks; that he knew that the street car would stop at intervening street intersections for the purpose of taking on and disembarking passengers; that he knew that disembarking passengers would necessarily have to pass from the street car to the sidewalk and across the side of the street being traversed by the truck which he was driving. In total disregard of the rights of all others, the driver of the death truck continued at an excessive rate of speed until this unfortunate accident occurred. These facts and circumstances did not require the jury to weigh the award in golden scales. Just such conduct was in the contemplation of the framers of the Constitution of 1874. This was the exact condition of affairs aimed at when § 31 of article 5 of the Constitution of 1874 was promulgated.

Many other cases might be cited in support of my contentions, but it is believed enough has been said to show my views on the subject. The judgment should be affirmed outright.

I am authorized to say that Justices MEHAFFY and HUMPHREYS agree with my views in this dissent.

MISSOURI PACIFIC RAILROAD COMPANY *v.* HENRY.

4-3271

Opinion delivered January 8, 1934.

R. E. Wiley and *E. W. Moorhead*, for petitioner.
Williamson & Williamson, for respondent.

Sam T. & Tom Poe, Meehan & Moncrief, Francis R. Stark and *Rose, Hemingway, Cantrell & Loughborough, amici curiae.*

McHaney, J. Three separate suits were filed in the Drew Circuit Court by tenants of certain lands in Desha County against petitioner, to recover damages caused by the flooding of said lands. It was alleged in each case that petitioner had built a temporary dam across a drainage ditch adjacent to said lands, some time prior to May 17, 1931, for its convenience in repairing a culvert under its tracks through which said ditch drained; and that on or about said date a general rain fell in that vicinity, filling said ditch and causing it to overflow onto their lands; that cotton seed had been planted in certain of said lands, and other had been prepared for planting; and that the overflow water stood on said lands for five or more days, causing the seed to rot without sprouting, and that the land remained in such condition for such a length of time that a replanting failed to produce any crop whatsoever. Damages were prayed in different amounts for loss of money and labor expended in planting cotton seed, loss of crop of cotton which would have been produced but for the flooding thereof, and loss of the use of said lands.

Petitioner demurred in each case on the ground that the court was without jurisdiction because the subject of the cause of action is damage to real estate and appurtenances thereto, and should be brought in the county in which the real estate lies. The court overruled the demurrer, and this action for prohibition followed.

Counsel for petitioner and respondent, as well as counsel as *amici curiae,* have filed exhaustive briefs dealing with the question of whether growing crops are a part of the land, whether a tenant's title is a constructive severance, and whether a tenant may sue for temporary damages to land, all bearing on the question of whether the action is local or transitory. We think these very interesting questions are not involved in this case. The complaints do not allege any damage to growing crops, or that any crops were growing on said land. On the

contrary, the allegations are that cotton seed had been planted on a portion of the land, but that it had not sprouted, the exact language being that "cotton seed planted in said land was thereby killed and prevented from sprouting; and said land, being thoroughly water-soaked and damaged for crop planting purposes by the water standing thereon for the period above described, was not sufficiently dry to make it possible to replant cotton or any other crop thereon until on or about June 1, 1931." In one of the cases it is alleged that 15 acres had been prepared for planting, but was not planted. There is therefore no question of damages to growing crops.

The question is: Do the complaints state actions for injuries to real property? If so, they are local and must be brought in the county where the lands lie. Section 1164, Crawford & Moses' Digest, 4th subdiv.; *Jacks* v. *Moore,* 33 Ark. 31; *Cox* v. *Railway Co.,* 55 Ark. 454, 18 S. W. 630. Even consent cannot confer jurisdiction of the subject-matter. *King* v. *Harris,* 134 Ark. 337, 203 S. W. 847. See *Kory* v. *Dodge,* 174 Ark. 1156, 298 S. W. 505. The seed before planting were personal property, but, when planted and became commingled with the soil, they became a part of it, and were therefore realty. These actions were necessarily for injuries to real estate, for the destruction of the seed, and for the loss of the use of the land. The real estate was temporarily injured by the overflow by preventing the use of the land for the growing of crops. While no permanent injury to the land was claimed, a temporary injury thereto was alleged, in that the dam so constructed held the water thereon for such a length of time that it could not be cultivated in the year 1931. This was a damage to the tenants' interest therein, and resulted not only in the loss of the seed which had been planted, but in the labor of preparing it for seeding, and in the crop that otherwise would have been grown. We do not discuss the measure of damages, as only the question of jurisdiction is before us.

It necessarily follows from what we have said that the Drew Circuit Court was without jurisdiction, the

venue of the actions being in Desha County, where the land is situated.

Let the writ of prohibition issue.

MEHAFFY, J., dissents.

SCOTTISH UNION & NATIONAL INSURANCE COMPANY *v.* HUTCHINS.

4-3360

Opinion delivered January 8, 1934.

C. W. Norton and *R. Lee Bartels,* for petitioner.

Mann & Mann, S. S. Hargraves and *Winstead Johnson,* for respondent.

MCHANEY, J. Respondent, J. P. J. Bruce, a resident of this State, brought suit in the St. Francis Chancery Court against petitioner, a foreign insurance corporation doing business in Arkansas, to restore a lost policy of fire insurance issued by petitioner to said respondent, covering property in the city of Memphis, Tennessee, and for judgment against it for $3,000, the face of the policy, alleging that the property insured had been destroyed by fire and petitioner's failure to pay on demand. Service was had on petitioner by serving H. A. Knight, its agent in Forrest City, where the suit was brought. Petitioner appeared specially, moved to quash the service, and objected to the jurisdiction of the court. It alleged in said motion that, although it was doing business in this State, and had appointed an agent for service in this State, it

had not consented to service on said Knight or any other agent, except as to contracts made or business done in this State; that the contract sued on was executed and delivered in the State of Tennessee, covered property located in said State, the indemnity running to the insured, a resident of said State; that the loss complained of occurred there; that performance was to be had there; and that respondent Bruce is not a *bona fide* resident of this State. The court overruled the motion to quash and dismiss for want of jurisdiction, and petitioner seeks a writ of prohibition.

Petitioner first contends that the court was without jurisdiction, and cites *National Liberty Ins. Co.* v. *Trattner,* 173 Ark. 480, 292 S. W. 677, and *Yockey* v. *St. Louis-San Francisco Ry. Co.,* 183 Ark. 601, 37 S. W. (2d) 694, to support the contention. We held in the former case (quoting from the latter: "That, under our Constitution and statutes relating to foreign corporations doing business in the State and providing for service of process on the Insurance Commissioner in actions against foreign insurance corporations, an insurance corporation of another State cannot be sued in Arkansas on a contract of insurance made in another State with a resident of that State, covering property located therein. The court recognized the general rule that, where a foreign corporation consents, on coming into a State to do business, service on a designated State officer shall be a valid service on the company in all actions relating to any business done by the company while in the State, but said that it does not extend to business transacted in another State with persons living outside of this State." In the latter case, *Yockey* v. *Railway,* we held that an action for personal injuries to a nonresident received in another State might be maintained in this State against a foreign railroad corporation operating a line of railroad in this State, if based on service on an authorized agent in this State.

In the case at bar, Bruce, plaintiff below, is a resident of this State, the complaint so alleges. This distinguishes it from the Trattner case, *supra,* where the plaintiff was

a nonresident. We perceive no valid reason why the jurisdiction of the courts of this State may not be invoked by citizens of this State on contracts entered into by them elsewhere with corporations doing business in this State, after valid service on an authorized agent in this State.

Service was had on a local agent of petitioner in Forrest City, and it is further contended that the service was bad because not on the designated agent. This contention was ruled adversely to petitioner in the recent case of *Pacific Mutual Life Ins. Co.* v. *Henry, ante* p. 262.

Writ denied.

WASSON *v.* CARMICHAEL.

4-3383

Opinion delivered January 8, 1934.

Trieber & Lasley, for appellant.

John W. Newman and *A. F. House,* in behalf of J. H. Carmichael.

BUTLER, J. Proceeding under the provisions of act No. 14 of the Acts of 1933, approved February 6, 1933, the Attorney General appointed J. H. Carmichael as special counsel in the liquidation of American Exchange Trust Company, insolvent, subject to the approval of

the Pulaski Chancery Court, wherein the liquidation was pending. He took this course after act No. 14, which did not carry an emergency section, was no longer in abeyance. In the meantime, the Bank Commissioner, proceeding under the provisions of act 61 of the Acts of 1933, approved February 28, 1933, and to which an emergency section was attached, had employed DuVal L. Purkins as counsel in the said liquidation. The conflict of the Attorney General's appointment with the Bank Commissioner's employment of such counsel was brought for hearing before the chancery court. The question of law was whether act No. 14 was impliedly repealed by the later act No. 61 to the extent of the former's provisions relating to the conduct of the legal affairs of the Bank Department and the selection of counsel for banks and building and loan associations which are in charge of the Bank Commissioner. The chancery court concluded that the provisions of act No. 14 had not been impliedly repealed, and accordingly that a need existed within the contemplation of that act for the appointment of counsel in the American Exchange liquidation by the Attorney General. The appointment of Mr. Carmichael was thereupon approved. The Bank Commissioner appealed, and he thus brings before this court the same question of implied repeal.

It is the contention of the appellant that the two acts, in so far as they relate to the same subject, are repugnant in their provisions to the extent of working an implied repeal of § 4 of act No. 14 of the Acts of 1933.

It is the settled rule, in the construction of statutes, that repeals by implication are not favored, the presumption being that the Legislature has knowledge of prior statutes, especially of those relating to the same subject, and that therefore, if it intended a later statute to repeal a former, it will so declare in express terms. For this reason, courts are reluctant to interpret the last legislation upon any given subject as impliedly repealing a former law relating to the same subject. In order that the later legislation shall impliedly repeal a prior law, there must appear to be an irreconcilable conflict. If the provisions

of the two acts can be harmonized so that both may stand, it is the duty of the court to do this. *Martels* v. *Wyss*, 123 Ark. 184-7, 184 S. W. 845; *Sanderson* v. *Williams*, 142 Ark. 91, 218 S. W. 179.

Applying these principles to the construction of the acts involved, the trial court, in an exhaustive and able opinion, held that there was no conflict between the two acts, that § 4 of act No. 14 dealt with local counsel, and that the provisions of act No. 61, relating to the employment of counsel by the Bank Commissioner, referred to such counsel as would represent the bank generally. In support of the conclusion reached by the trial court, counsel for appellee calls attention to the express amendment of § 5 of act No. 113 of the Acts of 1913, as amended by § 1 of act No. 46 of 1927, which deal only with the authority of the Bank Commissioner to appoint department counsel, and the silence of act No. 61 as to § 54 of act No. 113 of 1913, which related to the employment of counsel as the Commissioner might deem necessary in the liquidation of insolvent banks. The argument is made that the failure to refer to, or amend, § 54 of act No. 113 of the acts of 1913 demonstrates that there was no intention to restore the authority given to the Commissioner prior to the passage of act No. 14 to appoint liquidating or local counsel. They stress the term "local counsel" used in § 4 of act No. 14, and argue that the failure to use such term in act No. 61 is a further indication that it was the intention of the Legislature to leave the appointment of local counsel under the provisions of the former act and restore to the Bank Commissioner authority to appoint departmental counsel only. It is also argued that, since the authority of the Bank Commissioner to appoint attorneys for liquidation and attorneys for general service in his department was derived at different times and under different acts, it is evident that it was not the intention of the Legislature to disturb the provisions of act No. 14 relating to the appointment of local counsel.

Prior to the session of 1933, the Commissioner was clothed with the sole authority, although derived, it is true, at different times and by different acts, of selecting

counsel for general services or for special work in the liquidation of insolvent institutions which he had taken in charge. This authority was exercised without question. Act No. 14, approved February 6, 1933, and becoming effective ninety days after its passage by reason of the failure to enact an emergency clause, was "An act to curtail the State's legal expenses and regulate and restrict the employment of special counsel," and provided in general that the Attorney General should be the attorney for all of the State's officials, departments and agencies, and that, as to office work and advice to such, no special counsel should be employed, but that in the liquidation of insolvent institutions in charge of the State Banking Department, when the need of local counsel was presented to the court having supervision of the liquidation and it deemed local counsel necessary, such might be appointed by the Attorney General, the compensation of such counsel to be fixed by the court; and, where the Attorney General deemed special counsel necessary to prosecute any suit on behalf of the State, or to defend any such, or any action brought against any of the State's officials or agencies, he might, with the approval of the Governor, employ such counsel, and his compensation be fixed by the court in which the litigation was pending, with the approval of the Governor and Attorney General. Also, in cases where the Attorney General should fail to render the services requested and imposed upon him by the provisions of the act, the Governor was authorized to employ special counsel.

That part of the act relating to local counsel for the Banking Department is as follows: "Section 4. Whenever a bank, trust company, or building and loan association shall become insolvent, or for any cause be taken over by the State Banking Department, and the services of local counsel may be needed, such fact shall be presented to the chancery court of the district in which such institution is located, and, if the chancery court deems it necessary for local counsel to be employed, the Attorney General may, in such event, appoint special counsel to be approved by the court or the chancellor. The compensation of such special counsel shall be fixed by the

chancery court permitting the employment of such counsel."

Act No. 61 was approved February 28, 1933, and became effective from and after its passage by reason of the emergency clause attached. That clause is § 6 of the act, and expresses the reasons for its enactment, which are thus stated: "It is hereby ascertained that the divisions of the State Bank Department heretofore separately existing should be consolidated at once in order to effect necessary economics in the conduct of the said department; that defects and omissions in the laws relating to the liquidation of closed banks have developed which should be supplied at once in order to facilitate such liquidations; that existing laws do not provide, or adequately provide, for the security of deposits of certain funds of a public nature; and that there are instances of liquidations and distributions of assets of closed banks which should be investigated at once lest the rights of creditors and stockholders be lost through failure to take prompt action in respect of any irregularities which may have occurred. In consequence of the necessity for prompt action as aforesaid, an emergency exists," etc. * * *

It was provided by § 1 of act No. 61 that, "Upon taking charge of any bank, the Commissioner shall proceed to liquidate its affairs, to institute, maintain and defend suit and other proceedings in the courts of this State or elsewhere, (and) to enforce in this State or elsewhere, if necessary, the liabilities of the stockholders."

Section 2 related to the expense of the liquidation of any bank in charge of the Commissioner, and provided that: "Any and all expenses of the liquidation of any bank of which the Commissioner has taken charge, including the compensation of the Special Deputy Commissioner, counsel, employees and assistants, the expenses of the Commissioner or employees of the State Bank Department incurred in connection with such respective liquidation, and a reasonable allowance toward the general expenses of the said department to equalize the loss of its revenues resulting from the fact that its employees have

been obliged to devote their time in part to such liquidation instead of exclusively to the affairs of going concerns, whence are derived the usual revenues of the said department, shall be fixed by the Commissioner, subject to the approval of the chancery court or chancellor thereof in vacation, and shall be paid out of the funds of the said estate in his charge."

Section 3 provides that: "Said Commissioner shall employ from time to time such assistants, examiners, clerks, stenographers and counsel as he may find necessary to properly and efficiently discharge the duties of his office, and he shall fix their compensation, provided he shall incur no expense until an appropriation shall have been made for the respective purpose, and in no case shall any liability be created for the State in excess of the appropriation therefor, or in excess of the revenues of the State Bank Department. * * * The said counsel so employed, or such of them as the Commissioner may from time to time designate for the respective purposes, shall advise the Commissioner in all legal matters affecting the said combined department, conduct all litigation in respect of institutions subject to the supervision of the said combined department and of which the Commissioner shall have taken charge, and defend all suits brought by reason of alleged acts or omissions of the Commissioner in the discharge of the duties of his office."

It will be observed that § 3 of act 61 is more comprehensive in its terms than the section of the act it amends, in that it not only impowers the Commissioner to employ counsel, but designates the purposes for which they shall serve, which includes all litigation with respect to institutions subject to the supervision of the combined departments of which the Commissioner shall have taken charge. When the emergency clause is considered, it is clear that the services the counsel shall render will relate to the liquidation of closed banks as well as to any other duties assigned to him by the Commissioner, and therefore the counsel provided by § 3 cannot be justly said to be departmental only, but the expression "counsel" with the duties to which they may be assigned is sufficiently

broad to cover all kinds of services, both those performed by a local attorney and special in their nature, and those performed by a general counsel. It would seem therefore that § 3 of act 61 is not only amendatory of previous existing laws relating to the same subject, but is in substitution thereof, and this, although no specific mention is made of previous legislation. The argument that the fact that the words "local counsel" are not used in act No. 61 refutes the contention that § 4 of act No. 14 was intended to be repealed, and that the "counsel" referred to in act No. 61 was only departmental or general counsel, cannot be sustained when the entire provisions of act No. 61 are considered. If counsel appointed by the Commissioner are clothed with the authority of conducting all litigation respecting institutions subject to the supervision of the Commissioner, and which had been taken in charge for purposes of liquidation, or for other reasons, then, clearly, "local counsel" provided for by § 4 of act No. 14 could not act. Therefore the provisions of act No. 61 are repugnant to, and in conflict with, § 4 of act No. 14. That the Legislature meant to clothe the Commissioner with the same powers with respect to the employment of counsel that he had before the session of 1933, and that he was again authorized to employ counsel, a part of whose duties would be to render such services as might be necessary in the liquidation of an insolvent bank, is made clear when the manner in which they are paid for such services and the method pointed out in § 2 of act No. 61 is considered. When counsel are representing the bank generally, they are paid for such services out of the appropriations made for the expenses of the department, but while serving in the liquidation of banks it is provided in the section last noted that the compensation of counsel shall be fixed by the Commissioner subject to the approval of the chancery court or chancellor thereof in vacation, and shall be paid out of the funds of the estate (of the bank in process of liquidation). It may be, as argued, that it is better that a local counsel be employed for work connected with the liquidation of a bank rather than to leave it to one of the regularly employed staff of attor-

neys of the Banking Department, but that was a question solely for the Legislature.

We are of the opinion, when the entire provisions of act No. 61 are considered, together with the reasons calling for the enactment of that legislation as stated in its emergency clause, that it was the purpose of the Legislature to substitute the provisions of that act relating to the employment of counsel in the place of all previous legislation, and that any counsel employed might be directed by the Commissioner to act specially in representing the interests of a bank in liquidation, or any other institution, in charge of the Bank Commissioner, and to perform also any such general duties as the Commissioner might direct. As it appears to us that there is a clear repugnancy between § 4 of act No. 14 and the provisions of act No. 61, *supra,* we hold that the former section was impliedly repealed by the enactment of act No. 61.

The trial court therefore erred in the approval and confirmation of the appointment of the attorney selected by the Attorney General, and the order entered is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MEHAFFY and MCHANEY, JJ., dissent; HUMPHREYS, J., not participating.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* HARDEE.

4-3272

Opinion delivered January 8, 1934.

Rainey T. Wells and *Arnold & Arnold,* for appellant.

J. F. Quillin, for appellee.

BUTLER, J. This is an action on a policy of life insurance issued to the husband of the appellee, Mary Hardee. On the pleadings and evidence adduced, the case was submitted to the trial court sitting as a jury, and, from a verdict and judgment in favor of the plaintiff, the defendant has prosecuted this appeal.

The question for our decision involves the proper construction of a certificate of insurance in a fraternal benefit society. The evidence presented to the court below is not in dispute, and the facts may be thus stated: Jesse Hardee, the husband of the appellee, became a member of the appellant society in 1909 and secured a certificate of insurance for $2,000. He was in good standing on June 13, 1929, when, pursuant to an application he had made on May 28 preceding, his certificate of insurance was canceled by agreement and a new one issued. In his written application for exchange of certificate, he applied for an ordinary life certificate in the sum of $2,000 in lieu of his certificate then in being. The application contained, among others, these provisions: "The new certificate is to become effective on the first day of June, 1929, and to bear the date of June 1, 1923, and age of 45.

"It is understood and agreed that withdrawal values, if any, on the new certificate will be available to me only after I have made payments on said new certificate for three full years from date thereof."

Payment of monthly premium installments was provided in the sum of $5.44 each month, being equivalent

to an annual premium of $62.82. In the application the insured agreed to abide by the by-laws of the society then existing, or as they might be thereafter amended. Other provisions were inserted relating to the condition of the health of the insured, etc., and the application further contained the following:

"Waiver of Old Certificate.

"I hereby warrant that my certificate No. 215,736 has been lost or destroyed; that I have not transferred or assigned said certificate to any person or persons, and, that it is not to my knowledge in possession of any person or persons, and, as a condition precedent to the approval of the within application for exchange, I waive all rights and benefits which I or my beneficiaries may have heretofore acquired or may now have under said certificate, and I hereby cancel the same and agree to forward said certificate to the office of the Sovereign Camp of the Woodmen of the World if it should come into my possession again."

The certificate issued on the application was an ordinary whole life certificate in the sum of $2,000, and, under the head of "Special Provisions and Conditions," § 2, provided as follows: "Cash Surrender, Loan Value, Paid-up and Extended Insurance: After thirty-six monthly payments on this certificate shall have been made, should the member fail to pay any subsequent monthly payment, the member, within three months after due date of the monthly payment in default, but not later, upon written application and legal surrender of this certificate may select one of the following nonforfeiture options: Option (a). The cash surrender value set forth in column 1 of table A on page 3 hereof for the period to the end of which premiums have been paid in full. Option (b). A paid-up certificate for the amount set forth in column 2 of table A on page 3 hereof for the period to the end of which premiums have been paid in full. Option (c). Extended insurance from such due date, for the amount of the death benefit on page 1 hereof, but without total and permanent disability benefits, for the period specified in column 3 of table A on page 3 hereof for the

period to the end of which premiums have been paid in full.

"If there be any indebtedness against this certificate, the cash surrender value set forth in column 1 of table A on page 3 hereof shall be reduced thereby, and the value of the options above named shall be decreased proportionately."

Section 3 of the "special provisions" provided in part as follows: "After thirty-six monthly payments on this certificate shall have been paid, if any subsequent monthly payment be not paid on or before its due date, and if the member has not, prior to such due date, selected one of the options available under the nonforfeiture provisions of this certificate, the association will, without any action on the part of the member, advance as a loan to the said member the amount of the monthly payments required to maintain this certificate in force from month to month until such time as the accumulated loans, together with compound interest thereon at the rate of five per cent. per annum, and any other indebtedness hereon to the association, equal in cash value hereof at the date of default in the payment of the monthly payments. When the said cash value has been consumed in loans advanced and interest thereon, then this certificate shall become null and void; provided that, while this certificate is continued in force under this provision, the member may resume the payment of monthly payments without furnishing evidence of insurability, and the accumulated loans and interest thereon shall become a lien upon this certificate and shall continue to bear interest at the same rate. Provided further, that such lien may be paid in whole or in part at any time by the member, but, if not paid, loan and accumulated interest thereon shall be deducted upon any settlement with the member, or from the amount payable at the death of the member."

The by-laws of the society, which, by the terms of the application and certificate, became a part of the contract, provided for the monthly installment of assessments to be due and payable on or before the last day of the month, and that failure to make the same should

work the suspension of said member from the society, and render the certificate void and terminate the contract of insurance.

Beginning with the month of June, 1929, down to and including the month of September, 1931, the insured paid each monthly installment when due, amounting to a total of 28 monthly payments. He did not pay the installment falling due in the month of October, 1931, or any other installment thereafter, and died on February 24, 1933, in arrears to the society for sixteen monthly premiums the total amount of which, with accrued interest, was $89.82. At the time of the exchange of policies the insured was 51 years old, but because of the fact that under his first certificate he was due a certain amount of accumulated reserves, the rate charged him in the new policy was as of the age of 45 years, and the nonforfeiture values were to be computed as if the certificate had been issued on June 1, 1923, and, after the accumulated reserves had been used for the purposes last stated, there remained a cash reserve of $186.24, which was credited to the new certificate as reserve on June 1, 1929, the date of its issuance. At the end of the policy year, June 1, 1931, the cash and loan value of the certificate amounted to $268.38, up to which time the monthly payments had been regularly made down to and including the month of September following. Hence it appears, and this is admitted, that there was a cash reserve on the old policy which was credited on the new on June 1, 1929, in a sufficient sum with the 28 monthly payments made on the latter to carry it well beyond the date of the death of the insured, and which it was the duty of the society to apply to the payment of monthly premiums and thus prevent a forfeiture of the policy. *Pfeiffer* v. *Mo. State Life Ins. Co.*, 174 Ark. 783, 297 S. W. 847; *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865; *Supreme Lodge, etc.,* v. *Walker,* 181 Ark. 407, 26 S. W. (2d) 94.

But appellant insists that the cash reserve, although it existed at the time of the issuance of the new policy in a sum sufficient with the monthly premiums paid to carry the policy to a date beyond the death of the insured,

was not available for that purpose because it contends that the plain language of the special provisions of the certificate, §§ 2 and 3, *supra,* are to that effect and could only become available after 36 monthly payments were made after the issuance of the new certificate, and that this follows because of the language in "waiver of old certificate," *i. e.,* "I waive all rights and benefits which I, or my beneficiaries may have heretofore acquired or may now have under said certificate." It is argued that, if the beneficiary is to derive any advantage from the reserves which accrued by reason of premium payments on the old certificate, such advantage must be derived by virtue of the terms and provisions of the new certificate, and therefore the reserves accumulated under the old could not be automatically transferred to the new unless its terms so stipulated. We do not agree to this interpretation of the waiver, first, because under the old certificate there was sufficient cash reserve to justify the writing of the insured as of the age of 45 years, and any waiver of the right to the benefit of the balance of the cash reserve remaining would be without consideration. *McClain* v. *Reliance Life Ins. Co.,* 170 Ark. 478-482, 280 S. W. 15.

Second, when all of the language in the waiver is considered, it is manifest that the language quoted above and relied on by the appellant was inserted as a precaution on the contingency that the old certificate which was thought to have been lost might not have been so in fact, and the benefits of the insured and his beneficiaries must have referred to the amount contracted, that is, the payment of the $2,000 on the death of the insured, or cash surrender value of the same, so these might not be asserted by any one in the future in whose hands the old certificate might be. That this waiver was required and executed simply because the old certificate was lost is made clearer by the agreement in it that the same should be canceled, and that it should be forwarded to the home office of the society if it should again come into the possession of the insured; and that the right to the cash reserve was not waived was clearly shown by the fact

that the society, on the date of the new certificate, credited such reserve to it. Thus the parties themselves construed the contract of waiver, and this supports our view. *Mo. State Life Ins. Co.* v. *Ross,* 185 Ark. 556, 48 S. W. (2d) 230.

It is admitted that there was a cash value sufficient to extend the policy beyond the death of the insured, but it is further argued that such value was not available under the terms of the policy. What we have said heretofore sufficiently disposes of this contention. But, even if it should be assumed that the right to the use of the cash reserve was waived, it is our opinion, when the contract is considered, including the application, the certificate with its provisions, and by-laws of the society, the contention of the appellant could not be sustained. It is the settled rule of this court that insurance contracts, like all others, must be considered as a whole, and the several parts construed together, those defining liability as well as those stipulating against it; and that, since the contract was written by the insurer, it must be construed liberally in favor of the insured and strictly against the insurer; if there are any conflicting provisions, those most favorable to the insured must be given effect to effectuate the purpose for which the insured paid his premiums, *i. e.,* that his beneficiaries should be paid the stipulated sum in the event of his death. *American Indemnity Co.* v. *Hord,* 183 Ark. 266, 35 S. W. (2d) 353; *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *Franklin Fire Ins. Co.* v. *Butts,* 184 Ark. 263, 42 S. W. (2d) 559; *Mechanics' Ins. Co.* v. *Inter-Southern Ins. Co.,* 184 Ark. 625, 43 S. W. (2d) 81.

The contention that the clause providing that the nonforfeiture values shall be computed as if this certificate had been issued on the first day of June, 1923, provided merely the method of computation after they had become available, cannot be sustained for the reason that in the application, which is a part of the contract, their availability is not deferred and made conditional to the payment of any number of installments on the new policy, but it is plainly provided that the "new policy is to bear date of June 1, 1923, and the withdrawal values to be

available three full years from date thereof," and from this it necessarily follows that this date was fixed as a basis for making the very computation contended for by the appellee and determined by the court below.

Sections 2 and 3 of the special provisions, where the 36 monthly premium clause appears, are standard clauses inserted in all similar certificates, regardless of the effective date, and are clearly those which control when one is first insured, for it appears from the table of cash and loan values in the policy that there are none until the end of the third certificate year, and it is for this reason, it seems to us, that the 36 monthly premium clause was inserted, and applicable to an original contract of insurance and not to a case where an existing contract was exchanged for another, as in the case at bar.

In *Daly* v. *Sov. Camp, W. O. W.*, twice decided by the Kansas City Court of Appeals of Missouri, and reported in 34 S. W. (2d) 229 and 55 S. W. (2d) 743, and in *Higgins* v. *Sov. Camp, W. O. W.*, decided by the Supreme Court of Alabama and reported in 224 Ala. 644, 141 So. 562, the appellant in the instant case was the party defendant in those, and the policies considered by the courts were the same as the one here involved. The contention in those cases was that, because of the 36 monthly payment clause, the availability of the cash reserve or loan value was deferred until the payment of 36 monthly premiums, was denied by the courts under facts much more favorable to the society than in this case; for it does not appear that in those cases there were reserves accrued under the old policies exchanged for the new, sufficient to keep the latter alive beyond the date of the death of the insured, as in the case at bar. To say the least, such an ambiguity arises because of the provision in the application that the new certificate should bear date as of June 1, 1923, and the reserves be available three years from date thereof, and the provision in the certificate that the nonforfeiture values shall be computed as if the certificate had been issued on June 1, 1923, and the 36 monthly payments provided for in §§ 2 and 3 of the policy, *supra,* before the options in the first-mentioned section and the premium loan in the last should be available, to

leave it doubtful as to whether or not the provisions of §§ 1, 2 and 3 related to holders of old certificates exchanging them for new, and calls for the application of the rule that the doubt must be resolved against the insurer, and for an affirmance of the case on this contention.

Affirmed.

MOORE *v.* BRASEL.

4-3281

Opinion delivered January 15, 1934.

J. Loyd Shouse, A. B. Arbaugh, W. S. Moore and *Jack Holt,* for appellant.

S. W. Woods, for appellee.

JOHNSON, C. J., (after stating the facts). It will be seen from the foregoing statement of facts that appellant is a subsequent creditor seeking to set aside a conveyance made some years prior to the creation of his debt.

This court held in *Jenkins* v. *Smith,* 170 Ark. 806, 281 S. W. 377: "In order for a subsequent creditor to secure the avoidance of a voluntary conveyance, the intention to defraud existing or subsequent creditors must be proved by the facts and circumstances surrounding the transaction, and the presumption of such intention will not be indulged from the execution of a voluntary conveyance."

It will thus be seen that no presumption can be indulged that the gift of the old Brasel farm by James Brasel to his wife was fraudulent in aid of appellant's rights. The intent to defraud subsequent creditors is not

made to appear merely because of outstanding liabilities against the grantor; these liabilities must be shown to have been in excess of all property retained by him. The chancellor found, from the testimony, that James Brasel was solvent at the time the gift was made to his wife, and we think this finding is supported by the testimony. At any rate, we are unwilling to hold that the chancellor's finding to this effect was clearly against the preponderance of the testimony. In this view the chancellor's findings should not be disturbed. *Arnold* v. *McBride,* 78 Ark. 275, 93 S. W. 989; *Eureka Stone Co.* v. *First Christian Church,* 86 Ark. 212, 110 S. W. 1042; *Craig* v. *Craig,* 90 Ark. 40, 117 S. W. 765; *Waite* v. *Stanton,* 104 Ark. 9, 147 S. W. 446; *Nevada County Bank* v. *Sullivan,* 122 Ark. 235, 183 S. W. 169.

Neither is any question of estoppel presented here. Appellant is not only a subsequent creditor, but is a secured one as well. As late as 1931, the security held by him was reasonably worth twice the amount of his debt. Under these circumstances, appellant was not injuriously misled by the outstanding title to this piece of property. Moreover, the title was never in the name of James Brasel; therefore it cannot be said that James Brasel did any affirmative act, in reference to this title, which has misled appellant. The contention that James Brasel told appellant at the time that he borrowed this money that he was the owner of the Hudson farm is flatly contradicted by James Brasel.

The contention that Lulu Brasel permitted her husband to improve the property, collect rents therefrom and to pay taxes thereon are likewise without merit. It was the natural thing for a wife to do to permit her husband to perform these duties. Neither fraud nor estoppel can, or should be, based upon these acts.

It is true, of course, that, where a wife permits her husband to handle her property as his own, holding out to creditors this indicium of ownership, the wife thereby estops herself to assert ownership as against creditors who contract on the faith of this *prima facie* ownership, but such are not the facts of this case.

Neither is the contention that appellant's money was used by James Brasel in extinguishing prior indebtedness, thereby subrogating appellant to all rights of existing creditors, established by the testimony. The chancellor found, and we concur, that appellant's money was not in fact used for such purpose.

Since the chancellor's findings of law and facts conform to the views here expressed, the decree must be affirmed.

BOSTON MOUNTAIN COMPANY *v.* HIMMELBERGER-HARRISON LUMBER COMPANY.

4-3282

Opinion delivered January 15, 1934.

Pace & Davis, Walter L. Pope and *D. T. Cotton,* for appellant.

Oliver & Oliver and *J. Loyd Shouse,* for appellee.

SMITH, J. This suit was brought to foreclose a mortgage given to secure a note, the execution and nonpayment of which is admitted. The question here in issue arose out of the cross-complaint and the answer thereto. It appears that John H. Himmelberger, individually, and as trustee, owned large tracts of land in Newton County, and that the Himmelberger-Harrison Lumber Company, of which he was president, owned other lands. Ben E. McFerrin represented Himmelberger and his corporation in Newton County, and the extent of this agency, whether general or special, is one of the disputed questions of fact in the case. The testimony shows without dispute that McFerrin received a salary of $25 per month, and, in addition, was paid twenty-five cents per acre for land

sales in which he took part. It was McFerrin's duty to pay the taxes, and to report timber depredations. We find it unnecessary to consider or decide what, if any, additional authority McFerrin had.

In August, 1929, McFerrin opened negotiations with Himmelberger for the purchase of certain tracts of land containing 4683.02 acres, and in January, 1930, McFerrin met Himmelberger's son by appointment in Poplar Bluff, Missouri, to consummate their prior negotiations. Out of this conference developed the sale and purchase of the lands which is the subject of this litigation. A contract was entered into by McFerrin, W. R. Foley and N. G. Sawyer, as individuals, to buy the lands for a cash payment of $5,000, two deferred payments of $15,000 each, and a third deferred payment slightly in excess of $15,000. Notes were executed to cover these deferred payments, and two of them were paid, and it is the third and last of these notes which is here involved.

The deed was not made to these gentlemen, as the contract of sale provided, but was made to a corporation which they organized on February 4, 1930, known as the Boston Mountain Company, of which McFerrin became and is president, and notes for the deferred purchase money were executed in the name of the corporation by McFerrin as president.

The cross-complaint alleged that McFerrin was the general agent of the vendor, and in that capacity made representations as to the amount of timber on the lands, which representations induced the contract of sale and were later found to be erroneous, and that there was a very material shortage in the quantity of timber, and credit was asked upon the last note to mature for this shortage. The answer to this cross-complaint raised a number of questions, but we consider only one of them, as we find it decisive of this case.

The testimony on the part of the vendor was to the effect that in this transaction McFerrin occupied the relation, not of an agent of the owner, but that of a prospective purchaser who later became purchaser. We think the testimony establishes this fact, and it is therefore

unimportant to consider the representations which McFerrin made to Sawyer and Foley, his associates.

The decree from which this appeal comes rendered judgment against the Boston Mountain Company for the amount of the note, and against McFerrin individually, and decreed the foreclosure of the mortgage. McFerrin has not appealed from that decree.

It is true the owner made concessions in the price of the lands on account of McFerrin's previous agency, but McFerrin dealt with the owner, not as agent, but at arm's length as a prospective purchaser, and he knew as much or more about the quantity of timber than the owner did. McFerrin testified that he made representations to Foley and Sawyer as to the quantity of timber on the lands, and that his estimates were excessive, but he admitted that the owner of the lands made no representations to him in this respect.

We are confirmed in the view expressed by the minutes of the meeting of the stockholders of the Boston Mountain Company, held February 4, 1930, which recite that "The president (McFerrin) reported that he, together with N. G. Sawyer and W. R. Foley, had negotiated the purchase of 4,683.02 acres of timber land in fee from John H. Himmelberger, trustee, same situated in Newton County, Arkansas," etc. The minutes recite the terms of the payments and the three notes to be executed, and that these were to be secured by a mortgage on the lands, "and further by personal indorsement of Ben E. McFerrin, N. G. Sawyer and W. R. Foley."

It may be said that McFerrin did not profess to have accurate knowledge as to the quantity of timber on the lands; indeed, the lands had not then been surveyed. An inspector was employed and a cruise of the lands was begun, but before it was completed McFerrin was called away to fill another engagement, and the inspection was not completed, although more than half of the lands were inspected. It was later found, after the lands had been purchased and surveyed, that a large quantity of timber had been removed by the owners of adjacent lands who may have been mistaken as to their property lines. At any rate, we have concluded that McFerrin acted for

himself and his associates in the purchase of the lands, and they may not now charge their vendor with the responsibility for his excessive estimate.

We conclude that the chancellor was correct in holding that the cross-complaint was without equity, and that it was properly dismissed for that reason. The decree is therefore affirmed.

OZAN GRAYSONIA LUMBER COMPANY *v.* WARD.

4-3274

Opinion delivered January 15, 1934.

McRae & Tompkins, for appellant.

J. H. Lookadoo, for appellee.

HUMPHREYS, J. This suit was brought by appellee against appellant in the circuit court of Clark County to recover damages for injuries received while assisting in taking up steel rails from a logging railroad, through the alleged negligent failure of appellant to warn the crew in which he was working that the train was going to move forward before giving the move-up signal to the engineer.

Appellant filed an answer, denying the negligence alleged, and pleading as additional defenses the assumption of the risk, contributory negligence and a settlement and release for all injuries received by appellee on account of the alleged negligence on appellants' part.

The cause was submitted to the jury upon the pleadings, testimony and instructions of the court, resulting in a verdict and judgment for $15,000, from which is this appeal.

At the time appellee received his injury, he was a member of a crew of about twenty-five men engaged in taking up steel rails from a log road and loading them on flat cars. An engine and several flat cars were used to haul the rails when taken up and loaded. The train would move forward the length of a rail and stop while the employees would pull the spikes holding the rails on each side with claw-bars and disconnect and load the rails. The men would then throw the claw-bars and other tools used by them under the back part of the last flat car and then load the rails. After the rails were loaded, the train would move forward the length of another rail, in order that they might be taken up and loaded in the same way.

The testimony is conflicting as to whether the custom was to notify the crew that the train was about to move before signaling the engineer to move same forward. The testimony was also in conflict as to whether appellee stooped over to pick up one of the claw-bars about the time the train moved forward or whether he was standing behind the flat car waiting for the customary notice when he was injured. The testimony was also in conflict as to whether one of the claw-bars was raised and shot backward with force, striking appellee on the left cheek, when said bar was run over by the flange of the car wheel, or whether one end was raised up, striking appellee on the cheek, while he was in the act of picking it up before the flat car had time to clear it by moving forward. The end of the claw-bar in question struck appellee on the cheek and caved in the molar or cheek bone, from which injury, according to the testimony introduced by appellee, he suffered great pain and the loss of all earning power. The testimony was also in conflict as to whether appellee settled with, and released appellant from, all damages sustained for the consideration of $200 on the representation of appellant's regularly employed physician that his injury was not a permanent one, but one from which he would entirely recover.

When the case was called for trial, appellant sought a continuance on account of the absence of two of its witnesses, Dr. Cole, who performed an operation on appellee in an effort to raise or elevate the depressed or caved-in cheek bone, and Harvey Robinson, who was the engineer operating the engine at the time appellee was hurt. The motion for continuance on account of their absence contained a statement of what each would swear if present. Appellee admitted that, if present, each absent witness would testify to the statements contained in the application for a continuance. These statements were subsequently read to the jury and treated as evidence in the case. Section 1270 of Crawford & Moses' Digest provides that a trial shall not be postponed on account of the absence of a witness if the adverse party will admit that on the trial the absent witness, if present, would testify to the statement contained in the application for a

continuance. The trial court followed the statute in overruling the motion, and, as appellant was not deprived of the benefit of the evidence of the absent witnesses, we are unable to say that the court abused its discretion in refusing to continue the case until the next regular term of court, which would convene in about two months thereafter.

Appellant also contends for a reversal of the judgment because appellee was behind the last flat car, which was moving away instead of toward him, and that therefore the failure to notify the crew that the train was about to start before signaling the engineer to start same could not have been the proximate cause of the injury. It is argued that he was in the clear, as much so as if the notice had been given him. Perhaps so, as far as being clear of the train, but perhaps not so as far as being out of danger. He was not injured by the train itself, but by a claw-bar which was raised up and shot backward by the forward movement of the train. Appellee testified that, had he known the train was going to move, he would have been on his guard, and would have avoided the injury. Of course, if appellee knew that the train was going to move without the customary notice being given, then the notice would not, and could not, have benefited him, but this was a disputed question of fact for determination by the jury.

Appellant next contends for a reversal of the judgment because appellee's own negligence was the direct and proximate cause of the injury. This would be true if the undisputed evidence reflected that he stooped over and attempted to pick up the claw-bar, prematurely or before the train moved forward, so as to clear the bar. On this issue there was a conflict in the testimony. There was testimony tending to show that he was struck by the bar being shot backward when he was standing up, and at a time when he was not attempting to pick it up.

Appellant next contends for a reversal of the judgment because, though it be conceded that appellee's testimony was true concerning the way in which he was injured, yet it was an accident which appellant could not have reasonably anticipated. The testimony showed that

the tools used in pulling the spikes so that the rails might be loaded onto the flat cars were, under appellant's direction, thrown under the last car, without reference to whether the wheels might run over them when the train was moved; and also that, if run over by the wheels, they might be lifted and moved in any direction. In view of this testimony, appellant should have anticipated and provided against any resultant injury.

Appellant also contends for a reversal of the judgment because the trial court refused to give its requested instruction No. 4, which is as follows: "You are told that no duty devolved upon the defendant to notify the plaintiff or the steel gang before setting the train in motion under the circumstances, and you will disregard his allegation of negligence."

This instruction was peremptory, and was requested on the theory that the customary notice could not have benefited appellee because he knew the train was about to move, or knew it was moving when he was hurt. Appellee testified that he did not think the train would start without notice, so it cannot be said that, under the undisputed testimony, he knew the train was about to start or had started when he was hurt.

Appellant also contends for a reversal of the judgment because the court gave instruction No. 1, requested by appellee, in substance, to the effect that, if they found Dr. C. C. Purtle, the local physician of appellant, who took charge of appellee and treated him for the injury, told him he would recover after a lapse of time and that, relying upon said representation, he settled with and released appellant, and afterwards it turned out that the representations were false, then appellee would not be bound by the release. This court is committed to the rule that a release executed by an injured person, relying on a mistaken statement of the physician of the party responsible for the injury that it was slight and temporary and not permanent, is not binding upon the party making it. *Kiech Mfg. Co.* v. *James,* 164 Ark. 137, 261 S. W. 286. The instruction seems to have been framed upon this rule, and is a correct declaration of the law applicable to the facts in this case, as will be seen from the follow-

ing excerpt from appellee's testimony: "Q. Mr. Ward, how come you to sign that release? A. On what Dr. Purtle told me. Q. And what did Dr. Purtle tell you? A. He told me my face would get well and never cause me any more trouble. Q. Would you have signed it if he had not told you that you were not injured very bad? A. No, sir." It will be noted that the misrepresentation relied upon was one of fact, and not of opinion, so it was unnecessary to show that it was fraudulently made. Misrepresentation of existing facts, though innocently made, will avoid a release induced by it.

Appellant also contends for a reversal of the judgment because instruction No. 1 permitted an avoidance of the release if Dr. Purtle made representations of an existing fact which afterwards proved to be false; whereas instructions Nos. 10 and 11, requested by appellant and given by the court, required appellee to show that the false representations were fraudulently made by Dr. Purtle. It is argued that instructions Nos. 10 and 11 conflicted with instruction No. 1, but, even so, it resulted in no prejudice to appellant. Appellant was not entitled to instructions 10 and 11, so the conflict was immaterial so far as it was concerned. It could not be prejudiced by a conflict between a correct instruction and instructions more favorable than it was entitled to. *Clark* v. *Pickler,* 168 Ark. 818, 271 S. W. 462.

Appellant also contends for a reversal of the judgment because the court gave instruction No. 3, requested by appellee. We find no merit in either the general or specific objections made to it. The instruction is a general statement of the law applicable to the facts and could not in any way have prejudiced the rights of appellant.

Appellant also contends for a reversal of the judgment because the release contains the following clause: "I hereby represent that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries, disabilities and damages, and that no representations or statements about them have induced me to make this settlement."

Such a clause appeared in the release sought to be avoided in the case of *Kiech Mfg. Co.* v. *James, supra,* but this court ruled in that case that, when it appeared that the release was actually induced by representations of the extent of the injury by the party's physician who caused said injury, which representations were not substantially correct, as shown by subsequent developments, then the injured one was not bound by the release.

Appellant also contends for a reversal of the judgment because Dr. Ross, who examined appellee for the purpose of informing counsel for appellee as to the extent of the injury and to testify in the case as an expert, was permitted to testify as to subjective symptoms. No objections were made or exceptions saved to any particular testimony of the doctor, and we are unable to say whether he based his opinion as to the condition of appellee on subjective or objective symptoms.

Lastly, appellant contends for a reversal of the judgment because the verdict was excessive. The testimony introduced by appellee tends to show that at the time of the injury he was an able-bodied man with an actual earning capacity of $1,000 a year; that his life expectancy was 28.91 years; that his ability to earn and work was destroyed by the injury; that his left sinus is entirely gone; that his left eye is turned a little and held wider open than it was, and that his eyesight is impaired; that his upper lip is partially paralyzed and interferes with his speech; that he suffers much pain and is never free therefrom due to a disturbance of the nerves. In view of the destruction of his earning capacity, his long life expectancy, his disfigurement and his pain and suffering, it cannot be said that the judgment for $15,000 is excessive.

No error appearing, the judgment is affirmed.

ARKANSAS GENERAL UTILITIES COMPANY *v.* OGLESBY.

4-3283

Opinion delivered January 15, 1934.

DuVal L. Purkins and *Leffel Gentry,* for appellant.

R. W. Wilson and *W. F. Norrell,* for appellee.

HUMPHREYS, J. The questions presented on this appeal are: first, whether instruction "B", given at the request of appellee, ignored the defense of contributory negligence interposed by appellant to the alleged cause of action; second, whether instruction "C," given at the request of appellee, made the test of care which he should have exercised when confronted by an emergency a matter within his own judgment or within the judgment of an ordinarily prudent man; and, third, whether the judgment recovered is excessive.

Appellee sued appellant for damages on account of personal injuries received from electric shocks while attempting to disconnect his radio from an overcharged insulated cord and the switch on the porch connecting the service line with the house, which cord and line had become overcharged through the alleged negligence of the employees of appellant. Appellant, at the time, was the owner and operator of a water and electrical system at Wilmar, where appellee resided. Appellee was one of its electric patrons.

The testimony introduced by appellee tended to show that, when the high and excessive current or voltage entered his home, he heard a muffled report like a gun, and discovered that the radio was in flames, and that his house might burn; whereupon he caught the line that connected the radio with the socket and snatched it loose from the connection; that the shock partially blinded him; that the blaze entering the house through the wire looked like jagged lightning, and, in order to prevent the house from burning, he ran out on the porch and threw the switch, at which time he received another shock, resulting in painful and permanent injuries.

Appellant's defense of contributory negligence was based upon the fact that appellee took hold of the cord to disconnect the current from the radio and hold of the switch to disconnect the service line from the house.

(1) Instruction "B," requested by appellee and given by the court, which appellant contends ignored its defense of contributory negligence, is as follows: "You are instructed that corporations can act only through their agents, and it devolves upon the defendant company to have some one available to perform its duties to the public, and you are instructed that notice to an employee of defendant of the alleged defective condition of the wire was notice to the company, and, if you find from a preponderance of the evidence that after notice of the alleged defective condition of the wire the defendant, acting through its agents, carelessly failed, neglected and refused to correct the alleged sagging condition of the wire, if you find it was sagging as alleged in the complaint, and you find from the evidence that the action of the defendant in failing to remedy the sagging condition of the wire after notice of same was negligence, your verdict ought to be for the plaintiff; and, provided you further find that the plaintiff was injured as alleged in his complaint as the direct and proximate result of such negligence, and provided further you find that plaintiff was not negligent."

Appellant argued that the effect of the instruction was to submit to the jury the question of whether the proximate cause of the injury was due solely to the acts

of appellant or solely to the acts of appellee, whereas, appellant was entitled to an instruction to the effect that, although it was negligent, yet, if appellee was also negligent or if the concurrent acts were the proximate cause of the injury, appellee could not recover. We do not construe the last proviso in instruction "B," set out above, to mean that before appellant can be excused from its negligent acts it was necessary for the jury to find that the sole cause of the injury was a separate and distinct negligent act of appellee. Certainly the instruction does not say so, and, when read in connection with instruction No. 8, requested by appellant and given by the court, the real meaning of the last proviso is made plain. Instruction No. 8, as given, is as follows: "You are instructed that it was the duty of the plaintiff, at all times, and under all circumstances, to exercise that degree of care for his own safety as would be ordinarily exercised by a reasonable and prudent man under like circumstances and conditions."

When instructions "B" and 8 are read together, they necessarily mean that, if the concurring negligence of appellant and appellee was the proximate cause of the injury, no recovery could be had against appellant. If appellant's construction of instruction "B" is correct, then it was useless to ask instruction No. 9, which was given by the court, and which is as follows: "It is for the jury to determine whether or not the plaintiff was injured, and if you find that he was, and you further find that he was negligent and that his negligence was the sole and proximate cause of the injury, then he cannot recover, and your verdict will be for the defendant."

(2) Instruction "C," requested by appellee and given by the court, and which appellant contends announces an erroneous test of care when fronted with an emergency, is as follows: "If you find from the evidence in this case that the plaintiff was confronted with an emergency or sudden peril which at the time appeared to him to threaten destruction of his property, and that he, acting in such emergency, jerked a cord that connected the radio with the electric socket in his house and pulled the switch on the porch, he is not thereby alone chargeable

with contributory negligence if he, at the time, acted as a man of ordinary care and prudence would have acted under the circumstances, even though he did not act in the most judicious manner, since an act done in an emergency or extreme circumstance is not to be judged by the same rules which are chargeable ordinarily to acts done in cool blood with time and opportunity for the party to consider the reasonableness and the merit of the act he is about to do."

Appellant assails the instruction because same did not leave it to the jury to determine whether a reasonable, prudent person would have believed that there was a threatened destruction of appellee's property, but left it to the jury to determine whether appellee himself thought that there was a threatened destruction of his property. This interpretation might be placed upon the instruction if the words "which at the time appeared to him to threaten destruction of his property" stood alone and without modification, but the entire paragraph, including the words mentioned, was modified by the words "if he, at the time, acted as a man of ordinary care and prudence would have acted under the circumstances." When read as a whole, the instruction necessarily means that the jury must have found that it appeared to appellee, as a reasonably prudent man, that the destruction of his property was threatened.

(3) According to the testimony introduced by appellee, at the time of his injury he was in good health, earning $120 per month, and he had an expectancy of 15.39 years; as a result of the electrical shocks, he was totally and permanently disabled; as a result of the injury, he suffered great physical pain and mental anguish, and would continue to suffer such pain and anguish throughout life on account of being partially paralyzed and blind for all practical business purposes.

The jury seems to have believed this testimony relative to appellee's condition rather than the testimony introduced by appellant to the contrary, and, in view of such finding by the jury, we cannot say that their award of $10,000 is excessive.

No error appearing, the judgment is affirmed.

SPADRA COAL COMPANY *v.* WHITE.

4-3260

Opinion delivered January 15, 1934.

[redacted]

J. H. Brock and *Patterson & Patterson,* for appellant.

J. J. Montgomery and *Reynolds & Maze,* for appellee.

KIRBY, J., (after stating the facts). Appellant contends that the court erred in giving said requested instruction No. 5, set out above, and the contention must be sustained. This instruction requires a higher degree of responsibility from employers than the law warrants, placing on the master in effect the absolute duty to furnish a safe place for his servant to work, while under the law he is only bound to the exercise of ordinary care to provide a reasonably safe place in which to work. It was so held by this court in the case of *Fort Smith-Spadra Mining Company* v. *Shirley,* 178 Ark. 1007, 13 S. W. (2d) 14, wherein an instruction almost identical with the one here was condemned and held to be erroneous.

The error in giving appellee's instruction No. 5 was not cured by the giving of a correct instruction on the point for appellant, said correct instruction necessarily being in conflict with, and contradictory of, said erroneous instruction of appellee's. *St. Louis-San Francisco Ry. Co.* v. *Horn,* 168 Ark. 191, 269 S. W. 576; *Bullman Furniture Co.* v. *Schmuck,* 175 Ark. 422, 299 S. W. 738. "Separate and disconnected instructions, each complete and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole" *Temple Cotton Oil Co.* v. *Skinner,* 176 Ark. 17, 2 S. W. (2d) 676.

Neither was appellant required to make a specific objection to the instruction, as it was inherently erroneous; a general objection being sufficient to reach the defect. *First National Bank* v. *Peugh,* 160 Ark. 517, 255 S. W. 4.

There are some other objections to the instructions which we do not notice, since they do not appear to have been preserved in the motion for a new trial.

For the error committed in the giving of appellee's requested instruction No. 5, the judgment is reversed, and the cause remanded for a new trial.

BROOKS *v.* RANDOLPH STATE BANK.

4-3284

Opinion delivered January 15, 1934.

[redacted]

Hal L. Norwood, Attorney General, *Geo. H. Steimel* and *E. Newton Ellis,* for appellant.

H. L. Ponder, for appellee.

KIRBY, J., (after stating the facts). The learned chancellor held that, under the ruling of this court in the case of *Taylor* v. *Hale,* 186 Ark. 873, 56 S. W. (2d) 428, this was an attempt to collect taxes on shares of stock as provided by § 9944, Crawford & Moses' Digest; but, in the absence of a showing that the Commissioner in charge of the insolvent bank had assets in his hands belonging to the stockholders with which to pay delinquent taxes assessed against such shares of stock, there was no liability on the part of the Commissioner to pay the delinquent taxes.

The chancellor obviously misconceived the purpose of this suit, as disclosed by his memorandum opinion holding it to be one to collect taxes assessed against the shares of capital stock of the insolvent bank, when the complaint and amendment thereto clearly shows that it is a suit to collect taxes assessed against the personal property of the insolvent bank subject to taxation in accordance with the statute. Section 9853, Crawford & Moses' Digest.

Under said statute, the property of the insolvent bank continued subject to taxation notwithstanding the bank's insolvency. Said property was regularly and duly assessed by the deputy bank commissioner in charge of said bank, and the complaint shows there were funds on hand belonging to the said bank sufficient to pay the taxes. The complaint alleged further that demand was duly made by the collector for payment, and same was refused by the Deputy Bank Commissioner in charge of said insolvent bank; that the property against which the taxes were levied had been sold and disposed of, converted into money and was beyond distraint by the officer, and he was entitled therefore to bring the action in equity to follow and impound the proceeds arising from the

disposition and sale of the property in the hands of the defendants or in possession of any one of them.

Having sold the property upon which the State's lien for taxes existed, and having on hand an amount sufficient to pay the taxes, it was the duty of the Bank Commissioner to pay same, and the chancellor should have required him to do so, and erred in holding otherwise and sustaining the demurrer to the complaint. See 34 Cyc., page 347, title "Receivers."

For the error designated, the decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

MISSISSIPPI RIVER FUEL CORPORATION *v.* YOUNG.

4-3264

Opinion delivered January 15, 1934.

Harry L. Ponder, Owens & Ehrman and *John M. Lofton, Jr.*, for appellant.

W. F. Smith, for appellee.

MEHAFFY, J. The appellant, Mississippi River Fuel Corporation, owns a pipe line through which it transmits natural gas from the Monroe field in Louisiana, through the State of Arkansas, to St. Louis, Missouri. The line was constructed in 1929.

The appellee, E. E. Young, was a fireman on the Missouri Pacific Railroad, and was going north near Judsonia, Arkansas. The pipes to be used in the construction of the lines were shipped from some point in Pennsylvania to the appellant, at Judsonia, and were being unloaded when one of the heavy pipes fell across the railroad track. Appellee, seeing the pipe, thought there would be a derailment, and, to avoid this danger, jumped from the cab of the engine and was injured.

This suit was brought against the appellant to recover damages for the injury, and appellee alleged that the pipe was being unloaded and thrown across the railroad track by appellant's servants; that it was the negligence of the appellant and its servants that caused his injury.

Appellant denied the allegations in the complaint, and further answered, alleging that it was not engaged in laying the pipe line at the time of the injury of appellee; that it had nothing to do with the unloading or laying of said pipe; that the construction work was being done by an independent contractor; that appellant did not exercise any control or supervision over the unloading of said pipe; that it had contracted with a contractor for the construction of the entire line, and that the contractor, in the performance of said contract, unloaded, hauled and laid said pipe; that the contractors had sublet the loading; and that appellant's servants and agents had no connection with the unloading, and were therefore not liable.

There was a verdict and judgment against appellant for $1,500, and the case is here on appeal.

It is not contended that appellee was guilty of any contributory negligence, and it is not contended that the persons who unloaded and threw said pipe on the track were not guilty of negligence. The only question for our consideration is whether there is sufficient evidence to show that the appellant was responsible for unloading the pipe; in other words, whether the pipe was being unloaded by appellant or by an independent contractor. If the pipe was being unloaded by appellant, it is liable for the injury. If, however, the appellant has shown that the unloading was being done by an independent contractor, over which it had no control, it is not liable. This is the only question in the case.

It is admitted that the appellant owned the pipe and the pipe line; that the pipe was shipped from Pennsylvania to Judsonia, and delivered to appellant there; the receipts for the pipes, which were consigned to appellant and delivered to it were signed by J. G. Reece, by W. H. C.; that W. H. C. was on the ground, and did the signing for the Mississippi River Fuel Corporation, the consignee.

It is contended, however, that the appellant entered into a written contract with Ford, Bacon & Davis, contractors, to do the construction work on the line; that the appellant received the pipe at Judsonia and turned it over to the contractors, who were to be responsible for the unloading, hauling and constructing the line, and that Ford, Bacon & Davis sublet to Williams Bros., and that Williams Bros. sublet the job of stringing the pipe along the right-of-way to the firm of Tibbetts & Tibbetts.

H. B. Lowther testified that Reece was employed by the Mississippi River Fuel Corporation, and the receipts for the pipes were signed "J. G. Reece, by W. H. C." It is, in fact, undisputed that Reece was in the employ of the appellant. Lowther, however, testified that there was no one in the employ of appellant with initials W. H. C. He also testified that the work was under a written contract, and that he had had possession of the contract, but did not have it with him. His testimony was then objected to because it was contended that the

contract, if there was a written one, was the best evidence. In this we agree with the appellee.

The fact being admitted that the appellant was the owner of the pipe line, was having it constructed, that the pipe was shipped to and delivered to it to be used on the pipe line, raises the presumption that the persons engaged in unloading and stringing the pipe were working for the appellant. The appellant, owning the pipe line, shipping the pipe to itself, cannot escape liability without showing that it was having the line constructed in such a manner as to relieve itself of liability for the negligence of the persons doing the work. The burden was upon it to show that the work was being done by an independent contractor.

When the person employed is in the exercise of a distinct and independent employment and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for the negligence of the servant does not exist. We recognize the rule that where one person contracts with another to do and perform certain work or labor, and the person for whom the work is done has no control or management thereof, the one who undertakes the work becomes an independent contractor.

When one relies on a written instrument and fails to produce the instrument when called for by the other party, or where objection is made to the testimony introduced as to the contents of the written instrument, and the one relying on such instrument fails to produce it, the presumption is that the production of the instrument would disprove the contentions of the party relying on such instrument.

In this case, the appellant, relying on a written contract to show that the work was being done by an independent contractor, had the burden of proving this, and its failure to produce the written contract raises the presumption that it would not support appellant's contention.

"Where it is apparent that a party has the power to produce evidence of a more explicit, direct and satisfac-

tory character than that which he does introduce and relies on, it may be presumed that, if the more satisfactory evidence had been given, it would have been detrimental to him, and would have laid open deficiencies in, and objections to, his case which the more obscure and uncertain evidence did not disclose. * * * Failure of a party to call an available witness possessing peculiar knowledge concerning facts essential to a party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness would naturally be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party." 22 C. J. 115-116; Wigmore on Evidence, vol. 1 (2d ed.), 584 *et seq.; Lynch* v. *Stephens,* 179 Ark. 118, 14 S. W. (2d) 257.

Appellant here relies on a written contract, making the firm of Ford, Bacon & Davis an independent contractor, which, if true, would be shown by the written contract. Oral testimony as to the terms of the written contract was improper, and the failure of the appellant to introduce in evidence the written contract raises an inference that the contract would not support appellant's contention. Appellant relies solely on the written contract.

The statute provides that, if either party should rely on any deed or other writing, he shall file with his pleading the original deed or writing, if in his power, or a copy thereof. Section 1223, Crawford & Moses' Digest.

"Mere withholding or failure to produce evidence, which, under the circumstances would be expected to be produced, and which is available, gives rise to a presumption less violent than that which attends the fabrication of testimony or the suppression of documents in which other parties have a legal interest; but the courts recognize and act upon the natural inference that the evidence is held back under such circumstances because it would be unfavorable." Jones on Evidence, vol. 1, 152; see also notes on page 582 of 34 L. R. A.; *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. (2d) 84.

The evidence proving that the negligent party was the servant of the appellant is not very strong, but, when any party constructing a pipe line or work admits that it owns the pipe line and that it is having it constructed, the presumption is that the persons performing labor in the construction of the work are the servants of the person owning the property, and having the work performed. At any rate, we are unwilling to say as matter of law that the secondary testimony is sufficient to destroy the presumption created by appellant's ownership and possession at the time of the injury. It is quite possible that the only way that proof could be made of the relation of master and servant would be to show that the master was having the work done, and that the servant was doing the work which the master was having done, and this evidence would be sufficient to show the relation, unless the master introduced evidence showing that the work was being done by an independent contractor. The jury could have found under the evidence in this case that the work was being done by an independent contractor. It did not so find, however, but found against this contention of the appellant, and this finding is conclusive here. We find no error, and the judgment is affirmed.

ARKANSAS GENERAL UTILITIES COMPANY *v.* SHIPMAN.

4-3286

Opinion delivered January 15, 1934.

DuVal L. Purkins and *Leffel Gentry,* for appellant.

C. T. Sims and *George H. Holmes,* for appellee.

MEHAFFY, J. This suit was begun in the Drew Circuit Court by appellee against the appellant to recover damages in the sum of $5,000 for personal injury, alleged to have been caused by the negligence of appellant.

The appellant operates an electrical system at Wilmar, Drew County, Arkansas, and it is alleged that it maintained an electrical transmission line, conveying 33,000 volts of electricity near appellee's home, and also a service line of 110 volts; that on July 3, 1932, one of the 33,000-volt wires fell across the 110-volt wires, causing an unnecessary, excessive and dangerous amount of electricity to be transmitted into the residence of appellee, and into the light and radio connections in said residence; that, as a result, the radio was burned and blazed up, and appellee, in order to save the residence from being burned, took hold of the insulated cord which connected the radio to the 110-volt service line, and broke the connection by separating the plug, and that when she did so, there was a powerful electric arc therefrom, which damaged her eyes, and the current entered her body, causing injury to her head, eyes, heart, muscles and nerves. It was alleged that appellant was negligent in erecting and maintaining the wire carrying 33,000 volts of

electric current which broke and fell upon the 110-volt wires, connected with the residence of appellee; that, in erecting and stringing the wire upon the poles, said wire was stretched so tight that the strain and tension thereon was so great that said wire was pulled in two. It is also alleged that appellant did not exercise reasonable care in making inspection, and that, if it had it would have known of the strain upon the wire.

Appellant filed answer, admitting the ownership of the 33,000-volt transmission line and the 110-volt distributing line, but denied all allegations of negligence, and denied that appellee received any injuries, and alleged that, if appellee was injured, it resulted from her own negligence.

There was a verdict and judgment in favor of the appellee against the appellant for $2,093.08. The case is here on appeal.

There is no dispute about the transmission line, which carried 33,000 volts, breaking and falling on the other wires. There is a sharp conflict in the evidence as to the injury, and also contention is made by appellant that appellee was guilty of negligence herself, which caused the injury. It would serve no useful purpose to set out the testimony. It is in conflict on all matters of fact.

The evidence showed that there were pennies in the fuse box, and the appellee's evidence shows that appellant's representatives knew of this before the injury. This evidence is also disputed. No one testified as to how much voltage went into the house. The wires had been there several years, and one witness testified that he inspected the wires 60 days before the injury.

Witnesses for appellant testified that it would be physically impossible for the line to break under strain because this break happened in the summer time, and breakage of wires drawn too tight would occur in the winter months. Several witnesses also testified that, in their opinion, the transmission line was struck and severed by lightning. No one saw the line struck by lightning, nor did any one testify about lightning on that day.

Appellant first contends that the case should be reversed upon the opinion in the case of *Dierks Lumber & Coal Co.* v. *Brown,* 19 Fed. (2d) 732. In that case the court held that the doctrine of *res ipsa loquitur* applied in a case where the evidence showed that a current of electricity of high voltage, unnecessary, unsafe and unsuitable, passed into the store over the power company's wires and caused injury. The breaking of the 33,000-volt wire in the instant case, breaking and causing high current of electricity to enter the home of appellee, causing injury, speaks for itself, and makes a *prima facie* case of negligence. The court further said, in the case relied on by appellant: "If no further evidence appeared in this case than circumstances showing that an excessive current of electricity of high voltage, unnecessary, unsafe and unsuitable for the purposes of the store, was transmitted over defendant's wires into the store, and that plaintiff suffered injury therefrom, such circumstances would point to negligence and be sufficient, no facts or circumstances being shown to disprove the same, to take the case to the jury. As the Supreme Court said in the Sweeney case, *supra* [228 U. S. 233, 33 S. Ct. 416]: 'The circumstances are evidence of negligence.' "

Of course, the presumption arising from the happening of the accident may be rebutted, and in this case the appellant undertook to rebut this presumption by showing that it had inspected the wires, and by introducing evidence tending to show that the high voltage wire was struck by lightning. These were facts, however, for the jury to determine.

Appellant next cites *City Electric St. Ry. Co.* v. *Conery,* 61 Ark. 381, 33 S. W. 426. It is contended that the test of the duty is announced in this case. The court, after stating the high degree of care required of one controlling electric current, said: "This fact being established, the next question is, upon what duty of the appellant to the appellee can this action be based? The answer to it is, upon the duty enjoined by the rule which requires every one to so use his property as not to injure another. The applicability of this rule may be shown

by many illustrations. One is where an owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure."

The court then, after citing other illustrations, continues: "This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms and wires and other apparatus along streets and other highways. They are required to do so for the protection of persons and property. If they negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damage for the wrong done, if the party injured is guilty of no culpable negligence contributing to the injury."

We do not agree with appellant that it was the duty of the appellee to show that transmission wire broke because it was stretched upon the poles so tight that the strain and tension thereon pulled the wire in two. The circumstances and the breaking of the wire is evidence of negligence.

The appellant argues at length that the evidence is insufficient to sustain the verdict. This court has many times held that the jury will not be permitted to guess and speculate, but, where there is any substantial evidence upon which to base a verdict, it cannot be disturbed by this court.

If the evidence had established the fact that the wire was struck by lightning and severed within such a short time before the accident that the appellant could not have repaired it by the exercise of ordinary care, the appellant would not be liable; but whether the evidence establishes this fact was a question for the jury.

Objection was made by appellant to some of the instructions, but these objections are not argued in its brief.

"The duty of an electric company in reference to keeping its appliances in safe condition is a continuing one. Not only must it exercise a high degree of care in the original selection and installation of its electric ap-

paratus, but thereafter it must use commensurate care to keep the same in a proper state of repair. The obligation of repairing defects does not mean merely that the company is required to remedy such defective conditions as are brought to its actual knowledge. The company is required to use active diligence to discover defects in its system. In other words, an electric company is bound to exercise due care in the inspection of its poles, wires, transformers and other appliances." Curtis on Electricity, 699; *Ark. Power & Light Co.* v. *Cates,* 180 Ark. 1004, 24 S. W. (2d) 846.

"A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have a right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such condition, to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in this condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse the company for failure to keep their wires perfectly insulated." 1 Joyce on Electricity, 735; *Duncan Elec. & Ice Co.* v. *Chrisman,* 59 Okla. 67, 157 Pac. 1031; *Ark. Power & Light Co.* v. *Cates, supra.*

We think the evidence was sufficient to submit the questions of fact to the jury as to the negligence of the appellant and the contributory negligence of appellee. On all the issues of fact where evidence was introduced, the testimony was in conflict. All of these questions were for the jury, and not the court.

We find no error, and the judgment is affirmed.

HEMBY *v.* STATE.

4-3276

4-3316

Opinion delivered January 15, 1934.

George R. Steel and *Pinnix & Pinnix,* for appellant.

Tom Kidd and *Alfred Featherston,* for appellee.

McHANEY, J. This action originated in the county court of Pike County, where a complaint was filed against appellant, a boy eighteen years of age, charging him with being the father of a bastard child theretofore delivered of Cornelia Cornelius, a girl seventeen years of age. Trial in the county court resulted in a finding and judgment that appellant was not the father of said child. An appeal was prosecuted to the circuit court, where a jury trial was had, which resulted in a verdict that appellant was the father of said child, and it was adjudged that he forthwith pay to said girl "the sum of $50 for the lying-in expenses, and the further sum of $10 per month for each month dating from the birth of said child until it arrives at the age of fourteen years, and that defendant immediately enter into a bond to the State of Arkansas in the penal sum of $300, with good and sufficient security to be approved by the judge of this court, conditioned to be void if said Tommy Hemby, his executors or admin-

istrators, shall indemnify each county in this State from all costs and expenses for the maintenance or otherwise of such child while under the age of fourteen years, and for the payment of the monthly dues hereinbefore adjudged to be paid; and that all costs of this proceeding be by the defendant immediately paid, and it is further ordered that defendant be remanded to the jail of Pike County if said sum is not paid and bond executed in thirty days from date, and there be by the jailer safely kept until all moneys now due the prosecuting witness, Cornelia Cornelius, be paid, and the bond herein ordered to be made be furnished and approved by this court. And the court doth find that the sum of $210 is already past due on the monthly dues herein adjudged to be due, for which judgment is rendered against defendant, on which execution or other process may be issued, in addition to commitment to jail.'' Case No. 3276 is an appeal from that judgment.

Thereafter *habeas corpus* proceeding was instituted in the chancery court, seeking the release of appellant from the order of commitment. The chancery court dismissed the petition for want of jurisdiction, and case No. 3316 is certiorari to the Pike Chancery Court. Both cases have been consolidated for hearing in this court. In view of the disposition we make of the matter in the former, it becomes unnecessary to discuss the latter.

While the evidence tending to show that appellant is the father of said child is very unsatisfactory, depending almost entirely upon the evidence of the prosecuting witness, we are of the opinion, after careful consideration thereof, that there was sufficient evidence to take the case to the jury, and its finding, based on substantial evidence, is conclusive in this court.

The serious question in the case, and the one that has given us most concern, is whether, under the undisputed facts in the record, the court erred in committing appellant to jail until he had paid the $210 adjudged against him and executed a bond, conditioned as heretofore set out.

Section 777 of Crawford & Moses' Digest, as amended by act 111 of 1927, p. 310, empowers the court

to commit the accused person to jail until the amount adjudged against him shall have been paid with costs, and to require bond conditioned as aforesaid. Section 778, Crawford & Moses' Digest, reads as follows: "If such person shall refuse or neglect to enter into bond with securities above provided, the county judge shall commit him to the jail of the county, there to remain until he shall comply with such order, or until he shall be otherwise discharged according to law." Under these sections of the statute, the court made the order above quoted. The undisputed facts in this record show that it was impossible for the appellant to comply with the order of court above quoted. The facts show that appellant is a boy eighteen years of age, living with his father on the farm; that he earns no money, and is supported by his father. He earns his board and clothes by his work on the farm, and is sent to school by his father at Delight. His father is a small farmer owning only a small amount of property of any kind. Appellant testified that he attempted to comply with the order of the court, but was unable to borrow the money to pay the amount of the judgment against him, or to get anybody to sign his bond who could qualify for the amount thereof. There is no evidence contradicting this testimony. The question then is, does the court have the power to commit for an indefinite length of time for failure to pay the amount adjudged against him and for failure to make the bond? The case of *Land* v. *State,* 84 Ark. 199, 105 S. W. 90, is quite similar to the case at bar. In that case the court, speaking through the late Chief Justice McCulloch, said: "But it is said that where the accused is unable to comply with the order the result is to imprison him for an indefinite length of time, perhaps for life. This, of course, depends on his ability or inability to comply with the order of the court. We have no such question before us in this record, as no effort was made by the appellant to show that he was unable to pay the lying-in expense and costs, or to give bond for the payment of the monthly allowance. The statute clearly gives the court power to discharge the defendant from custody

when it is made to appear to the satisfaction of the court that he cannot comply with the order.

"Imprisonment under this statute may be likened to that for failure in a divorce case to comply with an order of the court with respect to alimony. This court said, in a case of that kind, 'that imprisonment in such a case is justified on the ground of willful disobedience to the orders of the court; and so soon as it is made to appear that the defendant is unable to comply with the orders of the court, he should be discharged. Ex parte *Caple*, 81 Ark. 504, 99 S. W. 830.' "

But the very question which the court said was not in the case of *Land* v. *State, supra,* his ability or inability to comply with the order of the court, is the main issue in the case now before us, and, as above stated, his inability to comply is undisputed. If imprisonment under this statute is to be likened to that of failure in a divorce case to comply with an order of the court with respect to alimony, and imprisonment in such a case is justified only on the ground of willful disobedience to the order of the court, as held in the Land case, then appellant undoubtedly should have been discharged. Our statute, § 778, Crawford & Moses' Digest, provides that, if the accused shall "refuse or neglect" to enter into bond with security, etc., he shall be committed. We think the evidence conclusively shows that appellant has neither refused nor neglected to comply with the order within the meaning of the statute. It is shown that he tried to make the bond, but could not do so. He did not "refuse" because that word implies a willful disobedience. To neglect to do a thing implies negligence on the part of the person. Webster defines neglect as "omission of proper attention; avoidance or disregard of duty, from heedlessness, indifference, or willfulness; failure to do, use, or heed anything; negligence; as, neglect of business, of health, of economy." In *New York Guaranty & Indemnity Co.* v. *Gleason,* 53 How. Prac. (N. Y.) 122, it is said: "What constitutes neglect or refusal? To neglect and to omit are not synonymous terms. There may be an omission to perform an act or condition which is altogether invol-

untary and inevitable, but neglect to perform must be either voluntary or inadvertent. 'To neglect is to omit by carelessness or design' (Webster's Dictionary) not from necessity, and there can therefore be no possibility of neglecting to do that which cannot be done."

We are therefore of the opinion that appellant has neither neglected nor refused to obey the order of the court within the meaning of the statute. See also *Brown* v. *Hendricks,* 102 Neb. 100, 165 N. W. 1075; *State* v. *Kranendonk,* 79 Utah 239, 9 Pac. (2d) 176; *State* v. *Reese,* 43 Utah 447, 135 Pac. 270.

We are therefore of the opinion that the judgment of the circuit court, in so far as it relates to the commitment of appellant for his failure to comply with the order of the court, should be reversed and remanded with directions to vacate and quash the order of commitment.

WAID *v.* WAID.

4-3289

Opinion delivered January 15, 1934.

J. F. O'Melia, for appellant.

Utley & Hammock, for appellee.

McHANEY, J. Appellee, husband of appellant, brought this action against her and the First National Bank of Fort Smith, to recover the sum of $3,640 and the accrued interest thereon, the total amounting to $4,211.11, which she had deposited in a savings account in said bank, in

her maiden name of Ethel Marie Mivelaz. The parties to this action were married January 1, 1928. At that time appellee was under a "try out" contract of employment as traveling salesman with the R. Hoe Company, manufacturers of printing machinery and supplies, by which he received traveling expenses only, but in June or July he began receiving a salary in addition to expenses. Fort Smith was his headquarters during 1928, where they lived with appellant's sister. In December he was transferred to New Orleans, became sales manager of a large territory, and was given a salary of $350 per month plus traveling expenses. Some time after their marriage, appellee opened a checking account in the First National Bank in their joint names, giving either the right to check thereon. Salary and expense checks from his employer were sent to him at Fort Smith, were received by her in his absence, and she was instructed by him to deposit same to said account after deducting such sums as she might need for her living expenses in his absence. Some of the funds she received were deposited according to instructions, but, from August 28, 1928, to March 3, 1930, she withheld from deposit in that account $3,640 of said money sent her, and deposited same to her own credit under her maiden name, Ethel Marie Mivelaz. From May, 1929, to December, 1932, there was deposited in the checking account in their joint names the sum of $8,750.57, but he received no salary or expenses after February 15, 1932, as he suffered a serious and permanent injury in an automobile wreck January 18, 1932, and did no work thereafter, and it appears from the bank records that $2,427.50 was deposited in said account from April 11 to December 23, 1932.

Appellant defended the action on the ground that the money deposited to her credit was a gift from her husband. The court found against her contention, and she has appealed.

Substantially the only question presented is one of fact. Did appellee give her the money she deposited to her credit in a savings account? There is no conflict in the testimony, except on the issue of gift or no gift. It

is undisputed that all the money deposited in both accounts came from his earnings. It is also undisputed that he knew nothing about this account in her maiden name until the bank charged him with an overdraft, and, upon investigation of this matter, discovered same. Appellant says he gave her the money, and is corroborated to some extent by her two sisters and a niece. Appellee denies that he gave her the money to be kept as her own, but that it was to be deposited in the checking account. In this he is corroborated to some extent by the facts and circumstances surrounding the transaction. The fact that she deposited it to her credit in her maiden name; that she did not deposit it in the bank where she had another savings account, the Merchants' National; that she did not tell him that she had done so, all tend somewhat to show an effort to hide or conceal the matter, and to corroborate him that there was no gift. The court found the issue in favor of appellee, and we are unable to say the finding is against the preponderance of the evidence.

Moreover, if this is a gift at all, it is a gift *inter vivos* or *donatio inter vivos*. In *Stifft* v. *W. B. Worthen Co.*, 176 Ark. 585, 3 S. W. (2d) 316, we said: "Gifts *inter vivos* or *donationes inter vivos* are gifts between the living, and are perfected and become absolute during the lifetime of the donor and the donee. * * * The elements necessary to constitute a valid gift *inter vivos* were stated by this court in *Lowe* v. *Hart*, 93 Ark. 518, 125 S. W. 1030, to the effect that the donor must be of sound mind, must actually deliver the property to the donee, must intend to pass the title immediately, and the donee must accept the gift." We think the evidence in this case fails to satisfy this rule. There was no intention on his part to pass the title to her immediately or at all. He intended that the money be deposited in their joint checking account, over which he had some control. While she did not draw any checks on that account, she could have done so without accounting to him therefor.

It follows that the decree must be affirmed.

JOHNSON, C. J., and KIRBY and BUTLER, JJ., dissent.

JOHNSON, C. J., (dissenting). The applicable rule on appeal in chancery cases is that this court tries and de-

termines such cases *de novo,* and the findings of fact by the chancellor are allowed to stand, unless clearly against the preponderance of the testimony. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160; *Ellis* v. *District,* 142 Ark. 73, 218 S. W. 389; *Teague* v. *Hutto,* 132 Ark. 180, 200 S. W. 805.

The converse of this rule is aptly illustrated in *Leach* v. *Smith, supra,* wherein this court said:

"When chancery causes are taken up for determination by this court, the judicial balance, so to speak, stands at perfect equipoise. One side of the scales is labeled 'appellant,' the other 'appellee.' The testimony in the record is examined and all that is incompetent is discarded. That which remains for appellant is put on his side, and that for the appellee on his side, and if the scales are evenly balanced, or so nearly so as to leave the judges in doubt as to where lies the greater weight, then the decision of the court below is persuasive and is allowed to stand as the correct result."

The majority opinion hold that the testimony in the instant case is so evenly balanced that the chancellor's findings tip the scales in favor of appellee, therefore affirm the case. To this finding and determination I can not agree. The testimony in the case is to the following effect.

Appellee Ben W. Waid testified that he and appellant were married January 1, 1928. "The first salary drawn after marriage was in June or July, 1928; we lived in my wife's family home at Fort Smith; my salary and expense checks came to our home; the money was deposited in the First National Bank of Fort Smith and was subject to my check. I trusted my wife to make the deposit of my salary, but did not intend that she should claim any of it as her separate property." In December, 1928, appellee was ordered to New Orleans and thereafter lived there. After January, 1929, appellee lived in New Orleans and came to Fort Smith only occasionally, and, during this period of time, his salary and expense checks came to him there. He visited his wife at Fort Smith as often as possible, sometimes twice a month and sometimes the visits were three months

apart; that in January, 1932, he was injured; that witness was taken off the payroll of his employer February 15, 1932, thereupon witness moved back to Fort Smith and started a chicken ranch. When witness began to improve his chicken ranch, he first discovered that a part of his money had been deposited in his wife's name. On cross-examination witness testified that his checks continued to go to his wife at Fort Smith until March, 1930, thereafter he received the checks at New Orleans, but continued to send money to his wife at Fort Smith; that, as he now remembers, he gave his wife at various times $325 for her personal needs; that after March, 1930, witness earned $350 a month up to February, 1932. Witness further testified, that he never stated in the presence of Jessie Dawson that he had given the money in controversy to his wife; that he had never made any such statement to Mrs. Newman. Witness had drawn all the checks that were drawn against his account and, in addition thereto, made an overdraft of $325. Mr. Simms, a witness on behalf of appellant, testified that he was vice-president of the First National Bank of Fort Smith and knows the parties; that Mrs. Waid effected a checking account in his bank subject to the check of Mr. Waid also; but the savings account is in the name of Ethel Marie Mivelaz; the savings account reflects a credit to Ethel Mivelaz for the sum of $4211.11, which includes interest to date. The statement made and exhibited to Mr. Simms' testimony reflects that Mrs. Waid's savings account was opened August 27, 1928, and shows a total deposit aggregating $3,640, the last deposit being made March 3, 1930. The difference between the present status of the account is due to accumulated interest. In rebuttal appellee testified that he did not know that deposits were made in a savings account in the name of Ethel Marie Mivelaz until the filing of this suit; that he did not tell Mrs. Waid to make such deposits and did not give his consent thereto. That there is not now any change in the friendly affectionate relationship between himself and wife. The checking account reflects a total deposit of $8,750.57. This account was open by witness'

authority. This was all the testimony introduced in behalf of appellee.

The testimony on behalf of appellant was, to the following effect, that she and appellee were married on January 1, 1928, and thereafter lived in her home in Fort Smith. Appellee sent his checks to her for deposit with instructions to put so much money in checking account —the rest he gave me—made a special gift to me. These checks would average $175 every two weeks and expense checks were from $75 to $100 a week. "Appellee opened the checking account at the First National Bank, and I did not authorize him to open it in my name." Witness put all checks sent her in the checking account except what appellee gave her. Witness' maiden name was Ethel Marie Mivelaz. All deposits made in the savings account were given witness by appellee on the date of deposit. Appellee gave witness no money after March 3, 1930. After March 30, 1930, witness did not receive any checks from appellee. Witness has lived in Fort Smith during all her married life. Appellee has resided in New Orleans since March, 1930. Witness has never drawn any money out of the savings or checking accounts. Witness had her name taken off the checking account when it became overdrawn. Appellee sent witness $50 or $100 after 1930. Witness deposited the money which appellee gave her in the name of Ethel Marie Mivelaz. Witness has never mixed her money with that of appellee's, and this is the only money which was so deposited.

On cross-examination, witness testified, that all appellee's gifts to her were in the form of money. Appellee, if he were not at home, would call her over the telephone and tell her what to do with the money. The savings account was my gift money. Witness never asked appellee for money when he failed to give it to her. Witness has income property in Fort Smith from which her expenses are paid.

Marguerite Mivelaz testified, in behalf of appellant, as follows:

That appellant and appellee, after their marriage in 1928, lived in witness' and appellant's home in Fort

Smith; that witness had often heard appellee say: "Here, Ethel, is a check and I give it to you with all my heart and to do what you please with it," and appellant would put the check in her account in the bank. Witness has heard such statements from appellee numbers of times. After 1929, appellee lived in New Orleans and did not give appellant any more money. Mrs. Newman, another witness on behalf of appellant, testified, that she was a sister to appellant and Marguerite Mivelaz and lived in the same block in Fort Smith and witness had heard appellee say that he had given appellee money; that she heard him make this statement on two occasions.

Jessie Dawson, a witness on behalf of appellant, testified that she lived in an adjoining house to appellant and was with her continuously; that appellee continuously boasted that he had given money to appellant and made fun of her clothing and said she didn't have to dress that way; that she had money of her own and he boasted that he had given it to her. Witness has heard these boasts from him in the last year or so. Appellee did not state how much money he had given appellant, just said that he had given her gifts and wondered why she did not dress better. This was all the testimony introduced in said cause.

The testimony here presented, when measured by the rule cited *supra,* of necessity must be found to preponderate in favor of appellant. Under long-established rules of this court, the burden of proof in the whole case is upon appellee. His testimony is entitled to no greater weight than that of appellant. Viewed in this light, the testimony of appellee and appellant should be determined of equal weight, therefore the decree should have been in appellant's favor. But this is not all. Three other witnesses strongly corroborated the testimony of appellant as to the gift. This testimony should not be ignored as is done by the majority. This court is now evading the responsibility of trying this case *de novo;* it is attaching the same credence to the chancellor's findings of fact, heretofore and now given to findings of juries. This overturns established rules of this court heretofore thought to be impregnable.

The testimony above recited demonstrates an unusual condition of affairs—the husband suing the wife to recover money deposited in her name—merely because it was earned by the husband during coverture. Moreover, it is unusual in that the wife furnished the house and living expenses out of her own separate estate at all times since the marriage, never at any time spending one dollar of the husband's earnings in this regard. Also this record reflects that appellee has earned and deposited on a checking account in a Fort Smith bank $8,750, every dollar of which has been expended by appellee for things other than living expenses for himself and wife; in addition to this, after March, 1930, appellee received all of his earnings at New Orleans and disposed of same for his own maintenance and convenience. It is unusual that a wife would remain in Fort Smith, earning her own living during every day of coverture, yet assert from the witness stand that she had affection for her husband.

But one question arises on this record for decision, namely: Did appellee give this $3,660 to his wife prior to its deposit in bank?

I assert that this record demonstrates that he did. This is true, first, because it is perfectly natural for a husband to do just what appellant says her husband did —gave her this money. This gift constituted only approximately 30 per cent. of the total amount deposited in this Fort Smith bank and, when viewed in this light, was a reasonable award to his wife for her efforts in assisting him in accumulating money and property. I assert that this circumstance corroborates appellant that this deposit was a gift from appellee. Moreover, the testimony of Marguerite Mivelaz and Mrs. Newman, to the effect, that the husband made gifts to his wife of his earnings should not be disregarded merely because they are appellant's sisters; if such be so, however, Jessie Dawson testified that appellee had boasted to her of the gifts he had made to his wife, and this record does not reflect that this witness has any bias or prejudice in her favor.

On the other hand, the only testimony supporting the chancellor's finding of fact, that his deposit was not a gift, is the testimony of appellee, and the effect of his testimony is merely a denial that such gift was effected. I assert, without fear of contradiction from this record, that the great preponderance of the testimony is to the effect that this deposit was a gift from appellee to appellant and should be so determined by this court.

Since when, until now, has any court decided on the uncorroborated testimony of a husband, that a wife is not entitled to have or hold any of the property and money accumulated during coverture? Since when, until now, has any wife been required to furnish her own home and living expenses during coverture, then denied the right to participate in the husband's accumulations to the extent of even $1?

Although the dower statutes of the State have no direct application, neither are they analogous to the question here under consideration. They do demonstrate, however, that the wife is not wholly without legal rights. Not, until now, is the wife treated as a mere chattel of the lord and master, the husband, by this court.

The case should be reversed and the cause remanded with directions to enter a decree according to the decided preponderance of the testimony.

I am authorized to say that Justices KIRBY and BUTLER concur with the views here expressed.

BRYANT *v.* PARKER.

4-3279

Opinion delivered January 15, 1934.

W. J. Lanier, for appellant.

F. F. Harrelson and *W. J. Sherman,* for appellee.

BUTLER, J. A. W. Bryant died intestate on the 3d day of May, 1932, leaving surviving him a widow, Mrs. Lydia Bryant, and four daughters and a son by a former marriage and three grandchildren, the children of another daughter by the same former marriage, who had died some years before the death of A. W. Bryant. This action was begun by the widow to set aside a gift of $5,000 in money, and a deed of trust executed by Bryant and wife, Lydia Bryant, to Bryant's son-in-law, S. B. Walker, and his wife, Bertie Walker, to secure an alleged debt of $900 with accrued interest. Contention was made, first, that there was no actual gift of the money by the intestate to Walker and wife, and, if so, the donor was mentally incapable of thus disposing of his property, and, second, that there was no *bona fide* debt due which the mortgage was given to secure and that the trust deed was void. The administrator of the estate and certain other parties were made defendants as well as Walker and his wife and the other heirs of the intestate. Issue was joined on the allegations of the complaint, and much testimony was adduced before the trial court, which court, after having considered the pleadings and proof, rendered a decree dismissing Mrs. Bryant's complaint for want of equity. From that part of the decree relating to the validity of the gift to Walker and his wife, and upholding the deed of trust, Mrs. Bryant has appealed.

Two questions of fact are involved: first, whether or not the evidence is sufficient to establish a gift *inter vivos,* and, second, whether or not Bryant, at the time of the making of the gift to Walker, was mentally capable of knowing the effects and consequences of his act.

It is the contention of appellant's counsel, which he has ably presented for our consideration, that the act of

Bryant was so unnatural in the light of surrounding circumstances as to strongly indicate that no actual gift of the money was intended to be made by him to his son-in-law, and that, if so, it indicated that his mind was so enfeebled by age and infirmity as to render him legally incapable of disposing of his property; that the attempt to take advantage of his alleged gift was a fraud upon him and the appellant; that the circumstances further show that there was in fact no consideration for the execution of the deed of trust; that all of this corroborates the testimony adduced by the appellant to sustain the allegations of her complaint, and clearly preponderates in her favor, and that therefore the decree of the trial court should be reversed.

The law relating to gifts *inter vivos* is well settled, and has been many times stated by this court, the authorities being reviewed and the rule restated in the recent case of *Stifft* v. *W. B. Worthen Co.,* 176 Ark. 585, 3 S. W. (2d) 316, (cited by the appellant) as follows: "The elements necessary to constitute a valid gift *inter vivos* were stated by this court in *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, to the effect that the donor must be of sound mind, must actually deliver the property to the donee, must intend to pass the title immediately, and the donee must accept the gift. It will therefore be seen that a gift *inter vivos* cannot be made to take effect in the future, as such a transaction would only be a promise or agreement to make a gift, and, being without consideration, would be unenforceable and void, and considerations of blood or love and affection are not sufficient to support such a promise. 12 R. C. L. 930. This court, from *Hynson* v. *Terry,* 1 Ark. 83, down to the present time, in an unbroken line of cases, has held that actual delivery is essential, both at law and in equity, to the validity of a gift, and that without it the title does not pass. Mere delivery of possession is not sufficient, but 'there must be an existing intention accompanying the act of delivery to pass the title, and, if this does not exist, the gift is not complete.' " *McKee* v. *Hendricks,* 165 Ark. 369-383, 264 S. W. 825, 952, and cases cited. In the case of *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65, it is said: "Gifts

causa mortis, as well as *inter vivos,* are based upon the fundamental right every one has of disposing of his property as he wills. The law leaves the power of disposition complete, but, to guard against fraud and imposition, regulates the methods by which it is accomplished. To consummate a gift, whether *inter vivos* or *causa mortis,* the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos,* the moment the gift is thus consummated, it becomes absolute and irrevocable."

Although there are circumstances which render the conduct of Bryant with respect to his property unusual, we are of the opinion that, when all of the testimony is considered, it is sufficient to make the gift of Bryant to Walker and his wife a completed and irrevocable one within the rule stated, that at the time of its execution he was mentally capable of performing the act, and further that the evidence preponderates in favor of the appellee, Walker, in regard to the validity of the debt and the deed of trust to secure the same. Bryant was a widower at the time he married the appellant, having a number of children, all of whom were grown, as well as his grandchildren, with the exception of one. When he was courting the appellant, he told her of his financial condition, that he owned a home and had about $8,000 in cash in the bank. This appears to have been approximately true. He was married to the appellant in the month of April, 1927, being then well advanced in years and afflicted with ills usually attendant upon persons of that age, but, except for occasional spells which would confine him to his home for a few days at a time, he was able to perform those actions which men ordinarily did; he was able to, and did, work in his garden, attend to his live stock and make trades, but grew progressively more infirm and feeble until his death. About one year after his marriage, he sent for his son-in-law, S. B. Walker, and, without any previous intimation of such intention, told him he was going to give him $5,000 out of the money he had then on deposit in the Planters' Bank & Trust Company of Forrest City. He directed Walker to draw

a check payable to himself and his wife for that sum and gave it to Walker, telling him that it was his desire that no mention be made of the matter. Walker carried the check to his home, where he informed his wife of what had occurred, and gave her the check, which she indorsed. Bryant went with Walker to the bank and introduced him to the cashier where the check was presented, some conversation had relative to it, and the money transferred from the account of Bryant to a savings account in the name of S. B. Walker and Bertie Walker. The cashier related these conversations, which are unnecessary to set out here, but, when taken in their entirety, together with the testimony of Walker and his wife, and with the subsequent conduct of Bryant, are sufficient to sustain the chancellor in his finding that the facts attendant upon these circumstances were sufficient to constitute a valid gift *inter vivos*. When the $5,000 was transferred to Walker, there remained a little in excess of $600 to the credit of Bryant. If he had any other money in his possession or to his credit elsewhere, we are not so informed. At any rate, about a year before his death, Bryant informed Walker that his funds were exhausted, that he needed $900, and wanted to borrow that amount from him, agreeing to give Walker a deed of trust to secure the loan on the home in which he and Mrs. Bryant lived. Walker agreed to lend Bryant the money, and, on instructions given, the note and deed of trust were prepared by Walker's attorney, who, accompanied by a notary, carried the instruments to the home of Bryant, where the matter was explained to Mrs. Bryant and she there signed the deed of trust, relinquishing her dower and homestead rights in the property described. Before this was done, she had been informed by Bryant that his money was all gone, and that it was necessary to borrow from Walker, and to execute the deed of trust.

The evidence shows that a part of the $5,000 gift was used by Walker in making the loan to Bryant, and it is upon this fact that the contention is based that there was no consideration for the execution of the deed of trust, or any valid debt created by the transaction.

On the question of Bryant's mental capacity, the evidence is in conflict, but, as we view it, it preponderates to the effect that while physically weak and infirm, he was mentally capable of knowing, and did know, the effect and consequences of any business transaction which he might make. The evidence is undisputed, both on the part of the appellant and that given by Walker, that there was no particular reason why Bryant should have preferred one of his children above the others, or why he should have denuded himself of his estate so as to leave his widow destitute. The two had lived happily together during their married life; he was kind and considerate of her, and she of him, and, so far as the record discloses, there at no time existed any discord between the two. The evidence further shows beyond any dispute that Walker and his wife had done nothing more for their father than the other children or that he held them in any greater degree of affection than the others. But, with all this, the fact remains that he had absolute control over his money and the power of disposing of it as he saw fit. The record is silent as to the motivating cause of his preference. What his secret motives were, we do not know, and have no means of discovering. It might be, and it appears, that he was unjust and unkind to a faithful wife, but that does not alter the law, and, however much we may question the justness of his act, we cannot gainsay its legality.

The appellant calls attention to a number of circumstances which, it is contended, dispute the claim that Walker had absolute control and dominion over the $5,000, such as borrowing various sums from time to time and giving mortgages to secure the same, and, as we have before noted, the apparently unnatural conduct of Bryant. But these were not sufficient in the mind of the chancellor to overturn the direct evidence of facts and circumstances which supported the view he reached.

It would serve no useful purpose to set out the evidence in detail, and would unduly extend this opinion. The questions before the chancellor were disputed questions of fact, and the judgment he reached was, in his

opinion, as in ours, supported by a preponderance of the testimony.

Let the decree be affirmed.

UNION CENTRAL LIFE INSURANCE COMPANY *v.* BOGGS.

4-3290

Opinion delivered January 15, 1934.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Woodson Mosley and *R. W. Wilson,* for appellee.

BUTLER, J. The appellee, a guardian of an insane person, brought suit against the appellant insurance company to recover disability benefits under a clause in the contract of insurance issued by said company to the ward of the appellee. An answer was filed to the complaint and various motions made and proceedings taken, when finally the appellee, by amendment to the complaint, alleged that she and the appellant, pending the litigation, had agreed upon a settlement of the controversy by which she was to be paid by the appellant a stipulated sum in

full settlement of all demands which then existed or might thereafter arise under the policy, upon her execution and delivery to the appellant of a "valid, binding and unimpeachable release," and the delivery to the insurer of the policy for cancellation; that she had complied with the terms of the agreement, but that the appellant had failed to settle according to the agreement. She prayed for judgment.

To the complaint, as amended, the appellant tendered its answer, admitting the agreement, but alleging that the appellant was without authority to execute and deliver a release of the nature and effect agreed upon. Appellant denied that appellee had executed and tendered any such release, and admitted its willingness to carry into effect the agreement upon the performance by the appellee of her part of the agreement, namely, that she would execute and deliver a valid, binding and unimpeachable release.

On the issues thus joined on the complaint as finally amended and the amended answer thereto, the cause came on to be heard, and by express agreement of the parties, a jury was waived and the cause submitted to the court sitting as a jury. The court, after having heard the evidence, refused the findings of fact and declarations of law requested by the appellant and rendered judgment in favor of the appellee, basing the same on the findings of fact and declarations of law requested by appellee, as follows:

"I. The court finds that on the 6th day of September, 1930, Victor James Boggs was duly adjudicated insane by a proper order of the probate court of Cleveland County, and that his wife, Elizabeth McMurtrey Boggs, was appointed by said court as his guardian; that she is now the duly appointed, qualified and acting guardian of Victor James Boggs; that as guardian of Victor James Boggs, she had authority to compromise, for a valuable consideration, his claim and suit against the defendant, the Union Central Life Insurance Company, upon such terms and conditions as might be agreed upon between her and said Union Central Life Insurance Company,

provided such compromise agreement was made in good faith and not in fraud of the rights of her ward, Victor James Boggs.

"II. The court finds that the compromise agreement made between the plaintiff, Elizabeth McMurtrey Boggs, and the defendant, the Union Central Life Insurance Company, which was reduced to writing and signed by the parties, a copy of which is attached as exhibit A to the amendment to plaintiff's amended complaint and the original of which was introduced in evidence in this cause as exhibit 1 to plaintiff's testimony, was made in good faith and is not in fraud of the rights of plaintiff's ward, Victor James Boggs, but, on the contrary, is to the best interests of the said ward and his estate.

"III. The court finds that said agreement of compromise was effective to obligate the defendant, the Union Central Life Insurance Company, to pay to the plaintiff, Elizabeth McMurtrey Boggs, as guardian of Victor James Boggs, the sum of $4,000, upon the execution and delivery by said guardian to the Union Central Life Insurance Company of a valid, binding and unimpeachable release, fully and finally releasing and discharging the defendant of all liability, causes of action, claims and demands of every name and nature now existing or which might arise hereafter under the insurance contract effected by the defendant on the life of Victor James Boggs on the 22d day of March, 1921, and the policy of life insurance issued pursuant thereto, being No. 683,532, a copy of which is attached as exhibit A to the memorandum of agreement to compromise introduced in evidence and upon the surrender to the defendant of said policy of life insurance for cancellation and final extinguishment of all its liability thereon.

"IV. The court finds that, pursuant to the agreement of compromise sued on and introduced in evidence, Elizabeth McMurtrey Boggs, as guardian of Victor James Boggs, duly executed and tendered to the defendant, the Union Central Life Insurance Company, a valid, binding and unimpeachable release a true copy of which was attached as exhibit B to the amendment to plain-

tiff's amended complaint and introduced in evidence as exhibit 4 to plaintiff's testimony. The court further finds that said instrument of release is efficient to consummate and make effective for all time the compromise settlement agreed upon, and to relieve the defendant insurance company fully and finally of any and all liability of every name and nature now accrued or which could by any possibility hereafter accrue on the policy of insurance sued on and introduced in evidence. The court finds further that, at the time plaintiff tendered to the defendant said release, she tendered the policy of life insurance issued by the defendant on the life of her ward, Victor James Boggs, on the 22d day of March, 1921, No. 683,532, impowering the defendant to cancel same and to extinguish finally and fully all possible liability of every name and nature now accrued or which might hereafter arise thereon. That plaintiff, as guardian of Victor James Boggs, had authority to do all these things, and, by her acts and deeds herein, to bind her ward, Victor James Boggs, and any and all persons who are now or who may hereafter be in privity with him, so that said settlement and release are not subject to impeachment in any subsequent proceeding. The court also finds that the plaintiff is now tendering to the defendant said release and said policy for the sole consideration of the payment to her by the defendant of the sum of $4,000."

The issue presented to the trial court for its determination, and now before us on review, is succinctly stated by the appellant, as follows: "The controlling issue in this case is whether the plaintiff, as guardian of Victor James Boggs, an insane person, had authority to compromise and settle, finally and fully, all her ward's rights under the insurance policy involved and to execute and deliver to the defendant a valid, binding and unimpeachable release, for the consideration agreed on. If she did have such authority, so that her agreement to compromise and the release which she executed and tendered pursuant thereto would have forever foreclosed the right of her ward, or any one in privity with him, to attack the settlement after the defendant had paid

the consideration agreed upon, the judgment of the lower court should be affirmed. On the other hand, if the compromise settlement could later be impeached, either on the ground that she was without authority to make it or on the ground that she did not act in good faith and to the best interests of her ward in making it, then she has not tendered performance of her undertaking to furnish a valid, binding and unimpeachable release, and the judgment of the lower court should be reversed."

The appellant contends that there is no express authority conferred by statute on the guardian of an insane person to bind a ward by a compromise settlement, and that because of this appellee was without authority to enter into the agreement and to execute and tender the release, and therefore, the same was not a valid, binding and unimpeachable release. This contention is based on the language of § 5848 of Crawford & Moses' Digest, as follows: "Such guardian is authorized and required to collect all debts due his ward and give acquittances and discharges thereof, and adjust, settle and pay all demands due from his ward, so far as his estate and effects will extend."

The contention is made that, despite the holding in the case of *Moss* v. *Moose,* 184 Ark. 798, 44 S. W. (2d) 825, it appears that the only way for settling a claim of the character of that here involved and in the manner sought is through the agency of the probate court under the power given by § 5852 of Crawford & Moses' Digest, which is as follows: "The probate courts, respectively, shall have power to control the guardian of any such ward in the management of the person and estate, and the settlement of his accounts, and may enforce and carry into execution their orders, sentences and decrees, in the same manner as a court of chancery."

In the case of *Moss* v. *Moose, supra,* it was held that it was not the purpose of constitutional and statutory provisions relating to the jurisdiction of the probate court to invest it with jurisdiction of contested rights and of litigation concerning the titles to property, and that an order of the probate court upon the *ex parte*

application of a guardian approving a compromise by the guardian of a claim in favor of the ward is not binding as a judgment because not authorized by law, and any such judgment would be void for want of jurisdiction. The argument is made that this case has no application to the case at bar because of the difference in the subject-matter involved, that in the case of *Moss* v. *Moose* being a claim for unliquidated damages in behalf of minors, whereas that in the instant case is not for unliquidated damages, but for a debt due on a contract which it is the duty of the guardian to collect, and that therefore the probate court has power to control the guardian in the matter and to enforce its orders. For that reason, it is insisted, that, in order to execute a release of the character contemplated by the agreement, it was the duty of the guardian to procure from the probate court an order authorizing the appellee to enter into the compromise agreement and to execute the release in evidence and, not having procured such order, she was without authority to act, and that the circuit court was without jurisdiction of the issues involved.

It is true that the subject-matter involved in the case at bar is different in its nature to that considered by the court in the case of *Moss* v. *Moose, supra,* yet the doctrine of that case is applicable to this for the reason that the rights of the parties are in dispute, which dispute has resulted in litigation over which the probate court has no jurisdiction under the holding in the case cited. We think the statute is sufficiently broad to authorize the guardian of an insane person to compromise a disputed claim, subject to review by a court of competent jurisdiction. The circuit court was the only one in which the suit, as first framed by the complaint, could have been instituted, and a basis of compromise and settlement reached between the parties during the pendency of the suit was one over which the court had power to render judgment upon the compromise agreement on evidence which convinced it of the good faith of the parties to the agreement where it was clearly beneficial to the ward. The court found that this was the case upon evidence which justified that conclusion. As is

stated in *Moss* v. *Moose, supra,* where the court had power to render a final judgment upon the merits in any case before it, the power to render judgment on a compromise agreement is necessarily implied.

The finding of the court that the agreement entered into was made in good faith and was beneficial to the ward and that it should be upheld, rendered the release valid and unimpeachable within the meaning of the agreement, and its judgment, being based on legally sufficient evidence, is conclusive of the rights of the parties, and is therefore affirmed.

WEBSTER *v.* HORTON.

4-3297

Opinion delivered January 22, 1934.

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Arthur D. Chavis, for appellant.

E. W. Brockman, for appellee.

JOHNSON, C. J., (after stating the facts). The decree of February 27, 1932, became conclusive and binding upon all parties thereto at the expiration of six months after its rendition, no appeal having been prosecuted therefrom. Section 2140, Crawford & Moses' Digest. *Stephens* v. *Williams,* 122 Ark. 255, 183 S. W. 527; *Newall* v. *Valley Farming Company,* 133 Ark. 456, 202 S. W. 838. Therefore all asserted claims and rights of the Websters are precluded thereby.

The rights of appellant, Curtis K. McAdams, under and by virtue of his intervention were expressly reserved by the court for future determination; therefore his rights are not precluded as the other appellants are.

Appellant Curtis K. McAdams asserts superior rights under and by reason of the supplemental decree entered by the chancery court of Jefferson County on January 21, 1930, in the then pending case of C. H. Triplett Company against appellees, the effect of which supplemental decree was to advance his mortgage from a second to a first lien against the minors' homestead. This supplemental decree was void, because the attorney representing the minors had no authority in law or in fact to make such an agreement. This court has many times held that neither a guardian nor the attorney representing such guardian has any authority to make agreements or admissions to the prejudice of the ward's interest. *Frazier* v. *Frazier,* 137 Ark. 57, 207 S. W. 215. In the case of *Rankin* v. *Schofield,* 70 Ark. 83, 66 S. W. 197, we said: "In the absence of authority given by statute, the general rule, says Mr. Rodgers, is that a guardian cannot agree to any compromise or settlement by which the property interests of his ward are affected without the

concurring sanction of the court, to which he must look for authority to bind his ward. Rodgers, Domestic Relations, 859. The recitals of the record, *supra,* show affirmatively that the chancellor performed no judicial act of investigation into the merits of the controversy, before entering the decree. On the contrary, that was purposely avoided, out of considerations of mere expediency, 'to put an end to tedious litigation, and as an amicable settlement and adjustment of a family affair.' Such added dignity to the compromise of the guardian did not make it any the less his compromise. In the face of such a record, we cannot indulge the maxim, '*Omnia praesumuntur rite et solemniter esse acta.*'

"It was plainly not the compromise of the court. There was nothing to show that it was for the benefit of the infant. The facts shown by this record do not bring the appellant within the maxim of *consensus tollit errorem* and bar her right of appeal."

As was said by this court in the Rankin case, *supra,* this agreement was plainly not the compromise of the court. There was nothing to show that it was for the benefit of the minors. The effect of the supplemental decree was to use the minor's insurance money for the sole and only purpose of advancing the second mortgage of Curtis K. McAdams to a first lien against their homestead. Moreover, it must be remembered that Curtis K. McAdams was an uncle of the minors, and they were entitled to his best advice and honest judgment. The trial court concluded, and we concur therein, that the effect of this supplemental decree was to advance the interests of Curtis K. McAdams, to the prejudice and detriment to the right of the minors.

It is next contended that the trial court erred in rendering the decree of February 27, 1932, subrogating the guardian and wards to all the rights of the C. H. Triplett Company under and by virtue of its mortgage. Neither can we agree with this contention. In *Southern Cotton Oil Co.* v. *Napoleon Hill Cotton Co.,* 108 Ark. 555, 158 S. W. 1052, the rule in reference to subrogation was stated as follows: "The doctrine of subrogation is an

equitable one, having for its basis the doing of complete and perfect justice between the parties, without regard to form, and its purpose and object is the prevention of injustice."

The decree granting subrogation in the instant case pronounced exact justice and equity between the parties. Appellant, Curtis K. McAdams, knew when he accepted his mortgage against this homestead that it was a second lien thereon, and second to the C. H. Triplett Company mortgage; he knew that the C. H. Triplett Company mortgage must be paid and satisfied prior to his mortgage. Therefore the decree of subrogation places him in no worse position than he was when he accepted his mortgage. On the other hand, refusal to grant subrogation in the instant case would cause the minors not only to lose their homestead but the insurance money which was applied on the C. H. Triplett Company mortgage. Exact justice and equity can be effected only by granting the right of subrogation to these minors.

Since the trial court's decision conforms to the views here expressed, the same must be affirmed.

GILLIAM *v.* BRADLEY LUMBER COMPANY.

4-3196

Opinion delivered January 22, 1934.

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Aubert Martin, Nelson H. Sadler, Graham Moore, D. L. Purkins and *J. R. Wilson,* for appellant.

D. A. Bradham, Clary & Ball and *C. C. Hollensworth,* for appellee.

JOHNSON, C. J., (after stating the facts). Appellant's requested instructions, Nos. 5 and 9, which were given by the trial court, are correct declarations of law when applied to the facts of this case. On the other hand, appellee's requested instruction No. 8, as given by the trial court, is in irreconcilable conflict with instructions Nos. 5 and 9, given upon appellant's theory. Appellee's instruction No. 8 tells the jury: "The jury are instructed that the particular act of negligence which the plaintiff charges the defendant in this case is that one Rufus Elmore, a fellow-servant of plaintiff, pulled a valve and changed the way the fuel would fall into the fuel house, without giving any signal or warning that he was going to do so. With reference to this charge of negligence, the court tells you that the mere fact that Elmore pulled the chain at the time he did, and the mere fact that plaintiff got sawdust in his eye, would not be sufficient in itself to

justify a finding on your part that Elmore was guilty of negligence."

Appellant's requested instruction No. 9 had, in effect, directed the jury to find for appellant, if they determined from the testimony that Elmore reversed the valve of the discharge pipe without warning to appellant, and thereby reversed the discharge of the fuel from the opposite side of the building in and upon appellant; and, if this were determined to be negligence upon Elmore's part, and this was the proximate cause of appellant's injury if any, then they would find for appellant. Appellee's instruction No. 8 as given by the trial court, was in direct conflict with the views expressed in appellant's requested instruction No. 9, because in instruction No. 8 the jury is directed in effect that appellant could not recover merely because Elmore negligently reversed the fuel valves, and was injured thereby. Under a long line of decisions of this court, it is reversible error to give conflicting instructions. *Postal Telegraph-Cable Co.* v. *White, ante* p. 361; *Southern Anthracite Coal Co.* v. *Bowen,* 93 Ark. 140.

Not only is appellee's requested instruction No. 8 in conflict with appellant's instructions, but it also invades the province of the jury, and is upon the weight of the evidence. It was a question for the jury to determine, and not for the court, whether or not the reversing of the fuel valves by Elmore, or the reversing of the discharge of the fuel into the fuel house, upon appellant, without warning, at the time and under the circumstances of this case, was negligence; and, if so, whether or not this negligence was the proximate cause of the injury, if any.

This court has many times held that it is error for trial courts to point out inferences to be drawn from particular facts in evidence. *Haley* v. *State,* 49 Ark. 439, 5 S. W. 880; *Rector* v. *Robins,* 82 Ark. 424, 102 S. W. 209; *McLemore* v. *State,* 111 Ark. 457, 164 S. W. 119.

Many, many times we have also held that trial courts should not instruct juries upon the weight of the evidence or give instructions which assume facts which are for the consideration of the jury. *Polk* v. *State,* 45 Ark. 165;

Railroad Co. v. *Byars,* 58 Ark. 103, 23 S. W. 583; *Murray* v. *Boyd,* 58 Ark. 504, 25 S. W. 505; *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811; *Railroad Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215.

Many other alleged errors are pressed upon us for reversal, but we assume that they will not recur upon retrial, therefore do not consider them.

For the error indicated, the cause is reversed, and remanded for new trial.

SMITH, MCHANEY and BUTLER, JJ., dissent.

STONE *v.* STONE.

4-3287

Opinion delivered January 22, 1934.

Partlow & Rhine and *Cleveland Cabler,* for appellant.

Jeff Bratton, for appellee.

JOHNSON, C. J. The sole question presented for consideration on this appeal is the interest the wife takes in money received by her husband from the United States Government as a pension by reason of services as a soldier in the World War. On August 27, 1932, appellee was awarded an absolute divorce from appellant by the Greene County Chancery Court, and in the decree the determination of property rights of the parties was expressly reserved for future adjudication. Thereafter a stipulation was filed in which the facts of the case were agreed to. It reads as follows:

"That the plaintiff and the defendant were married in Greene County, Arkansas, on December 11, 1917, and lived together as husband and wife until the 3d day of April, 1923, when the defendant deserted the plaintiff, and they never lived together thereafter; that on the 27th day of August, 1932, in a cause wherein Prudence Stone was plaintiff, and H. T. Stone was defendant, a decree of divorce was granted to the plaintiff on the grounds of desertion, occurring prior to the adjudication of insanity.

"That on April 24, 1923, the defendant, H. T. Stone, was adjudicated insane by a court of competent jurisdiction in Greene County, Arkansas, and that he was incarcerated, and is now incarcerated, in the Government Hospital at North Little Rock, Arkansas, and that H. R. Partlow is the duly appointed, qualified and acting guardian of H. T. Stone, incompetent.

"That H. T. Stone is the owner in fee simple, as an estate of inheritance, of the following lands in Greene County, Arkansas, to-wit: The southwest quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 14, township 18 north, range 6 east, containing 80 acres, more or less.

"It is further agreed that, in addition to the lands hereinbefore described, that there has been paid to the guardian of H. T. Stone the sum of one hundred dollars per month, in the way of compensation, by reason of the

said H. T. Stone being a World War veteran, and by reason of his rendering military service in the World War, and that the said H. R. Partlow, as guardian of H. T. Stone, has in his possession, and to his credit, money and other mortgage securities in the approximate amount of twelve hundred dollars, the last-named sum being exclusively derived from payment made by the United States Veterans' Bureau.

"It is further agreed that the said Prudence Stone has drawn the statutory amount of thirty dollars per month by reason of being the wife of H. T. Stone, and by reason of living separate and apart from her husband; that said payments were paid to her up to and including the date of her divorce, which was granted on the 27th day of August, 1932; that, in addition to the thirty dollars per month payments as hereinbefore mentioned, the guardian, by order of the court, has paid her an additional sum of one hundred thirty dollars.

"It is further agreed by and between the attorneys herein that the decree of divorce has been properly granted, the sole question being the proper division of the property."

Thus it will be seen that no question is presented in reference to the validity or invalidity of the divorce decree between the parties. Therefore, we decide the question here presented, assuming, for the purpose of this case only, that the decree is valid, and expressly reserving the question of the validity or invalidity of the divorce decree when properly presented.

It appears from the agreed statement that, on August 27, 1932, the date of the divorce decree, that appellant's guardian had, in cash and other personal securities, the sum of $1,200, which sums had accrued to him solely by reason of his pension from the United States Government. The trial court awarded appellee $400, or one-third of these securities, as her dower interest in appellant's personal property. Was this error? Section 3511 of Crawford & Moses' Digest, in part, provides: "* * * and the wife so granted a divorce against the husband shall be entitled to one-third of the husband's personal property absolutely, and one-third of all the lands whereof

her husband was seized of an estate of inheritance at any time during the marriage for her life, unless the same shall have been relinquished by her in legal form, and every such final order or judgment shall designate the specific property both real and personal, to which such wife is entitled." * * *

If the moneys and securities in appellant's possession are his property, and were on the date of the divorce decree, then, under the plain provision of the statute quoted, *supra,* appellee was entitled to one-third thereof upon being awarded a divorce.

Appellant's first contention is, however, that the money received from the United States Government by him as a pension did not belong to him as his property in contemplation of § 3511 of Crawford & Moses' Digest, because, as it is said, the United States Government has, and holds, a superintending control over all said funds. The Supreme Court of the United States has definitely decided this question adversely to appellant's contention. In *Spencer* v. *Smith,* 288 U. S. 430, 53 S. Ct. 415, the court said: "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."

Appellant next insists that, since appellee received thirty dollars per month for some years as her apportionment of her husband's gratuity from the United States Government, this must be construed as in lieu of statutory dower. No authority is cited supporting this contention, and we cannot agree thereto. The duty and responsibility rested upon appellant to support and maintain his wife during coverture, and the mere fact that he performs this duty in no wise extinguishes her right of dower. This award by the Federal Government

was for no purpose other than support and maintenance during the disability of appellant.

The last insistence is, that the award to appellee of $400 in specific personal property by the chancery court creates the relationship of debtor and creditor between appellee and appellant, and that therefore, under § 22 of the World War Veterans' Act (38 USCA), the same is exempted to him.

It is true, we decided in *Wilson* v. *Sawyer,* 177 Ark. 492, 6 S. W. (2d) 825, that money paid to a guardian of a World's War veteran by the United States Government was not subject to garnishment, either in the hands of the guardian or the hands of the veteran, but this holding has no application to the facts in this case.

Under the plain terms of § 3511, Crawford & Moses' Digest, *supra,* no money judgment is or should be awarded the wife against the husband, but, on the contrary, the court determines the specific personal property owned by the husband at the time of the divorce and directs one third thereof to be delivered to the wife. This, in effect, is the mandate of the order here complained of. It does not create the relationship of creditor or debtor, but, on the contrary, is a specific partition of property owned by the parties during coverture. The interest the wife takes in her husband's property, under § 3511, Crawford & Moses' Digest, *supra,* is analogous to that of common-law dower in real estate. The wife takes common-law dower, not by virtue of any contract, but by the mandate of the law. 9 R. C. L., § 5, p. 563.

This record discloses that the trial court awarded appellee's attorney a fee of one hundred dollars, to be paid out of appellant's remaining interest in the funds derived from the United States Government, as a pension. This was error. The relationship of debtor and creditor does exist between appellee and appellant in so far as this attorney's fee is concerned, and comes within the exemption as pronounced in *Wilson* v. *Sawyer, supra.*

For the reasons aforesaid, the decree of the trial court will be modified by eliminating the $100 attorney's fee, and, as thus modified, will be affirmed.

SMITH, J., dissents.

NORTHERN ROAD IMPROVEMENT DISTRICT OF ARKANSAS COUNTY *v.* SIMMERMAN.

4-3291

Opinion delivered January 22, 1934.

Ingram & Moher, for appellant.

Joseph Morrison, for appellee.

SMITH, J. Appellee filed suit against the board of commissioners of Northern Road Improvement District of Arkansas County, in which it was alleged that fractional northeast quarter of section 2, township 3 south, range 4 west, was condemned to be sold for the nonpayment of certain road taxes due the improvement district. The decree was rendered in March, 1927. It was alleged that the Commissioner of the court had erroneously recited, in the report of the sale made by him to the

court, that, pursuant to this decree, he had sold to the road improvement district a tract of land described as part fractional northeast quarter of section 2, township 3 south, range 4 west, whereas, the land sold was fractional northeast quarter of section 2, township 3 south, range 4 west. The report of sale was confirmed. The certificate of sale, issued by the commissioner of the court to the improvement district, was assigned for the amount of the taxes, etc., for which the land sold, to the plaintiff, who received from the commissioner of the court a deed erroneously describing the land as part fractional northeast quarter of section 2, etc.

It was prayed that "all records, papers and other proceedings concerning the above tract of land, wherein the description of said land appears to be described as part frl. northeast quarter of section 2, township 3 south, range 4 west, Arkansas County, Arkansas, be changed so as to correct said mistake, error or clerical misprision to read frl. northeast quarter of section 2, township 3 south, range 4 west." Plaintiff prayed, in the alternative, that, if reformation were denied, she have judgment for $240.16, the consideration paid by her to the commissioners of the district for the assignment to her of the certificate of purchase.

No answer was filed, and a decree was rendered, which granted the relief prayed. The improvement district has appealed from this decree.

The complaint is ambiguous and indefinite, and we do not understand that it alleges that the land was described as "part fractional northeast quarter," etc., in the warning order upon which the decree foreclosing the assessment lien was rendered; nor that it was so described in the decree itself, nor in the notice of sale thereunder. The employment of such a description in either instance would be fatal, and would render the sale invalid.

A proceeding to foreclose an assessment lien of an improvement district is in the nature of a proceeding *in rem*, and the statute pursuant to which the foreclosure decree was rendered provides that notice shall be given by publication in a newspaper, in which the lands pro-

ceeded against as being delinquent shall be described, and that "it shall be immaterial that the ownership of the said lands be incorrectly alleged in said proceeding." See § 13 of act 247 of the Acts of 1919, page 1071, creating the Northern Road Improvement District of Arkansas County, and § 23 of act 279 of the Acts of 1909, page 829, to which act 247 refers, in providing how delinquent assessments may be collected.

This statute providing that lands shall be proceeded against by their description means, of course, that they shall be correctly described; that a valid description shall be employed, one sufficient to advise the reader of the notice as to what lands are being proceeded against. The decree ordering sale of the delinquent lands must correctly describe the land ordered sold; and the notice of sale pursuant to the decree must likewise employ a correct description. A sale lacking these requirements is void.

It has been frequently and definitely decided that deed to a tract of land described as "pt." or "part of" has a void description, being void because of its indefiniteness. *Moore* v. *Jackson,* 164 Ark. 605, 262 S. W. 653; *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118; *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116; *Covington* v. *Berry,* 76 Ark. 460, 88 S. W. 1005; *Dickinson* v. *Ark. City Imp. Co.,* 77 Ark. 570, 92 S. W. 21; *Hewett* v. *Ozark White Lime Co.,* 120 Ark. 528, 180 S. W. 199.

On the other hand, it has been held that the use of the word "fractional" is a good description, where it is used in connection with a subdivision of a section in describing it to mean either that there is more or less land than is usually contained in such subdivision in the sectionizing of same by the government. In other words, a subdivision, according to the public survey, which is described as fractional is accurately and sufficiently described where it is made fractional from the fact alone that it contains either more or less, usually less, land than such subdivision ordinarily contains. In such cases, the designation "fractional" describes all the land in that subdivision. *Graysonia-Nashville Lbr. Co.* v. *Wright,* 117 Ark. 151, 175 S. W. 405. This case, however, like

those just cited, and numerous others, holds that a deed conveying lands as part of a particular division or subdivision of a section is void for uncertainty.

So therefore, if the tract of land here in question was described, either in the original warning order, or in the decree of sale, or in the notice of sale, as "part northeast quarter," etc., the sale was void, and no confirmation thereof would operate to cure this invalidity. On the other hand, if the land was described in the warning order, and in the decree of sale, and in the notice of sale, as "fractional northeast quarter," etc., the sale was good, because this is a valid and sufficient description, and in such case the clerical error of the commissioner of the court in employing an incorrect and insufficient description in his report of sale, and in the execution of a deed upon the approval of his report, are mere clerical misprisions, which may be corrected.

It was said in the case of *Buckner* v. *Sugg*, 79 Ark. 445, 96 S. W. 184, that it was settled, not only by the decisions of this court, but by the adjudged cases in the courts of other States, that, in order to make a valid sale, the land proceeded against must be described with certainty in all proceedings to enforce the tax. The reason assigned for such rule was that this was essential for the owner to have information of the charge upon his property.

As to the sufficiency of the description to be employed in such proceedings, it was said: "It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in assessments for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner, without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid. (Citing authorities.)"

This statement of the law was reaffirmed in the case of *American Portland Cement Co.* v. *Certain Lands*, 179 Ark. 554, 17 S. W. (2d) 281, where it was said: "The

description is void where it is so vague and indefinite that it in no way identifies the land." (Citing cases.)

This is especially true in cases where the proceeding is in the nature of a proceeding *in rem,* where it is not required that the land be proceeded against in the name of the true owner. The owner has no notice unless the land is described in the warning order required by the statute under a description sufficient to identify it.

Now, of course, it is not the law that one tract of land may be proceeded against as delinquent, and another tract of land be sold. Jurisdiction to sell is acquired by proper notice. It is, however, the law that, where land has been properly decreed to be sold and a valid sale has been had, subsequent clerical errors or misprisions may be corrected.

The case of *Hill* v. *Dillard,* 187 Ark. 486, 60 S. W. (2d) 572, announces this principle. There an administrator had advertised lands of his intestate for sale under an incorrect and insufficient description, and had executed a deed which contained the same description employed in the notice of sale. Suit was brought to reform the sale and the administrator's deed executed pursuant thereto to properly describe the intestate's lands, the lands which the administrator had intended to sell. In reversing the decree of the chancery court granting that relief, it was there said: "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 or judgments of probate courts or deeds made pursuant thereto in matters of substance."

Now it is not a matter of form only, after a sale, to substitute a valid description of a tract of land that was never sold for a description which was void, which did

not describe any land, and consequently put no one on notice.

It does not appear from the record before us that the original owner of the land in question was ever advised of the proceedings, or made party to it, except by the publication of the original warning order under which the jurisdiction to foreclose the assessment lien was acquired by the chancery court. Nor is the warning order, or the decree of foreclosure, or the notice of sale before us, and we cannot and do not pass upon the sufficiency of these matters, but it follows, from what we have said, that, if the land was described in the proceedings had prior to the sale as "part fractional northeast quarter," etc., the decree of foreclosure is void. If this be true, the necessity for notice to the owner which a correct warning order would give cannot be, and has not been, supplied by the subsequent proceedings from which this appeal comes, of which proceedings the owner of the land was without notice, and to which he was not a party.

But we interpret the decree from which this appeal comes as correcting only the clerical error of the commissioner of the court in reporting a sale under an improper description, and, in correcting the subsequent proceedings, including the commissioner's deed, to correctly describe the land which was actually proceeded against under a valid description, and, as thus interpreted, the decree must be affirmed, and it is so ordered.

NATIONAL OLD LINE INSURANCE COMPANY *v.* RUSSELL.

4-3298

Opinion delivered January 22, 1934.

Beloit Taylor, for appellant.

Barber & Henry and *M. F. Elms,* for appellee.

SMITH, J. Appellee filed a complaint in the circuit court of Pulaski County against appellant insurance company, hereinafter referred to as the company, which contained the following allegations: The company issued to appellee a life insurance policy, which had been continued in force by the payment of annual premiums until it had a cash surrender value of $603.65, and appellee made application to the company for the payment to him of this sum. Appellee surrendered his policy pursuant to this application, and, on February 20, 1933, the company drew its check on the Union Trust Company, of Little Rock, payable to appellee, for the sum of $603.65, the full cash surrender value. The check was delivered, at appellee's request, to his representative, who immediately forwarded it to appellee at Stuttgart, where it was received by appellee on February 22, 1933. This being a bank holiday, the banks of the city of Stuttgart were closed on that day on that account. Appellee resides in the country fifteen miles distant from Stuttgart, and for that reason induced one of the tellers of the First State Bank of Stuttgart to accept said check to be deposited on the following day, to obviate the necessity of returning to Stuttgart to make the deposit. The Stuttgart bank closed or failed to open its doors on the 23d, and was immediately taken in charge by the State Bank Commissioner for liquidation.

The plaintiff thereupon, and on February 23d, communicated with the defendant company by wire and by mail and requested that it stop payment on said check. This demand was complied with, and the company gave

the drawee bank notice on February 23d to stop payment of the check, "and payment on said check was stopped and same returned on February 25, 1933, through banking channels, and received several days thereafter by the plaintiff, Mack Russell; that by the time the check had been returned to the plaintiff, the Union Trust Company, upon which said check was drawn, had, on February 28, 1933, gone on a restricted basis."

In the letter confirming the telegram, which directed that payment be stopped, a request was made that the company issue another check "in lieu of the original one, which said defendant company, in its reply to plaintiff dated February 27, 1933, agreed to do upon the delivery of the original check to it; that, before said original check could be delivered to the defendant, the bank on which it was drawn had gone on a restricted basis, and thereupon the defendant company refused to issue a new check or otherwise pay the amount due this plaintiff."

It was further alleged that demand for payment had been made and refused, "except that the defendant tendered in payment 52½ per cent. of the amount of the original check, which is the amount or percentage since released by the bank on the restricted account of the defendant, and further tendered an assignment on its restricted account in the Union Trust Company for a sum which represented 47½ per cent. of the original check, which was refused by the plaintiff."

Judgment was prayed for $603.65, with interest, and the statutory penalty and attorney's fee.

The company filed a demurrer to this complaint, which was overruled, and, as the company elected to stand upon its demurrer, and declined to plead further, judgment was rendered for the full cash surrender value of the policy, and six per cent. interest thereon. Appellee moved the court to assess the statutory penalty of twelve per cent., and to allow a reasonable attorney's fee, which the court declined to do. The company has appealed from the judgment against it, and appellee has prayed a cross-appeal from the refusal to allow the penalty and attorney's fee.

It is earnestly insisted that the company fully discharged its obligation when it issued a valid check for the surrender value, which would, in due course, have been paid had it been presented for payment to the bank upon which it was drawn, and that the failure so to be paid arose out of the fact that appellee selected an insolvent agent to make the collection. However, the company agreed to and did stop payment of the check, so that it may not now be said that the check was tendered and accepted as final payment. Under the allegations of the complaint, the fact remains that the company gave a check, the payment of which was stopped at its direction, so that it has not paid the demand which it is under a contractual duty to discharge.

The case of *Southern Bank & Trust Co.* v. *Whited,* Ala. App. 145 So. 832, is cited by appellant company as authority for holding that the company discharged its obligation when it stopped payment of the check at appellee's request. But we think the case cited does not sustain that contention. The facts there were that payment was made of an uncertified check, like the one here involved, after the drawer, for the benefit of the payee, had notified the bank upon which the check was drawn not to make the payment. It was there held by the Court of Appeals of Alabama that the drawer of an uncertified check may stop payment on it at any time prior to payment, and that, when the bank is notified by the drawer, for the benefit of the payee, not to pay an uncertified check, the bank owed the payee the legal duty not to make payment.

We have no hesitancy in approving the law thus declared; but we find nothing in this opinion to support the contention that the company has, by stopping payment of the check, at the payee's request, discharged its duty as the drawer of the check. When the payment of this uncertified check was stopped before presentation and payment, it ceased to be, as was said, in effect, in the case cited, by the Court of Appeals of Alabama, an order for the payment of money, and it cannot therefore be held to be a payment or discharge of the company's obligation to appellee. Judgment was therefore properly

rendered for the amount of the unsatisfied obligation, with interest thereon.

We are also of the opinion that the court properly refused to render judgment for the statutory penalty and attorney's fee.

By the act of March 29, 1905 (Acts 1905, page 307), appearing as § 6155, Crawford & Moses' Digest, it is provided that, "In all cases where loss occurs, and the * * * life * * * insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss."

This statute was held to be valid and constitutional in the case of *Arkansas Ins. Co.* v. *McManus,* 86 Ark. 115, 110 S. W. 797. There was a discussion in this opinion of the purpose of such legislation and the theory upon which it could be sustained. It was there said that the insurance companies, after a loss insured against occurs, have the insured at a great disadvantage, and are in position to inflict great damage by mere delay in payment of losses, and that it was therefore neither unjust nor unreasonable to inflict a penalty which will in some degree compensate for that injury where the resisted claim is finally adjudged to be just, and which also tends to deter the insurer from interposing unnecessary delay in settlement.

This statute has been enforced in many subsequent cases, but it has been frequently stated that, being a penal statute, it should, like all such statutes, be strictly construed. *Business Men's Acc. Ass'n of America* v. *Cowden,* 131 Ark. 419, 199 S. W. 108; *Inter-Ocean Casualty Co.* v. *Warfield,* 173 Ark. 287, 292 S. W. 129.

There has been no denial of liability; nor was there any refusal to pay. On the contrary, the obligation to pay the cash surrender value of the policy was recognized, and a prompt effort, in good faith, was made to discharge it. The real question here involved is, who shall sustain the loss arising out of the failure of the bank

which appellee selected as his agent to collect the check, and the subsequent partial suspension of payment by the drawee bank? We are of the opinion that it was not the purpose of the statute to impose a penalty in such a case, and the judgment in its entirety will therefore be affirmed.

PRICE *v.* BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA.

4-3292

Opinion delivered January 22, 1934.

Roy E. Rison and *Tom W. Campbell,* for appellant.

Charles W. Mehaffy, for appellee.

HUMPHREYS, J. Appellant sued appellee in the circuit court of Pulaski County on an insurance policy issued by appellee to her husband providing payment to her as beneficiary of $3,000 in the event of her husband's death "from bodily injuries effected solely through accidental means." It was alleged in the complaint that, during the life of the policy, her husband, Joel Lee Price, was accidentally killed by being shot to death unexpectedly and by chance.

Appellee filed an answer denying that Joel Lee Price was accidentally killed but, on the contrary, was killed by officers of the law in a fight which he provoked and

in which he was the aggressor at a time when he and a man by the name of Eagle were engaged in robbing Terry Dairy Company plant at Scott and Eighteenth streets in Little Rock, Arkansas.

The cause was submitted upon the pleadings and evidence adduced, at the conclusion of which the court instructed a verdict against appellant and dismissed her complaint, from which is this appeal.

According to the undisputed testimony, Price and Eagle, wearing masks, and Price being armed with a .45 caliber automatic pistol, entered the property of Terry Dairy Company, tied its night watchman in the barn, broke into its iron safe, and were prowling through the building when officers appeared on the scene; that, in going out of a room into the hall, they were discovered and called to by the officers, whereupon they turned and ran into adjoining rooms; that officers Huston and Pate entered the door leading into a dimly lighted room in which Price was hiding and called to him that they were officers, whereupon he shot at them without notice and continued to fire until he was mortally wounded by them and fell to the floor; that they secured his pistol and a statement from him that Eagle was in an adjoining room; that officers Walker and Huston entered the adjoining room in search of Eagle and, upon being attacked by him, they shot and instantly killed him; that during the time Price was shooting at Huston and Pate, Huston shot Price three times and Pate shot him twice, all five shots taking effect; that he fell to the floor when the last shot was fired by Huston into his head; that Price shot four times, twice at each officer, none of which took effect; that subsequently Price died from one or more of the wounds received by him during the encounter.

The general rule of law is that death resulting from bodily injuries effected solely through accidental means in insurance policies does not include death resulting from wounds received in an encounter provoked by the insured or in which he was the aggressor and from which he did not attempt to retire in good faith; nor does it include death inflicted during the commission of a voluntary or intentional act on his part, the inevitable result

of which he could have or should have foreseen. *Mutual Life Insurance Company* v. *Distretti,* 159 Tenn. 144, 17 S. W. (2d) 11; *McGuire* v. *Metropolitan Life Insurance Company,* 164 Tenn. 32, 46 S. W. (2d) 53.

An insured engaged in the commission of a felony who, when discovered in the act, becomes the aggressor in an effort to shoot his way out, necessarily takes chances on being killed, and, if killed in an effort to escape, his death cannot be regarded as accidental within the terms of such policy. He ought to have anticipated or expected death from his own culpability, and hence, if killed, his death is not accidental.

Appellant contends, however, for a reversal of the judgment because Huston made a statement within 48 hours after the killing to the effect that he accidentally killed Price while he was trying to shoot the .45 caliber automatic pistol out of his hand. H. O. Davis testified that Huston made such a statement to him. Huston denied making the statement. Appellant argues that, on account of the conflict in the testimony between Huston and Davis, the court should have allowed the jury to determine the issue of whether the killing was intentional or accidental. Even if it be conceded that Huston was impeached so that the jury would have disregarded his testimony, yet the facts detailed above were supported by other undisputed evidence, especially by the testimony of Pate; or, to state it differently, if the testimony of Huston were entirely eliminated from this record, the remaining undisputed evidence showed that, while Price was engaged in the commission of a felony; he was discovered, and, in order to escape arrest, he opened fire upon the officers and continued to fire upon them until he was killed by them in necessary self-defense. The court, therefore, correctly told the jury that it was shown by the undisputed evidence that Price deliberately brought on his own death; hence that his death was not accidental within the meaning of the policy.

No error appearing, the judgment is affirmed.

WEISHAUPT *v.* BANK OF RUSSELLVILLE.

4-3299

Opinion delivered January 22, 1934.

Williams & Williams, for appellant.

Ward & Caudle, for appellee.

HUMPHREYS, J. Appellee brought suit against appellant and J. C. Fincher in the circuit court of Pope County for a balance due on two notes executed by appellant to J. C. Fincher on the 11th day of May, 1929, due and payable in two and three years after date, which notes were assigned to appellee by J. C. Fincher before maturity in payment of indebtedness Fincher owed it.

Appellant filed an answer admitting the execution of the notes but denying liability for the balance due on account of the want of title in Fincher to a part of the property for which the notes were given and on account of the fraudulent misrepresentation of appellee as to the ownership of part of said property by Fincher.

Appellee filed a reply to the answer denying each material allegation therein.

Based upon the allegations in the answer, appellant filed a motion to transfer the cause to the chancery court, which was overruled by the court over appellant's objection and exception.

The cause was then submitted upon the pleadings and testimony, at the conclusion of which the court in-

structed the jury to render a verdict in favor of appellee for the amount due upon the notes and rendered a judgment in accordance with the verdict, from which is this appeal.

The record reflects that the notes were given by appellant as a part of the purchase price for the entire equipment used in and about the operation of a certain coal mine known as the Hoing Coal Mine located in Johnson County, Arkansas, in section 20, township 9 north, range 25 west, consisting of two tipples, one wash house, one locomotive engine, one supply house, 3,600 feet of tramroad and right-of-way for same, including side tracks and switches, 25 cars more or less, one blacksmith shop complete; also that, at the time of the execution of the notes, a written contract for the transfer of said property, which was in the nature of a bill of sale, was executed between J. C. Fincher, as party of the first part, and appellant, as party of the second part; that the written contract contained the following provision:

"The said party of the second part on his part agrees and does by these presents accept the aforesaid property, with which he is familiar, in its present condition and quantities, taking the lease contract of the said Quick without recourse on the said party of the first part."

Appellant introduced testimony, over the objection and exception of appellee, tending to show that appellee's representative, who was president of appellee bank, represented that J. C. Fincher was the owner of all the property; whereas, E. C. Quick was the owner of a part thereof by purchase under a mortgage foreclosure sale of the southwest quarter, southeast quarter of section 2, township 9, range 25 west, on which some of the property or equipment was located.

Appellant contends the trial court erred in refusing to transfer the cause to the chancery court under the allegations of his answer. We think not, because the defenses interposed in the answer, if available to him, were just as available in law as in equity.

Appellant also contends the trial court erred in disregarding the testimony tending to show that there was an outstanding interest of a third person in a part of the

property or equipment and that there was a misrepresentation by appellee's agent to the effect that J. C. Fincher was the sole owner of all the property or equipment. This, of course, was the effect of instructing a verdict for appellee. The action of the court was tantamount to excluding such testimony.

The defenses interposed and the evidence introduced in support thereof were not available to appellant on account of the contract he made when he bought the property or equipment. The clause in the contract alluded to is as follows:

"The said party of the second part on his part agrees and does by these presents accept the aforesaid property, with which he is familiar, in its present condition and quantities, taking the lease contract of the said Quick without recourse on the said party of the first part."

The peremptory instruction given by the court was based upon this clause in the contract and was correct.

No error appearing, the judgment is affirmed.

FIRST NATIONAL BANK *v.* MERIWETHER SAND & GRAVEL COMPANY, INC.

4-3250

Opinion delivered January 22, 1934.

[redacted]

Ned Stewart, for appellant.

E. A. Upton and *Searcy & Searcy,* for appellee.

KIRBY, J., (after stating the facts). The only question for determination here is whether or not the acknowledgment of the mortgage substantially complies with the laws of this State, and whether the judgment creditors' liens are prior and paramount to the interest and equity of appellants in the property by reason of their mortgage.

The suit was brought to foreclose the mortgage and declare the judgment creditors' liens subordinate and inferior to the lien of the mortgage holders. The mortgage was introduced in evidence together with the notes secured thereby, and the same appears to have been

filed for record on the 1st day of August, 1927, at 9 o'clock and recorded in the recorder's office at 9 o'clock that day.

The president of the appellee gravel company identified the resolution of the board of directors authorizing the mortgage and also the notes secured thereby. He stated the amount due on the different notes and that it was the intention to include in the mortgage everything the company owned; and that the replacements made by the company were made with the consent of the mortgage holders.

The mortgage which appellants sought to foreclose is certainly, as to form and purpose, a mortgage both in law and equity. The only question which could be raised concerning the validity of the instrument is the sufficiency of the acknowledgment to entitle it to record in this State. The mortgage was taken by appellant bank, a Louisiana corporation, from appellee gravel company, also domiciled in Louisiana, upon property owned by said gravel company situated in Arkansas. The mortgage was drawn in Louisiana, and the acknowledgment appears to have been taken in conformity with the laws of that State. To entitle said mortgage to record in this State, the acknowledgment must have been taken by an officer authorized by the laws of this State to take acknowledgments, or in substantial compliance with our statutes. Section 7380, Crawford & Moses' Digest, provides the manner and form of taking acknowledgments to deeds and mortgages. Section 1516, Crawford & Moses' Digest, provides that an acknowledgment of the conveyance of any real estate taken without the State must be taken before a notary public, the attestation of such acknowledgment and the form of the certificate.

In the instant case the instrument was acknowledged before a notary public and the certificate attested by his official seal. The instrument as acknowledged recites the appearance of the grantor, Meriwether Sand & Gravel Company, Inc., by its president, etc., and ends as follows:

"Thus done and signed at my office in the Parish of Caddo, State of Louisiana, in the presence of Ruby C. Cochran and I. C. O'Leary competent witnesses on this 11th day of July, Nineteen Hundred and Twenty-Seven.

"Witnesses:

"Meriwether Sand & Gravel Company, Inc.,
"By Jas. S. Meriwether, President,
"Frank M. Cook, Notary Public,
"Ruby C. Cochran,
"I. C. O'Leary."

We must examine the acknowledgment as made to ascertain if it be in form and substance a substantial compliance with our laws relating to such acknowledgments.

Appellees claim that the record shows that appellants' mortgage was insufficiently acknowledged because the acknowledgment omitted the words "consideration and purposes, etc.," or words of similar import; and that because of the fatal defect of the acknowledgment said mortgage was illegally admitted to record and the recording thereof constituted no notice of the existence of a mortgage to third parties nor any lien against the lands included therein. Appellees cite *Drew County Bank & Trust Company* v. *Sorben,* 181 Ark. 943, 28 S. W. (2d) 730, and *Ford* v. *Burks,* 37 Ark. 94, a case holding the acknowledgment invalid because the word "purposes" was omitted; and also *Wright* v. *Graham,* 42 Ark. 141.

The acknowledgment of the instrument herein, however, was made by the proper officers, the president and secretary of the corporation, under a resolution by the board of directors thereof duly authorizing said mortgage, a certified copy of the resolution being attached to and made a part of the acknowledgment by the official, who stated, "that for and in consideration of the sum of one dollar ($1) cash in hand paid and the premises hereinafter set forth," the certificate ending as above set out: "Thus done and signed, etc."

The word "consideration" is properly used in the acknowledgment while the words "and the premises hereinafter set forth," certainly are words of similar import to "purposes" reciting all the purposes instead of saying "therein mentioned and set forth"; and said acknowledgment was a substantial and sufficient compliance

with our statute, the mortgage not being invalidated by the use of such language.

Appellants insist that, notwithstanding the holding of the chancellor that their mortgage was not entitled to record because of the defective acknowledgment and therefore constituted no lien against the property, the court erred in not holding their right to the property superior to that of appellees, who were only judgment creditors and not innocent purchasers. This contention must be sustained.

The instrument purports to grant, bargain, sell, transfer and assign the real estate, etc., to a trustee to be applied to the payment of the pre-existing indebtedness of these three Shreveport banks described therein, and would have constituted a valid legal mortgage between the parties, although no lien against the property because of the defective acknowledgment not entitling it to record. It is, however, none the less a conveyance of the property described therein by appellee to the trustee for application to the payment of appellee's indebtedness to appellants; and, whether it be considered an equitable mortgage or not, it was effective to convey appellee's interest in the property described for the purpose of securing such indebtedness.

The judgment creditors are not innocent purchasers, and by their judgments could only subject to the payment of their indebtedness the mortgagor's interest remaining in the property, their liens being subject to existing equities of third parties in the land, etc. *McGuigan* v. *Ricks,* 140 Ark. 418, 215 S. W. 611; *Doswell* v. *Adlen,* 28 Ark. 82; *Apperson Co.* v. *Burgett,* 33 Ark. 328; *Howe* v. *King,* 127 Ark. 511, 192 S. W. 883; *Robbins-Sanford Merc. Co.* v. *Johnson,* 166 Ark. 330, 266 S. W. 260; *Snow Bros.* v. *Ellis,* 180 Ark. 238, 21 S. W. (2d) 162; *First National Bank of Amarillo* v. *Jones,* 107 Tex. 623, 183 S. W. 874.

The chancellor could have foreclosed the mortgage settling the rights of all the parties, and should therefore have held the lien or claim of appellants superior to the lien of said judgment creditors and erred in not so doing. The decree is reversed, and the cause remanded

with directions to enter a decree in favor of appellants in accordance with the ruling herein. It is so ordered.

SMITH and MCHANEY, JJ., dissent.

SPRAGUE *v.* CLAY COUNTY USE SCHOOL DISTRICTS.

4-3254

Opinion delivered January 22, 1934.

[redacted]

J. L. Taylor and *Oliver & Oliver,* for appellant.

D. Hopson, Foster Clarke and *H. M. Cooley,* for appellee.

KIRBY, J., (after stating the facts). The second surety bond was required to be furnished by the depository bank upon a demand therefor by the county judge under the authority of act 163 of 1927, § 14, of which reads in part as follows:

"The county court, or the judge thereof, may at any time, if he deems it desirable, require a new bond, or additional bond to be filed by any depository selected under this act." The county judge demanded the execution of the new bond because of having heard of the opinion of the Attorney General that the law required it, and since most of the county officials were required to execute such surety bonds. This bond was executed and approved, and was in a sufficient amount to secure all the money paid into the depository under the law.

It was shown that all the moneys due the county and school districts were in the depository at the time the new bond was required to be executed. It appears from the testimony also that it was the intention to require the securing of the entire amount that might come into the depository thereafter by the new bond, which was given in lieu of, and in substitution for, the old bond, and not in addition thereto. Said surety bond was duly executed, approved and delivered to the depository bank, which had the moneys of the county in its possession at the time.

It has been held that a surety cannot be released from a county treasurer's bond from any liability which had already been incurred. Ex parte *Talbot,* 32 Ark. 424. It was also said there that the court had the discretion, however, to require the treasurer to give a new bond or security for the performance of official duties, and, upon the execution and approval thereof, the sureties on the old bond would be discharged from future liability, but not from any present liability.

The statute relative to the discharge of sureties on the former official bond by the execution of a new bond provides that, when a new bond is taken and approved, it

shall operate as a discharge of all the sureties in the former bond from all liability arising from any subsequent misconduct or default of the principal therein, and such sureties shall thenceforth be liable only on such bond for such breach thereof as shall have happened prior to the taking and approving of the new bond. Section 8303, Crawford & Moses' Digest.

It may be urged that a depository bond is not an official bond within the meaning of the statute, but the law requires the execution thereof for the protection and security of public funds collected by public officials and deposited therein, and we see no good reason why there should be a rule for less or more liability for the sureties on the bonds of such depository than is required by law of the sureties of the official who collects the money in the first instance. Such depository bonds have been held to be official bonds. *Maryland Casualty Co.* v. *Pacific Co.,* 245 Fed. 831.

The new bond was filed January 10, 1930, and approved January 25, 1930, and was intended to be in lieu of and supersede the old bond, as already said. On that day the bank had on hand $35,701.85 to the credit of the treasurer, and on January 18, a few days before the new bond was approved, his balance was $34,051.17, and was gradually reduced afterwards. The treasurer continued under the new bond to make deposits and draw out funds, and by November 17, 1930, he had drawn out $77,073.36, having a balance on hand of $29,118.29. The action of the county treasurer, after he knew of the opinion of the Attorney General and that the new bond had been made and approved, and after his talk with the county judge about it, was certainly tantamount to acceptance on his part of the new bond instead and in lieu of the old bond, and, since he withdrew from the bank an amount in excess of the balance as of January 10, 1930, the old bond was discharged. *State use Randolph County* v. *Pocahontas State Bank,* 184 Ark. 442, 42 S. W. (2d) 546. See also *School District* v. *McCrary,* 187 Ark. 800, 62 S. W. (2d) 953, and *Jefferies* v. *Wasson,* 187 Ark. 519, 60 S. W. (2d) 903.

It will be remembered that the chancery court, at the first hearing on the approval of the proposed sale by the Bank Commissioner, denied it, and at a later hearing additional testimony was taken, which was included in the findings and decree approving the sale. There was no action taken to prevent the carrying out of the decree authorizing the sale, and the treasurer and the school districts, being fully advised about the matter, will be held to have ratified the decree.

It is manifest that the new surety bond was executed to take the place of and supersede the old bond, and that the conduct of the treasurer and the school districts amounted to a ratification of the proceeding, and the sureties on the old bond were discharged thereby. The chancellor erred in holding otherwise, and, for this error, the decree is reversed, and, the cause having been fully developed, same will be dismissed. It is so ordered.

MARION MACHINE, FOUNDRY AND SUPPLY COMPANY *v.* FEDERAL OIL MARKETING CORPORATION.

4-3275

Opinion delivered January 22, 1934.

[redacted]

Walter L. Goodwin and *J. S. Brooks,* for appellant.

Jeff Davis and *Conard E. Cooper,* for appellee.

KIRBY, J., (after stating the facts). Appellants insist that the court erred in directing the verdict against them; but it has frequently been held that, under such circumstances of submission, the court has the right to direct a verdict, the parties having by such request waived the right to a verdict by the jury, and the decision of the court has the same effect as would have been given to the verdict of a jury, the evidence viewed in the light most favorable to appellee. *St. L. Sw. Ry. Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643; *Upson* v. *Robinson,* 179 Ark. 600, 17 S. W. (2d) 305; and *Stewart* v. *Budd,* 169 Ark. 363, 295 S. W. 748.

Appellants failed to sustain the burden of proof, which was upon them, to establish an abandonment of the lease as claimed; and there was no claim of any right to a forfeiture because of a cessation of operation of the wells, nor any claim of a right to cancellation of the lease because thereof.

The testimony in appellee's favor was very substantial, it being doubtful if there was not a decided preponderance thereof, and at least it was amply sufficient to support the verdict as directed. The appellants clearly had no right to take possession of and appropriate the casing out of the old wells under the circumstances, there having been no abandonment thereof by the lessees, and the lease not having expired or terminated by reason of forfeiture or otherwise; and the court committed no error in so holding.

The judgment is affirmed.

BRAWLEY *v.* ROGERS.

4-3300

Opinion delivered January 22, 1934.

Coleman & Reeder, for appellant.

John C. Ashley, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony shows that S. P. Murphy and Jane Spurlock executed the contract in question, and that it was done in consideration of their approaching marriage, which occurred shortly thereafter. It is not claimed that there was any fraud or undue influence used in the negotiations about the agreement or in the execution thereof; and it

was entered into in good faith for the purposes set out therein, and the parties lived together as husband and wife until the death of the husband.

The evidence does not indicate the value of the property owned by the respective parties at the time of the execution of the contract.

The antenuptial contract is sought to be avoided as one without consideration, it being insisted for the appellee that, under the law and the terms of the said contract, the appellant's intestate could have had no interest in appellee's property by marriage, since she was too old for the possibility of issue being born alive from the union, and since under the law otherwise she would have been entitled to dower, etc., out of his property; and that therefore the antenuptial contract was void for want of consideration.

The statute, §§ 7028 *et seq.*, Crawford & Moses' Digest, authorize the making of antenuptial agreements by parties contemplating marriage. The law has always allowed parties in contemplation of marriage to fix the rights of each in the property of the other by an agreement equitably and fairly made between them that will exclude the operation of the law in that respect. 13 R. C. L., pages 1012-15. It is likewise held that marriage is a sufficient consideration for such antenuptial agreement or marriage settlement. See 13 R. C. L. 1016; 30 C. J. 631; *Oliphant* v. *Oliphant,* 177 Ark. 613, 7 S. W. (2d) 783, and *Comstock* v. *Comstock,* 146 Ark. 266, 225 S. W. 621.

There is nothing to indicate that this antenuptial contract was not freely entered into, or that it is unjust or inequitable, and such contracts should be liberally construed to carry out the intentions of the parties. *Oliphant* v. *Oliphant, supra.* There was no intimation that said contract was not entered into in good faith or without the expectation of the parties living together until death separated them. *Id.*

The court therefore erred in holding the contract was invalid and unenforceable for want of consideration, and that appellee was not bound thereby. The judgment must be reversed, and, the case, appearing to have been fully developed, will be dismissed. It is so ordered.

ERWIN *v.* MILLIGAN.

4-3301

Opinion delivered January 22, 1934.

[redacted]

Coleman & Reeder and *T. J. Carter,* for appellant.

John C. Ashley and *Roy Prewitt,* for appellee.

MEHAFFY, J. Suit was begun in the Sharp Circuit Court by Mrs. Noble C. Milligan, appellee, against the appellant, Wade Erwin. The appellee alleged in her complaint that the appellant, Wade Erwin, came to her home in Sharp County, and, in the absence of her husband, unlawfully, wilfully and contemptuously did insult, disturb, disquiet and threaten her by the use of indecent language and proposals; that, because of said wrongful acts, words and proposals made to her by appellant, she became ill, excited and nervous; that her moral sensibilities and ideals of decency and propriety were shocked, and that she suffered, because of said acts and proposals, a nervous collapse and great pain, anguish and humiliation. She alleges that she was pregnant with child; that, because of her mental condition, nervous and physical

shock brought about by the improper conduct of the appellant, she was caused to have a miscarriage, and was caused great physical pain and suffering and irreparable injury to her health; that she was confined to her bed, and forced to expend large sums for doctor's bills and medicine; that her health was permanently injured. She also alleges that, prior to the misconduct of appellant mentioned in her complaint, she was a strong healthy woman, able to do her housework and assist her husband in the fields, making and harvesting his crops; that since the acts complained of she had been nervous, irritable and unable to perform her necessary duties or assist her husband as before; that, because of said wrongful acts and proposals, she had been damaged in the sum of $5,000 actual damages, and in the sum of $2,500 punitive damages. She prays judgment in the sum of $7,500, and costs.

The appellee, Noble C. Milligan, also filed suit against appellant and alleged the same acts and proposals of appellant that are alleged in the complaint in the suit brought by his wife, and, in addition, alleges that he lost the services of his wife, and had to pay doctor's bills. He prays for judgment in the sum of $2,500.

Appellant filed answer in each case, denying all the allegations in each complaint. The two cases were consolidated and tried together.

The appellee, Mrs. Noble C. Milligan, testified that she had three children, the oldest four years of age; that she had known appellant for 15 or 16 years; that in April, 1931, he came to her home twice; that he came the second time to their home a few days later about noon; when he arrived, she testified that her husband was coming from the field; that they met and shook hands, and talked something about appellant's purchasing a tractor from her husband; that they had this talk while she was preparing dinner; that, when they had eaten, appellant and her husband talked awhile, and her husband said he had to go to the field; appellant did not make any answer; he made no attempt to get up, and her husband then said that he had to go to his mother's to get a team, and told appellant to meet him as he came back and go to the field with him, and appellant agreed. Appellant remained sitting there

talking to appellee; her husband went on to the field, and, when she began to stack the dishes, appellant said: "I will give you my hand that I am your friend," and she told him she never expected him to be anything else but her friend. He then said: "I keep secrets, too," and by that time witness said appellant was reaching for her hand, and he acted as though he was going to draw her to him and kiss her. She was shocked, and told him she thought he was a Christian man; that he took hold of her right hand and she jerked back, and told him to go back where her husband was. He then asked her if he could stop as he came back by, and she told him he could not, but to go back where her husband was. He then said: "You will let me stop and be a friend to you for some money, won't you?" and she told him, if he had any money to give away, to give it to her husband. He then said: "I would rather give it to you." She testified that he asked her if she were going to tell her husband, and she said "Yes." He then said: "If you do, he might think something if you did."

This is substantially all of appellee's testimony as to what appellant said and did. She then described her shock and injury, her miscarriage and suffering, and inability to do her work.

Dr. I. M. Huskey testified that he treated Mrs. Milligan, appellee, on April 20th; that she was suffering with an abortion, and was in a serious condition. A hypothetical question was asked him, which recited the facts testified to by Mrs. Milligan, and closed as follows: "What in your judgment would be the cause of the miscarriage or abortion?" He answered that would be a sufficient cause for the abortion in the absence of any other condition in the way of disease or injury; that it would lead him to the natural conclusion that the severe mental strain of her condition would be the cause of her trouble.

There was some evidence introduced, tending to corroborate the evidence of appellee as to her illness, and all of the facts testified to in support of appellee's contention were contradicted by appellant and his witnesses.

The appellee, Noble C. Milligan, testified that he had expended $25 for doctor's bill. He also testified that

his wife was sick and unable to do the work which she did prior to the time of appellant's alleged misconduct, but he did not testify how much work she did nor how much of her services he was deprived of by reason of her injury, and there was no testimony by any witnesses as to the value of her services.

Noble Milligan sued to recover doctor's bills, and for loss of services, and obtained a judgment for $125. He testified about the condition of his wife and her inability to perform the services she had been performing, but he did not testify as to any acts or words of the appellant. He could not do so because he was not present. No one testified about the acts of Erwin, except Mrs. Milligan, the wife of Noble Milligan. This evidence of Mrs. Milligan could not be considered in her husband's case, and, since no one else testified to anything that was done or said by Erwin, there was no evidence in Noble Milligan's case that Erwin did or said anything.

Section 4146 of Crawford & Moses' Digest provides that husband and wife are incompetent to testify for or against each other, and the court told the jury that the testimony of Mrs. Milligan could not be considered by them in the case of Noble Milligan. This instruction was correct.

In the case of *Railway Co.* v. *Amos,* 54 Ark. 159, 15 S. W. 362, a case where there was a joint action by husband and wife against the railway company, the court said: "But no objection was made to the joinder, and no question arises upon it now except its bearing upon the competency of the plaintiffs as witnesses in the cause. It is argued that, as both plaintiffs were interested in the result, neither was competent to testify in the cause. But either was a competent witness in his or her own behalf, and the rule is settled by the previous decisions of this court that, in cases in which a party may be a witness for himself, marriage is not a disqualification as to his interest in the case, notwithstanding the other party to the marriage is a party to the suit." So, in the instant case, the wife was a competent witness in her own case, and might testify in her own behalf, but she could not testify in the case of her husband.

This court again said: "So it may be taken as settled by these two decisions that the fact that the husband and wife are joint plaintiffs in an action does not prevent either of them from testifying in his or her own case." *L. R. Gas & Fuel Co.* v. *Coppedge,* 116 Ark. 334, 172 S. W. 885.

Again we said: "This court has held that the fact that a husband and wife have joint claims in an action, does not prevent either of them from testifying in his or her own case, but that the testimony of the wife cannot be considered in the case of the husband, and the testimony of the husband cannot be considered in the case of the wife." *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. (2d) 960.

It therefore appears that there was no competent evidence in the case of Noble Milligan tending to show any wrongful conduct on the part of the appellant. Since there was no competent evidence in this case, and as no one except the wife can testify to anything done or said by Erwin, the judgment in the case of Noble C. Milligan against Wade Erwin must be reversed, and the cause dismissed.

The court submitted to the jury, in the case of Mrs. Milligan against the appellant, the question of punitive damages. Punitive damages are damages imposed by way of punishment, and are given for that purpose in addition to compensation for the loss sustained. It is generally said that punitive damages are awarded in view of the supposed aggravation of the injury to the feelings of the plaintiff by the wanton or reckless act of the defendant. 17 C. J. 968 *et seq.;* 8 R. C. L. 579; *St. L. S. W. Ry. Co.* v. *Owings,* 135 Ark. 56, 204 S. W. 1146; *Mo. Pac. Rd. Co.* v. *Yancey,* 178 Ark. 147, 10 S. W. (2d) 22; *Moore* v. *Wilson,* 180 Ark. 41, 20 S. W. (2d) 310.

We are of the opinion that, under the rules announced by these authorities, there was no evidence justifying the award of punitive damages, and the court erred in giving instruction No. 7 at the request of the appellee, which authorized the jury to return a verdict for punitive damages in favor of the appellee.

Appellant contends that appellee cannot recover in this case under the rule announced by this court that no recovery can be had for mental pain and anguish unaccompanied by physical injury and caused by unintentional negligence. He calls our attention to several authorities. The rule is well established that there can be no recovery for fright or mental pain and anguish caused by negligence where there is no physical injury. But the rule is equally well established that a recovery may be had where the injury is caused by wilful or intentional conduct. This suit is not based on negligence, but on the alleged intentional wrongful conduct of appellant.

"As a general rule, damages are recoverable for mental suffering consisting in a sense of wrong or insult, indignity, humiliation or injury to the feelings; and this rule is particularly applicable, it is said, where such suffering is the result of a wanton or intentional trespass on the person of a woman." 8 R. C. L. 521.

In the case of wilful or intentional wrong, the rule invoked by appellant has no application. *Rogers* v. *Willard,* 144 Ark. 587, 223 S. W. 15.

The appellant objected to the hypothetical question propounded to the physician, but we do not think there was any error in asking this question. The objection is that it did not contain all the facts in evidence. The evidence showed that shortly after the misconduct of appellant, alleged as the basis of the action, the appellee, Mrs. Milligan, rode two or three miles in a truck, and appellant contends that this should have been embraced in the hypothetical question, but there is no evidence that she received any injury by this ride, and it was not necessary to include this in the hypothetical question. Besides, the appellant asked practically the same question when his physician, Dr. Tibbles, was testifying, and in his question there was nothing said about the ride in the truck. We are of opinion that the hypothetical question was proper.

We have carefully read and considered the instructions, and have reached the conclusion that there was no error in giving or refusing to give instructions.

The evidence of appellee, Mrs. Milligan, and of the physician, if believed by the jury, was sufficient to support the verdict, and it is the province of the jury to pass upon the credibility of witnesses and the weight to be given to their testimony. It follows from what we have said that the judgment in favor of the husband should be reversed, and the cause dismissed; that the judgment for punitive damages in favor of the wife should be reversed and dismissed, and that the judgment for $750 in favor of Mrs. Milligan should be affirmed.

It is so ordered.

STATE EX REL. MURPHY *v.* CHERRY.

4-3252

Opinion delivered January 22, 1934.

Horace Sloan, for appellant.
Lamb & Adams, for appellee.
R. V. Wheeler, amicus curiae.

McHaney, J. Appellant, Francis A. Murphy, a large landowner and taxpayer within the limits of Big Creek Drainage District No. 15 of Craighead County, hereinafter called the district, brought this action for mandamus against appellee, Edward O. Cherry, as collector of revenue of Craighead County, to compel the collector to accept and receive overdue bonds and interest coupons of the district for the annual installment of drainage assessments due against his lands, and to issue his official receipt for said taxes. The district was made a party respondent to the petition. Appellees responded, denying the right of appellant to the writ, which the court sustained, and this appeal is from that order. The court found from the evidence adduced that the present market value of the lands embraced in the district, 47,421.62 acres, is less than the amount of outstanding indebtedness of the district on account of drainage improvement. This finding is supported by substantial evidence. A total of $310,000 in bonds was issued and sold by the district, bearing date January 2, 1918, with interest payable semi-annually at 5½ per cent. per annum. Total assessment of benefits were made against the lands in the district of $801,789.43, which bears interest at 6 per cent. Only $46,000 in principal of the bonds has been paid, leaving a balance in principal of $264,000 and interest still unpaid. The district has been in default of its maturities, of both principal and interest, since 1928. Delinquencies in tax payments have increased greatly since 1927, and at this time approximately three-fourths of the lands in the district are delinquent for district taxes, and a large amount thereof has forfeited to the State for the nonpayment of State and other general taxes.

The Legislature of 1931 passed act 156, which provides: "The commissioners or collectors for drainage, levee and other improvement districts are authorized to and shall accept, at their face value, past-due bonds or past-due interest coupons issued by said improvement district as full payment for taxes or assessments as they

accrue, and shall be accepted by the commissioners and collectors in payment for lands or other property belonging to the district that may have been forfeited to the district for the nonpayment of taxes due on the same. Provided, however, that past-due bonds or past-due interest coupons may be accepted as part payment for taxes or assessments or forfeited property; the balance to be paid in cash, provided, further, that no bondholder, by tender of bond or bonds can purchase any land from the said district in smaller quantity than as described in any call at the time said land is originally assessed."

The validity of this act is the basis of the principal contention in this case and this question has given us a great deal of concern. Appellee contends that it impairs the obligation of the contract between the district and its bondholders, and denies to the latter due process of law, in violation of both the State and Federal Constitutions, whereas appellant contends to the contrary, and that the right of set-off existed under the statute prior to 1918.

The county court, pursuant to the drainage statute, on December 30, 1918, [Crawford & Moses' Digest, § 3589] made an order providing for the issuance of bonds, times of payment, etc. Paragraphs E and F of this order are as follows: "E. It is further considered, ordered and adjudged that, in order to meet the interest upon the said bonds and pay the principal thereof as it matures, there is hereby appropriated for that purpose, and set aside out of the first moneys received from the collection of each installment of the said tax assessed against the real property, including lands, railroads and tramroads within said drainage district, a sum sufficient to pay the interest and principal of the bond issue maturing during the year in which that installment of the said tax is due and payable, in accordance with and as shown on the schedule hereinbefore set out, or any bonds and coupons that may have already matured and yet remain unpaid.

"F. It is further considered, ordered and adjudged that no part of the funds arising from the collection of any of the said installments shall be applied or used for any other purpose than the payment of the interest and

principal of the said bonds until there has been deposited with the St. Louis Union Trust Company, in the city of St. Louis, and the State of Missouri, an amount sufficient to pay the interest and principal maturing during the year in which the installment is due and payable, as well as all other bonds and coupons already matured and remaining unpaid." The bonds themselves provided that principal and interest should be payable in gold.

The sections of the order above quoted are a part of the contract between the district and its bondholders. Section E appropriates from the first moneys received from the collection of each installment of tax, which had previously been assessed by order of the county court against the real property, a sum sufficient to pay bond maturities and interest of that year, or any past-due bonds and coupons. Section F goes still a step further and prohibits the use of said funds for any purpose, except the payment of principal and interest of said bonds, until there has been deposited with the St. Louis Union Trust Company a sum sufficient to pay principal and interest of bonds maturing during the year as well as past-due bonds and coupons. We think the necessary effect of the order was to require the payment of all bonds and coupons maturing during the taxable year, and all overdue bonds and coupons *pro rata;* that is, if the amount collected in any year should be insufficient to pay current and past-due bonds and coupons, the funds on hand should be applied thereto without discrimination. The undisputed fact is that the district is in default on bonds falling due from 1928 down to the present, and that the collections fall far short of yielding an amount sufficient to discharge bonds and coupons overdue. Therefore, if appellant is permitted to use overdue bonds and coupons to pay his assessment or tax on assessed benefits, he will receive a preference over bondholders who are not landowners or taxpayers in the district, which, as we have already shown, is violative of the terms of the contract. Past-due bonds and coupons, being on a parity with bonds and coupons maturing during any taxable year, are entitled to share ratably in the proceeds of collections made during such year. This is impossible if some of the landowners are permitted

to pay taxes with such bonds or coupons. A bondholder, who is not a landowner, is entitled to the same rights as a bondholder who is also a landowner.

Less than fifty per cent. of the land in the district is improved and in cultivation. The remainder is of very little value. If past-due bonds and coupons may be used to pay taxes, it is reasonable to presume that the valuable lands will be protected and the worthless lands allowed to become delinquent. In which event, the bonds left outstanding would be practically without security.

Viewed in any light, act 156 of 1931 permits the working of an inequality among bondholders, and therefore permits the impairment of the obligation of the contract between the district and its bondholders. In re *Cranberry Creek Drain. Dist.*, 202 Wis. 64, 231 N. W. 588; see also *Rorick* v. *Bd. of Commr's of Everglades Dr. Dist.*, 57 Fed. (2d) 1048. In *Oliver* v. *Western Clay Drain. Dist.*, 187 Ark. 539, 61 S. W. (2d) 442, we held that: "Taking a sufficient amount of 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 be simply 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 (judgment against the district for construction work) 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." This holding is no authority for a bondholder-landowner to pay his taxes with past-due bonds.

Nor can we agree there was any right of set-off under existing law prior to 1918 as contended by appellant. Section 1197, Crawford & Moses' Digest, provides that: "A set-off may be pleaded in any action for the recovery of money and may be a cause of action

arising upon contract or tort." This is not an "action for the recovery of money." It is a mandamus action.

Many other arguments have been advanced by learned counsel for appellant, all more or less ancillary to the matters discussed. We find it unnecessary to review them as those herein considered are decisive of this case.

It follows from what we have said that act 156 of 1931 is unconstitutional and void, and that the judgment of the circuit court is correct, and must be affirmed. It is so ordered.

JOHNSON, C. J., and MEHAFFY, J., dissent.

JOHNSON, C. J., (dissenting). Few questions of greater importance than the one just decided have been submitted to this court for judicial determination in the past several years. I can not shut my eyes to the necessary implications of the majority opinion. Act 156 of 1931 has been struck down because of unconstitutionality. It is true that the virtues of this act should not save it; neither should its faults, if any, be invoked to accomplish its destruction.

In my humble opinion, act 156 of 1931 is a wholesome, constitutional and beneficial piece of legislation. It was promulgated, at a time when the world-wide depression was in its height and a world-wide business crisis of equal magnitude to that caused by flood, earthquake or other world-wide calamity. We can not and should not shut our eyes to the conditions as they are and were at the time of the enactment of this legislation. When this act was passed in 1931, thousands of people in this State were without employment and means of earning a living for themselves and their families; the value of income from all property situated in the State had practically vanished; these conditions produced the inevitable result of the loss of the homes of thousands of our people. On account of the many rivers and the vast quantities of low lands in this State, a large portion of the State's tillable lands are located within drainage and ditch districts. Sixty-two of the seventy-five counties of the State have within their boundaries road improvement districts which have outstanding bonds. More than $250,000,000 in outstanding bonds are

now in circulation against the various improvement districts within the boundaries of this State. The bonds of these various districts have been selling for the past several years, on the open markets, for as little as 25 cents on the dollar. It was to relieve this unfortunate situation and thereby enable the poverty stricken homeowner within these improvement districts to pay improvement district taxes that this legislation was passed. The constitutionality of this act should be measured by the actual authority reserved in the people, and not by imaginary constitutional restrictions. Section 1 of art. 2 of the Arkansas Constitution of 1874 provides: "All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same in such manner as they may think proper."

Thus it will be seen that, by constitutional mandate, all powers not expressly or impliedly prohibited by the Constitution are reserved in the people. This exact question was before this court in the early case of *State* v. *Ashley,* 1 Ark. 513, and this court there said: "A State Legislature can exercise all power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted they inherently possess as a portion of the sovereignty of the State."

The doctrine announced in *State* v. *Ashley,* has been consistently followed by this court up to the present time. I call especial attention to the cases of *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720; *Barton* v. *Drainage Dist. No. 30,* 174 Ark. 173, 294 S. W. 418, and *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9. In each of these cases, this court expressly affirmed the doctrine announced in *State* v. *Ashley,* and made full application of its meaning and intent.

In addition to what I have just said, all acts of the Legislature are presumed to be constitutional and valid. *Patterson* v. *Temple,* 27 Ark. 202; *Leach* v. *Smith,* 25 Ark. 246.

Defining the rule differently, this court has said: "A statute will not be pronounced unconstitutional unless there is a clear incompatibility between the act and

the Constitution." *Eason* v. *State,* 11 Ark. 481. Stating the rule another way, this court has many times held: "All doubts should be resolved in favor of the constitutionality of a statute." *Duke* v. *State,* 56 Ark. 485, 20 S. W. 600; *Carson* v. *St. Francis Levee Dist.,* 59 Ark. 513, 27 S. W. 590; *Graham* v. *Nix,* 102 Ark. 277, 144 S. W. 214; *Ark. La. & G. R. Co.* v. *Kennedy,* 84 Ark. 364, 105 S. W. 885.

Expressing the rule in a little different language, this court has said: "The courts should exercise their power of declaring an act of the Legislature void because in conflict with the Constitution with great caution, and only when the terms of the Constitution have been plainly violated." *State* v. *Moore,* 76 Ark. 197, 88 S. W. 881. And again: "A statute will not be declared unconstitutional unless no doubt exists on the question." *Stillwell* v. *Jackson,* 77 Ark. 250, 93 S. W. 71.

Thus it will be seen that before this court is authorized to declare act 156 of 1931 unconstitutional and void, it must appear, beyond doubt, that the same is in violation of some mandate of the Constitution. It is my view that no such antagonism prevails between the act in question and constitutional mandate. The majority opinion holds that act 156 of 1931 violates § 10 of article 1 of the Constitution of the United States and § 17 of article 2 of the Arkansas Constitution of 1874, which provide against the impairment of the obligations of contract. It seems to be the intention of the majority to hold that, since the trial court has found, from evidence adduced, that the present market value of lands embraced within the improvement district is less than the amount of outstanding indebtedness against the district, act 156, giving landowners a right not enjoyed by non-landowners thereby impairs the obligations of contract. This is not the correct test.

The solvency or insolvency of this improvement district cannot and should not be determined in this proceeding. No receivership has been applied for or granted, and this district should be treated as conclusively solvent in this collateral proceeding.

Big Creek Drainage District No. 15 of Craighead County was organized in 1917, under the authority of act 279 of 1909 and amendatory acts thereto. Section 7 of the act provides: "Said commissioners shall proceed to view the lands within the district, and shall inscribe in a book the description of each tract of land, and shall assess the value of the benefits to accrue to each tract by reason of such improvement, and shall enter such assessment of benefits opposite the descriptions, together with an estimate of what the landowner will probably have to pay on said assessment for the first year. Their assessment shall embrace, not merely the land, but all public or corporate roads, railroads, tramroads and other improvements on lands that will be benefited by the drainage system. They shall place opposite each tract of land the name of the supposed owner, as shown by the last county assessment; but a mistake in the name shall not vitiate the assessment."

The assessment of benefits in this district were made in conformity with the section quoted. The assessment of benefits so made is not against the whole district, but is against each separate tract of land and the aggregate or total assessment against the 47,421.62 acres is $801,-789.43, which assessment of benefits bears interest at the rate of 6 per cent. per annum. The bondholder knew when he purchased his bonds that the assessment of benefits was against each separate tract of land, and, of course, he purchased subject to this assessment. This is made certain by § 3606 of Crawford & Moses' Digest, which provides: "Any person or corporation, co-partnership or other parties owning lands assessed for the construction of any ditch or other improvement under the provision of this act shall have the privilege of paying such assessment to the treasurer at any time before the bonds therefor are issued."

This section gave definite notice to the bond purchaser that the landowner had the right to pay off the assessment of benefits against any separate tract of land, as determined by the board of commissioners. I therefore assert that the rights of the bond purchaser should be measured by the assessment of benefits against the several tracts of land in the improvement district and

not by the aggregate assessments against all the lands in the district. I also assert that neither the trial court nor this court has any right to take into consideration the present market value of the lands situated in this district for the purpose of determining the constitutional question here presented. The bondholder purchased his bonds on the faith of the assessment of benefits which were expected to accrue to the landowner by reason of the improvement and not upon the intrinsic value of the lands. The present holding of the court, when carried to its logical conclusion, will inevitably take from the landowners in all improvement districts in this State their last vestige of inheritance. The effect of the majority holding is that each tract of land stands as surety for each other tract in the district. I assert that this is not and should not be declared the law.

The prohibition against impairment in our Constitution of 1874 is identical with that in the Federal Constitution. In *Antoni* v. *Greenhow,* 107 U. S. 769, 2 S. Ct. 91, the Supreme Court of the United States held on the question of impairment: "In all such cases the question becomes, therefore, one of reasonableness, and of that the Legislature is primarily the judge." The same court held in *Sturges* v. *Crowninshield,* 4 Wheat. 122, that the obligations of contract are impaired only by a law which renders them invalid, or releases or extinguishes them. In *West River Bridge* v. *Dix,* 6 How. 507, the same court held that the State's right of eminent domain was a reservation in all contracts, and that such reservation was deemed a part of the contract. Neither does legislation regulating the public health or the public morals impair the obligations of contract. *Douglas* v. *Kentucky,* 168 U. S. 488, 18 S. Ct. 199.

Legislation to protect the public safety falls within the reserved power of the respective States and therefore does not impair the obligations of contract. *C. B. & Q. R. Co.* v. *Nebraska,* 170 U. S. 57, 18 S. Ct. 513; *T. & N. O. R. R. Co.* v. *Miller,* 221 U. S. 414, 31 S. Ct. 534.

Similar to the question now under consideration, the Supreme Court of the United States held, in *Manigault* v. *Springs,* 199 U. S. 473, 26 S. Ct. 127, that the economic interests of the State may justify the exercise of its con-

tinuing and dominant protective power, notwithstanding interference with contractual obligations.

All doubts about the reserved and protective powers of the several States were removed by the decisions of the Supreme Court of the United States in the recent cases of *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231; *Block* v. *Hirsh*, 256 U. S. 135, 41 S. Ct. 458; *Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 41 S. Ct. 465; *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 42 S. Ct. 289.

Chief Justice HUGHES, who handed down the opinion in *Home Building & Loan Ass'n* v. *Blaisdell*, cited *supra*, said: "Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may not be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."

The right of set-off created by act 156 of 1931 does not alter or impair the medium of payment, but only has to do with the remedy of enforcement. *Amy* v. *Taxing Dist. of Shelby County*, 114 U. S. 387, 5 S. Ct. 895.

Legislation giving a more efficient or additional remedy upon a prior contract does not impair its obligations. *Bernheimer* v. *Converse*, 206 U. S. 516, 27 S. Ct. 755.

Moreover, it has been definitely determined by the Supreme Court of the United States that the right of set-off is a benefit to bondholders and not a detriment. *Woodruff* v. *Traphall*, 10 How. 190; *Hartman* v. *Greenhow*, 102 U. S. 679; *Poindexter* v. *Greenhow*, 114 U. S. 270, 5. S. Ct. 903; *Keith* v. *Clark*, 97 U. S. 455.

Act 156 of 1931, when measured by the tests heretofore enumerated, is a valid exercise of reserved power and does not fall within the prohibitions of either the State or Federal Constitutions.

The majority opinion seems to hold that act 156 of 1931 discriminates in favor of landowners of the district and against non-landowners, therefore impairs the obligations of the contract. The act produces no such result. The bondholder has the right to purchase lands in the district, thereby becoming both a landowner and a bondholder, just as certainly as the landowner may purchase bonds and thereby become a bondowner and landowner. I cannot conceive just how this discriminates. Neither bondowner nor landowner is required to alter their positions except as they may elect, and I know of no rule of law holding this to be discrimination. The majority opinion further holds, "Less than 50 per cent. of the lands in the district are improved and in cultivation. The remainder is of very little value," etc. Just what this has to do with impairment I cannot see. As heretofore shown, the bondowner bought upon the faith of the assessment of benefits. Evidently the lands were not improved nor in cultivation when the bonds were purchased. But suppose they were, the fact that the lands have passed from a state of cultivation to one of wildness is no fault of the landowners who have stunted and starved themselves in an endeavor to keep their lands in a state of cultivation and pay the heavy taxes against the same yearly.

The fact, if it be such, that 50 per cent. of the lands in the district are wild and unimproved is as much the fault of the bondholder as that of the present owner of improved and cultivable lands in the district, and I see no justice in penalizing the one in favor of the other.

The Wisconsin case of In re *Cranberry Creek Drainage Dist.*, 202 Wis. 64, 231 N. W. 588, has no application to the facts of this case. The question of reserve power in the State was not considered or decided. No analogy is shown in the respective statutes creating the districts. Certainly the Wisconsin case should not be considered as controlling in the instant case.

The majority cite *Oliver* v. *Western Clay Drainage Dist.*, 187 Ark. 539, 61 S. W. (2d) 442, as supporting the opinion. Just how this conclusion is reached is beyond my powers of comprehension. The Oliver case is squarely against the present holding. In the Oliver case, although not so shown in this court's opinion as reported, Oliver was permitted to set off his attorney's fee against past-due taxes. The improvement district prosecuted a cross-appeal bringing in question this set-off, and counsel there, as here, urged that this allowed set-off impaired the obligations of contract, but we affirmed the cross-appeal. Just how an attorney's fee may be set off and deny the right to a bondholder is not pointed out in this opinion. It occurs to me that the holdings are inconsistent. The profession may distinguish if they can.

The judgment should be reversed and remanded.

Mr. Justice MEHAFFY concurs in this dissent.

HUMPHREY *v.* WYATT.

4-3404

Opinion delivered January 22, 1934.

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

Charles B. Thweatt, for appellee.

McHaney, J. Appellee is the tax assessor of Independence County. He brought this action to enjoin appellant, as Auditor of State, from requiring him to execute a release and acquittance to the State, as provided in § 2, act 201 of the Acts of 1933, as a condition precedent to his right to have a warrant issued to him on the appropriation made by said act. He prayed in the alternative for a certificate of indebtedness for one-half of his salary and a warrant for one-half, or a warrant for one-half the amount alone; or a certificate of indebtedness for the full amount.

Appellant demurred to this complaint, which was overruled, and a decree was entered directing appellant to issue to appellee a certificate of indebtedness for $125 which is the amount of salary due by the State for one month as fixed by act 160 of 1931. This appeal comes from that decree.

Act 160 of 1931 is an act classifying all the counties in the State for the purpose of fixing the salaries of the assessors and their authorized deputies, which it does. It further provides that one-half the salaries so fixed shall be paid by the State and the other half by the counties. Act 201 of 1933, p. 638, is entitled: "An act to make appropriations to cover a part of the expenses of assessing property for taxation and making up assessment records, and for other purposes." Section 1 appropriated $162,000 for the fiscal years ending June 30, 1934, and 1935, "for paying a part of the salaries of tax assessors," etc. Section 2 reads as follows: "The amount herein appropriated is equal to one-half of the part heretofore authorized by law to be paid by the State

to meet charges for services due tax assessors and county clerks as heretofore referred to in item 1, and the Auditor of State is directed, upon receipt by him of proper proof as to the correctness of claims filed against this appropriation, as now provided by law, to prorate said fund of eighty-one thousand ($81,000) dollars, to the end that each assessor and each clerk shall receive from the State one-half, and no more, of the amounts now provided by law for the salaries and fees of such officers out of State funds. The Auditor shall not pay any officer anything out of this appropriation until such officer has filed with the Auditor a release and an acquittance in full of all claims against the State for services rendered during the fiscal year of such payment." The amount appropriated by said act 201 is one-half of the State's part of the salary due as fixed by said act 160.

Appellant contends that appellee is entitled to a warrant for $62.50, conditioned upon his signing the release required by § 2 of act 201, above quoted; otherwise that he is not entitled to anything. On the other hand, appellee contends: "(1) that act 201 does not amend act 160, but merely offers to pay part of the salary if the assessor will release the balance; (2) that the provision for a release violates the obligation of a contract and takes property without due process of law; and (3) that, if the act is valid, the assessor is entitled to his full salary, unless he signs the release." It is conceded by both parties that the Legislature has the power to change salaries not fixed by the Constitution during the term of office of the incumbent, either to increase or decrease same. *Humphry* v. *Sadler,* 40 Ark. 101. It was there said: "Humphry's petition is based upon the idea that his compensation could not be abridged during his continuance in office. But the Constitution contains no limitation upon the power of the Legislature in the matter of augmentation or diminution of salaries, except as to those of the Governor, Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of State Lands, prosecuting attorneys, judges of Supreme and circuit courts and members of the General Assembly. Const. 1874, art. 19, § 11.

"When the office itself is created by the Constitution, but the compensation is left to the discretion of the Legislature, it may be increased or diminished so as to affect the incumbent. And it makes no difference whether the compensation be by fees or by salaries. *Warner* v. *People,* 2 Denio 272, S. C. 7 Hill, 181; *Conner* v. *City,* 2 Sandf. 355, affirmed in 1 Selden 285.

"It is well settled that an election or appointment to office creates no contract between the State and the officer, which is within the protection of that clause of our Federal Constitution, forbidding the States to pass laws impairing the obligation of contracts. *Butler* v. *Pennsylvania,* 10 How. 402."

In *Powell* v. *Durden,* 61 Ark. 21, 31 S. W. 740, the above statement was approved, and the court further said: "The mere discretion of the Legislature is not in determining when a general or special law is applicable, but, in a case like the act under consideration, in determining the amount of pay of these officers and the manner of paying them; and this discretion may be abused so that the courts would interfere to prevent such abuses. For instance, the Legislature cannot abolish or render useless a constitutional office, or even cripple it by a reduction of the salary of the incumbent, so that it cannot be sustained or properly maintained, or by attempting to do indirectly, what it cannot do directly in reference thereto." The third paragraph of the above quotation from *Humphry* v. *Sadler* settles appellee's second contention against him. There being no contract between the State and appellee, there is no obligation to violate.

We are of the opinion that the necessary effect of act 201 is to reduce the salaries of tax assessors temporarily, that is for the fiscal years ending June 30, 1934, and 1935, leaving act 160 unimpaired thereafter. The Legislature was evidently attempting to accomplish the laudable purpose of reducing the expenses of State government during the period of the depression, as is evidenced by the enactment of this and many other laws at the same session. In numerous instances smaller appropriations were made for official salaries, but in the

case of assessors not only was a smaller appropriation made, but a condition was attached requiring a release and acquittance to the State before a warrant could lawfully be issued. It therefore appears to us to be conclusive that the legislative purpose was to reduce the pay to which they were otherwise entitled during the biennium covered by act 201 of 1933. It is said in 46 C. J., 1020, that the intention to change official salaries during the term of office must be clear, "and the mere appropriation of a less sum for the payment of salaries is not generally regarded as changing the salary." There are cases to the same effect. But here the intention to reduce the State's part of the salary fixed in said act 160 is clear, and act 201 is not a mere appropriation of a less sum for salaries, but contains a positive requirement that: "The Auditor shall not pay any officer anything out of this appropriation until such officer has filed with the Auditor a release and an acquittance in full of all claims against the State for services rendered during the fiscal year of such payment." This necessarily reflects the intention of the Legislature that the officer should not be paid by the State during that time, unless the release were signed, and then only the amount of such appropriation. To this extent act 201 amends act 160 for the period covered by the act, and is therefore temporary in character and designed to effect a reduction in the State's expenses. If it were a mere appropriation act and nothing more than an appropriation of a less sum than that fixed by law, there would be more force to appellee's argument. This disposes of the argument that appellee is entitled to his full salary unless he signs the release, and § 4463, Crawford & Moses' Digest, has no application, for an appropriation has been made for the amount of the claim to which appellee is entitled.

The judgment will therefore be reversed, and the cause remanded with directions to sustain the demurrer.

ALTER *v.* ARKANSAS POWER & LIGHT COMPANY.

4-3296

Opinion delivered January 22, 1934.

E. W. Martin, for appellant.

Rose, Hemingway, Cantrell & Loughborough and *J. W. Barron,* for appellee.

MCHANEY, J. Appellant sued appellee for damages on two counts: "First, that he was a passenger on one of appellee's street cars in the city of Little Rock, having paid his fare, and that the operator failed to stop said car on signal given at his destination, and that he rode on to the end of the line, intending to alight at the desired place on the return trip; that the operator demanded an additional fare which he refused to pay because it was the operator's fault in ignoring his stop signal; that after traveling seven or eight blocks on the return trip, the operator again demanded the fare, struck him with a metal instrument, knocked him down, struck him several times on the head, threw him to the ground, and otherwise abused and mistreated him. Second, for false imprisonment in causing his arrest, imprisonment and detention without legal authority on a false charge of attempted robbery. He prayed damages both compensatory and punitive. Appellee answered, denying the allegations of the complaint, alleged that appellant,

while intoxicated and without cause, assaulted its operator who merely defended himself. As to the second count, appellee answered that the police officers arrested appellant because of his drunken condition and because of the unlawful assault made by him on its operator, for which it is not liable."

At the conclusion of appellant's testimony, the court withdrew from the consideration of the jury the claim for damages for false imprisonment alleged in the second count. The case went to the jury on the first count of the complaint, and there was a verdict for appellee, upon which judgment was entered.

Appellant first contends for a reversal of the judgment on the ground that the court erred in withdrawing from the jury the charge of false imprisonment. We cannot agree with this contention. The undisputed facts show that appellant was arrested by the police officers, was tried in the municipal court, convicted of simple assault and fined $25. He appealed to the circuit court, where he was again tried, convicted and fined $10. He appealed to this court, and the judgment was affirmed. See *Alter* v. *City of Little Rock,* memorandum opinion 187 Ark. 1162, 63 S. W. (2d) 279. Our statute, § 2336, Crawford & Moses' Digest, defines false imprisonment as follows: "False imprisonment is the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." Appellant's arrest was not "unlawful" and his "confinement or detention" was not "without sufficient legal authority." The court therefore correctly dismissed the false imprisonment count.

It is next contended that the court erred in refusing to permit the jury to consider any element of damages for appellant's wrongful expulsion from the street car. His requested instruction No. 7 embodied this element of damages, but assumed as an established fact, that his expulsion was wrongful. This was a disputed question of fact, and the court correctly refused the instruction as asked, and correctly modified same so as to eliminate this erroneous request, as also damages for false imprisonment.

It is also argued that erroneous testimony was admitted in permitting the operator to testify that about the same time there were numerous holdups of street car operators, and that he had been held up, and another operator shot. No objection was made at the time, but, after the testimony in this regard had been given, he asked the court to instruct the jury not to consider it. The court permitted the testimony to go to show the operator's state of mind only. We think it was competent for this purpose.

Assignments are argued as to the giving and refusing to give certain instructions, and in the modification of certain others. We have carefully examined these assignments and find them without merit. The court fully and fairly instructed the jury, and its finding is against appellant. No error appearing, the judgment must be affirmed.

HOME INDEMNITY COMPANY *v.* BANFIELD BROTHERS PACKING COMPANY, INC.

4-3293

Opinion delivered January 22, 1934.

[redacted]

Pryor & Pryor, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

BUTLER, J. The appellee, Banfield Brothers Packing Company, is a corporation engaged in the transportation of commodities for hire by means of buses and trucks, and was insured in the appellant, Home Indemnity Company, against loss imposed by law upon it for bodily injury or death occasioned to others by the operation of its vehicles, and also by another clause of the policy, against loss for damage or destruction of property caused by the operation of the said vehicles. Under the general conditions of the policy, and the subhead—"Notices to Company"—the following stipulation is found:

"Upon the occurrence of an accident, the assured shall give prompt written notice thereof to the company's home office at New York, New York, or to an authorized agent. If any claim is made on account of such accident, the assured shall give like notice thereof with full particulars. If, thereafter, any suit or other proceeding is instituted against the assured to enforce such claim, the assured shall immediately forward to the company at its home office every summons or other process served upon him. Notice given by or on behalf of the assured to any authorized agent of the company within the State in which this policy is issued, with particulars sufficient to identify the assured, shall be deemed

to be notice to the company, it being understood that failure to give any notice required to be given by this policy, within the time specified therein, shall not invalidate any claim made by the assured, if it shall be shown not to have been reasonably possible to give such notice within the prescribed time, and that notice was given as soon as was reasonably possible.

"The assured shall not voluntarily assume any liability, nor incur any expense, other than for immediate surgical relief, nor settle any claim, except at the assured's own cost. The assured shall not interfere in any negotiation for settlement, nor in any legal proceeding, but whenever requested by the company, and at the company's expense, the assured shall aid in securing information and evidence and the attendance of witnesses, and shall cooperate with the company (except in a pecuniary way) in all matters which the company deems necessary in the defense of any suit or in the prosecution of any appeal. * * *"

While the policy was in full force and effect, on the 16th day of December, 1931, a collision occurred between a truck owned and operated by the plaintiff, and an automobile owned by J. V. Stanfield, driven at the time by his wife, Margaret Stanfield. The driver of the truck was engaged in the business of his employer, and as a result of the collision, Stanfield's automobile was damaged, and it subsequently developed that Mrs. Stanfield had sustained severe personal injuries. She brought suit against the packing company on the 13th day of January, 1932, and on the day following a newspaper carried an account of the filing of the suit, which was read by the local agent of the packing company. He called Mr. Miller, the manager of the packing company, on the telephone, and they had some conversation regarding the matter. As a result of this, an attorney for the indemnity company came to Fort Smith on the 21st day of January to make an investigation of the accident. He made a partial investigation, but left before completing it, and Mr. Rush, the general claim agent of the indemnity company, came to Fort Smith about five or six days later to investigate the case. He informed Mr. Miller that, inasmuch as the claim was not reported to the in-

demnity company until after suit was filed, he could not handle it unless the packing company would execute a "Reservation of Rights Agreement." This agreement was accordingly executed, and is in part as follows: "The company disclaims liability for such accident under the aforesaid policy contract on the ground that no report of said accident was made to the company until after suit had been instituted in Sebastian Circuit Court, Fort Smith District, on January 13, 1932.

"Whereas, both parties now desire to cooperate to reduce to a minimum the final loss, if any, arising out of such accident, and to postpone the determination of their respective rights and liabilities under said policy until the amount of the assured's legal liability, if any, for damages arising out of such accident is made final, definite and certain."

Acting on the instruction of the Indemnity Company, Mr. Rush afterward wrote the packing company a letter denying liability on the ground that no report of the accident was made to the Indemnity Company within the time required by the policy. Thereupon the packing company notified the Indemnity Company that it would be required to defend the suit, and, this notification being ignored, the packing company employed counsel.

The case proceeded to trial, and resulted in a verdict in favor of Mrs. Stanfield in the sum of $2,406, being the total amount of the judgment, interest and costs.

This suit was brought by the packing company to recover said amount from the Indemnity Company and resulted in a verdict in its favor in the sum of $1,203. The Indemnity Company has prosecuted an appeal from the judgment, and the packing company has filed a cross-appeal from the order of the court overruling its motion for a judgment *non obstante veredicto*. The cross-appeal of the packing company will not be discussed for the reason that we have concluded that the whole case must be reversed for errors hereinafter pointed out.

It is undisputed that no notice was given the indemnity company immediately after the collision, and that the first notice it received was on January 14, 1932, the day after the suit was filed. The first contention made

by the appellant is that the court should have directed a verdict in its favor because the undisputed proof shows that no immediate notice was given, and that there was a failure to show that it was not reasonably possible to give notice sooner than it was given. The contention of the appellee is that the notice could not have been given sooner because it did not know that Mrs. Stanfield had suffered any injury from which it could be reasonably anticipated that a claim for damages would flow, and that the damage to the car and the injury to Mrs. Stanfield, of which it had knowledge, were of a slight and inconsequential nature, and that the failure to give notice was the occasion of no injury to the indemnity company, as it had ample opportunity, after receiving notice of the alleged injury, and the suit based thereon, to make whatever investigation was necessary to prepare for a defense of the suit, or to make a reasonable settlement, if it so desired. On this phase of the case the evidence is in conflict.

Mr. Stratton, the driver of the truck which collided with the automobile driven by Mrs. Stanfield, testified that the impact was very slight, and that he immediately examined the car and found but very little damage to it, and Mrs. Stanfield stated at the time that she had not been hurt, but was scared. The testimony of the other employees of the packing company is to the effect that on that day, and on two or three days following, Mrs. Stanfield was at the office of the company, demanding that her car be repaired; that she did not complain of having suffered any injury, and appeared to be uninjured but very angry; that the car was examined, and the damage found to be so slight, and they agreed to have the car repaired without regard to whether or not they were liable; that they estimated that the cost would not be over $1; and that none of them had any information that Mrs. Stanfield was injured in any way, or was claiming to be, until the suit was filed and they were notified of it.

In conflict with this is the testimony of Mr. and Mrs. Stanfield. The former testified that a short while after the accident he informed the manager of the packing company that his car had been badly damaged, and that

he wanted it fixed; that his wife had sustained personal injuries, and was then being treated by a doctor; that the manager replied, "I will see to that in a day or two," and walked off. He described how the car was damaged, and from his testimony it appears that the damage to it was not slight, but substantial.

The testimony of the attorney for the indemnity company who first came to investigate the claim is to the effect that the packing company would not cooperate with him or lend any assistance in making the investigation, and because of this he left. This is disputed by the witnesses for the packing company, its employees, who testified that they were rendering all the assistance they could, and that the reason the attorney left before completing the investigation was, as he stated, that he was called to another part of the State, and Mr. Rush would come and complete the investigation; that Mr. Rush did appear soon thereafter, and he makes no complaint of any failure of the employees of the packing company to cooperate with him, but that the manager, Mr. Miller, made some apology for his treatment of the attorney, and gave some explanation regarding it.

It appears from Mr. Rush's testimony that he had ample opportunity to make the investigation, and that he did so, reaching the conclusion that it was a case of liability, and from the statements made to him by Mrs. Stanfield he might have settled.

It is the contention of the appellant that the giving of the notice was a condition precedent to the appellee's right to recover, and that, while it is not expressly so provided in the contract, it is necessarily implied by the language employed, and, being such, the requirement of notice is of the essence of the contract; that the failure to give such notice immediately after the collision avoided the contract, even though the packing company was not apprised at the time that any claim would be made for personal injuries. The contention that immediate notice was required is based on the fact that the policy indemnified the insured, not only against claims for personal injury, but also against claims for property damage, and that the court should have directed a verdict in favor of the appellant.

We do not construe the language used with reference to the giving of notice as being a condition precedent. It is not so expressly provided, neither do we think it is necessarily implied for the reason that it is not to be supposed the requirement of notice was a device designed to prevent a recovery on a just claim. To be valid, it must have been for some reasonable purpose, and this was to give the insurer a reasonable opportunity to investigate the circumstances and prepare for a defense, if necessary; or, if it thought it prudent and could do so, to settle the claim arising because of the accident. We are of the opinion, therefore, that the cases cited by the appellant on this phase of the case are not in point, and, while we do not review them at length or seek to distinguish them from the case at bar, we may say that these cases turn either on a contract different in its terms to the one now before us, or upon a state of facts essentially dissimilar.

The contract under consideration in this case is similar in all essential particulars to that in the case of *Home Life & Accident Co.* v. *Beckner,* 168 Ark. 283, 270 S. W. 529, cited by appellee, which followed and approved the case of *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.

The case of *Hope Spoke Co.* v. *Maryland Casualty Co., supra,* was a suit not unlike the case at bar, and one of the defenses there made was that the notice was a condition precedent, and failure to give such notice would avoid the policy. In that case the court stated in effect that the language of the policy was ambiguous and should be given the interpretation most strongly against the insurer which it would reasonably bear. The court called attention to the unqualified stipulation in the policy that it would indemnify the insured against liability imposed by law on account of bodily injuries, and that, construing this stipulation with that of notice, indicated that the requirement of notice was for the purpose of giving opportunity for an investigation of the facts attendant upon the accident and to effect a settlement, or prepare for defense. This case also laid down the rule

that where the provision for notice was not a condition precedent, failure to give notice would not avoid the policy unless it was shown that the insurer suffered some loss or injury because notice was not given sooner. In the Beckner case there is language which might be interpreted to qualify that rule, but the real point on which the case turned was the long and inexcusable delay in giving notice. The accident involved in that case occurred on June 25, 1915, and the insured did not notify the insurer until January 24, 1917. The court held that this was an unreasonable and inexcusable delay, and, while not stating the reason for so holding, it is patent that it must have indulged the presumption that injury resulted thereby, because it is apparent that the insurer was prevented from making any reasonable investigation of the circumstances surrounding the accident, especially when it was further shown that a suit had been filed against the insured for injuries arising because of the accident approximately ten months before the date when the insurer was first notified of the happening of the accident and the filing of the suit.

The correct rule as announced in the Hope Spoke Company case is that, unless a stipulation constitutes a condition precedent and all rights under the policy are forfeited for failure to comply with it, an omission to comply therewith is not a defense to a suit on the policy unless some injury resulted from such omission. In support of the rule announced, the court cited, as fully sustaining it, a number of cases from respectable courts which will be found on page 9 of the volume in which that case is reported. See also *Frank Parmelee Co.* v. *Ætna Life Ins. Co.*, 166 Fed. 741.

It is also insisted that there was no duty to make a report of the accident because it was a trivial one. We think this is the general rule. In *McKenna* v. *International Indemnity Co.*, 125 Wash. 28, 215 Pac. 66, it is said: "It is not every trivial mishap or occurrence that the assured under such a policy of liability insurance must regard as an accident of which notice should be given immediately to the insurance company, even though it may prove afterwards to result in serious injury." The

general rule is stated in 36 C. J., 1105, as follows: "Where no bodily injury to the third person is apparent at the time of an accidental occurrence, and there is no reasonable ground for believing that a claim for damages against insured may arise, insured is not required to give insurer notice until the subsequent information as to injury would suggest to a person of ordinary and reasonable prudence that a liability might exist." But whether or not the accident was trivial, was a question for the jury under the evidence adduced. From the testimony of the Stanfields and of their attorney, the jury might have found that the personal injury was such that it might have been reasonably anticipated that serious consequences might arise and for which a claim for damages might be made, whereas the testimony adduced on the part of the packing company might have justified the contrary conclusion.

It is our opinion that the court did not err in refusing to direct a verdict for the appellant, but it is insisted, if this be so, the court erred in giving instructions Nos. 3 and 5, at the appellee's request and in refusing to give instructions Nos. 10 and 11, requested by the appellant.

Instruction No. 3 told the jury that the failure to give immediate notice of the accident would not be a defense to the suit if the packing company had no knowledge that Mrs. Stanfield had received a personal injury until she brought suit against the company. Instruction No. 5 told the jury that, although the packing company did know that she had received a personal injury and had failed to report the same until after suit was brought, this alone would not defeat recovery, but that it must be shown also that the appellant was damaged or sustained a financial loss on account of the failure to give immediate notice, and, if it lost no substantial legal right on account of the fact that notice of the accident was not given sooner, failure to notify would not be a defense. We think these instructions were properly given, and what we have heretofore said justifies that conclusion.

The appellant, however, was entitled to the converse of instruction No. 5 which was embodied in instructions Nos. 10 and 11, requested by it and refused by the court.

Those instructions in effect would have charged the jury that if it found from the evidence that the plaintiff in the case failed or refused to comply in good faith with the provisions of the policy to the defendant's prejudice, plaintiff could not recover, and the burden was upon the plaintiff to show by the evidence that it complied in good faith with the provisions of the policy or that its failure to do so worked no injury or prejudice to the rights of the defendant. These instructions should have been given, and the appellant should have been permitted to introduce the testimony offered tending to show that it had suffered prejudice. To show that it had not so suffered, appellee elicited from the attorney of Mrs. Stanfield, the evidence that the indemnity company could not have settled the case for less than $2,500. In response to this testimony appellant offered to prove by Mr. Rush, the general manager, that it was the usual and customary manner of handling claims, when notice was given of the accident, to make an investigation and to negotiate a settlement if the investigation disclosed liability. This testimony was overruled.

Appellant asked Mrs. Stanfield whether or not she would have accepted one hundred and fifty or two hundred dollars, and the court refused to permit her to answer this question. She had already testified that she would have been willing to settle her claim for personal injuries out of court, and in answer to the question asked as to whether or not she would have settled before she found out her condition, she answered: "I cannot say. I would have gone by what the doctor said"; and, in speaking of her attorney and as to whether or not she would have settled without consulting him, she stated that she did not know. She should have been permitted to answer the question overruled by the court, and her entire testimony should have been allowed to go to the jury to be considered for what it was worth, on the question as to whether or not appellant suffered injury because it was not notified of the injury to Mrs. Stanfield before the filing of the suit. The appellee, however, contends that all of these questions are precluded because, having

elected to investigate the case in attempting to settle the same, it waived the failure to give notice.

We are of the opinion that the "Reservation of Rights Agreement" was executed for the very purpose its title implies—namely, that the investigation made would not be a waiver of the defense stated therein. As we see it from the record before us, only two questions are involved; first, was the appellee unaware of any substantial injury suffered or claimed to have been suffered by Mrs. Stanfield until the bringing of the suit; and, second, if appellee had this knowledge, did it notify the appellant as soon as reasonably possible, and, if not, did such omission prejudice the rights of the appellant so as to cause it to be injured? The judgment of the trial court is reversed, and the cause remanded for a new trial, so that these issues may be submitted to the jury under proper instructions.

WELCH *v.* FARBER.

4-3277

Opinion delivered January 22, 1934.

W. L. Curtis and *Roy Gean,* for appellant.

Cravens, Cravens & Friedman, for appellee.

BUTLER, J. On the 15th day of May, 1931, Mrs. Charlotte Vincent, now Mrs. Charlotte Vincent Welch, contracted to and did sell to Arnold Farber a parcel of land in the city of Fort Smith upon which was located a building in which the Monumental Cut Stone Company had been engaged in business for a number of years. This was the trade name under which Mrs. Vincent and her husband operated. A stock of monuments, markers and other material, together with the office fixtures, machinery and equipment used for carrying on the business, was sold with the lot and building. The agreed price was $15,000, five thousand dollars to be paid in cash and the balance in deferred payments evidenced by promissory notes bearing interest at the rate of six per cent. per annum. The first six notes were for $1,200 each, the one first maturing being due on November 15, 1931, and the others falling due at intervals of six months thereafter. The last two notes were for $1,400 each, one due November 15, 1934, and the other on November 15, 1935. A written contract was entered into between the seller and the buyer by which the title to the personal property was retained in the seller until all the notes had been paid, and Mrs. Vincent was to, and did, prepare a deed which was placed in escrow in a Fort Smith bank according to the terms of the contract. The contract contained other provisions which are not material to the controversy here involved.

Default having been made in the payment of the matured notes, and, after some forbearance on the part of the seller, she filed suit in the chancery court alleging such default and that the defendant, Farber, was selling and disposing of the merchandise on hand without refer-

ence to cost or value and appropriating the proceeds to his own use; that he was threatening to remove and carry away the remainder with the equipment and fixtures, and that he was insolvent. She prayed for a receiver pending the litigation to take charge of, and preserve, the property. At the final hearing it was agreed that the relief sought was the cancellation of the deed and the recovery of the property delivered to Farber and the bills receivable obtained by him resulting from the sale of the property, the plaintiff waiving any right to a money judgment against the defendant on the notes referred to in the complaint.

The defendant answered admitting the purchase, the execution of the contract, and the failure to pay the notes as they matured, but pleaded as an affirmative defense fraud practiced by the plaintiff in the negotiations of the sale and the execution of the contract in that certain material, false and fraudulent representations were made to the effect that the income of the business prior to the time of the sale approximated the yearly sum of $15,000, which representations were relied on and were the inducing cause for the purchase and the execution of the contract; that the same were false and that the annual income instead of being as represented, did not exceed the sum of $8,102.94. The defendant further alleged that he had paid to the plaintiff besides the initial payment of $5,000 other sums on the principal, and the interest accruing, in the aggregate sum of $6,100, and that he had realized from the business less than $3,100. He prayed for a rescission of the sale, cancellation of the notes, and that he be allowed to offset against the sums realized from the business the amount paid to the plaintiff, and that he have judgment for the difference between said amounts in the sum of $3,000. This answer was made a cross-complaint to which the plaintiff filed her reply denying its allegations.

On the testimony adduced the trial court found for the defendant on his cross-complaint. On motion, this decree was set aside, the case was reopened and further testimony taken which resulted in a final decree holding in effect as in the first.

The court made a number of findings of fact and law which were in effect that the plaintiff recover the property sold Farber, less such as had been disposed of by him prior to the appointment of the receiver, and that the deed describing the real estate held in escrow be returned to her and canceled, and that she retain possession of a "sand blasting machine" which had been affixed to and become a part of the real estate.

The court found the allegations of fraud of the cross-complaint sustained by the evidence and that the amount paid appellant exceeded by the sum of $2,500 the value of the merchandise sold by him and for which he was entitled to judgment, and in effect denied appellant's prayer that she have the bills receivable for her merchandise sold by Farber, for which he had not collected, but that Farber should recover all of the property, accounts and money in the hands of the receiver, less that ordered returned to appellant as aforesaid.

This appeal challenges the correctness of the decree on three grounds. First, that the finding of the chancellor to the effect that fraud was practiced by the plaintiff (appellant here) and relied upon by the defendant (appellee here) is against the preponderance of the testimony; second, that the court erred in permitting a recovery in favor of the defendant because of a delay on the part of said defendant in seeking to rescind his contract of purchase; and, third, that the judgment in favor of the defendant on his cross-complaint is not sustained by the evidence, because it is claimed that the preponderance of the evidence is against the finding of the court in that respect, and shows that the amount of the merchandise sold and the reasonable rental value of the building equals or exceeds the amount paid by the defendant to plaintiff on the purchase price.

The principles applicable to the issues involved and the evidence adduced are well settled. On appeal from courts of equity, this court tries and determines the case *de novo,* and only on the competent testimony adduced. If it should appear that the evidence is equally balanced, or so nearly so as to leave it doubtful where the preponderance lies, the decision of the trial court will not

be disturbed. But, where a candid consideration and analysis of the evidence leads this court to the conclusion that the preponderance is against the judgment and decree of the lower court, it becomes our duty to reverse the decision. *Leach* v. *Smith,* 130 Ark. 465, 197 S. W. 1160; *Johns* v. *Road Imp. Dist., etc.,* 142 Ark. 73, 218 S. W. 389.

Applying these rules to the consideration of the evidence adduced, we have no hesitancy in reaching the conclusion that the finding and decree of the chancellor is against the preponderance of the evidence on each of the questions decided by him relative to and sustaining the prayer of the cross-complaint. Fraud may be shown not only by direct or positive evidence, but may be proved by circumstances from which an inference of fraud may arise. The burden is upon him who alleges fraud to prove the same by clear and satisfactory evidence. *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; *DuFresne* v. *Paul,* 144 Ark. 87, 221 S. W. 485; *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524. In order to establish actionable fraud, the representations must be of a decided and reliable character which are calculated to mislead the purchaser and induce him to buy on the faith and confidence of the same. The false statement must be of an existing fact known by the one who makes such statement to be false, or, where he does not know, asserts it to be true with the intent to have the party to whom it is made act upon it to his injury. Such must be the effect on the party to whom the statement is made. *Joyce* v. *McCord,* 123 Ark. 492, 185 S. W. 775, and cases cited *supra.*

To satisfy this rule, reliance must be had upon the testimony of Farber, which was in line with the allegations of his cross-complaint.

It is the contention of counsel for the appellee that his testimony relating to the alleged false representations is corroborated by the testimony of Mr. Shaw, the auditor employed to audit the books of the Monumental Cut Stone Company. It is also appellee's contention that Shaw's testimony is to the effect that Mrs. Vincent attempted to bribe him and to pay him the sum of $100 to

"doctor" his audit so as to induce Farber to purchase at the price she had named, $20,000. We have carefully examined the transcript of Mr. Shaw's testimony and think the interpretation of counsel is unwarranted. We are of the opinion that it does not corroborate the statements of Farber, nor does he state that Mrs. Vincent attempted to bribe him to alter the audit. In testifying as to how he made the audit and as to the books he used, he stated that it was not a complete audit because he did not have a complete set of records; that he had to use a combined cash book and journal; that he asked Mrs. Vincent for the general ledger and for the inventory, and that she said she didn't have either, and he so informed Farber. Neither Farber, Mrs. Vincent nor Shaw were asked if any explanation was given by Mrs. Vincent as to why she did not have the records asked for, and no explanation was given by any other witness.

In answer to a question relative to conversations had with Mrs. Vincent, Shaw stated that he told her that it did not look to him like the business would justify the price she was asking, and that she said that there were some items of income which were not on that set of records, and when he was asked, "Where did she claim the other set of records was?" he answered, "She didn't say." He was asked if he requested her to produce them and answered that he did, but that he didn't remember what she said. He was then asked, "Can you recollect what she said about the other records?" and answered, "The only thing I can be positive of is the fact that she said all of the sales weren't on the book that I had audited." Relative to the offer of $100 made by Mrs. Vincent to Shaw, his testimony is that "she asked me if I would help her sell it, and I told her I would not on that $20,000 basis because I could not tell the man the business was worth that when it wasn't; and the conversation went back and forth." When asked if anything was said about getting him to change the audit, he said, "She asked me if I would fix it so it would look better." He was then asked if "she offered to pay you anything," and answered that she offered to pay him $100 and did pay him that amount and that he had spent it. He was

then asked, "What did she give you that $100 for?" and he answered, "She gave me the $100 to help her sell the business."

The most to be gathered from this testimony is that the witness, Shaw, inferred that there were other records than those he had examined, and it is as reasonable to presume, as otherwise, that he had reference to the general ledger and inventory which Mrs. Vincent told him she did not have. He nowhere states, even when pressed, that she told him she had another set of books, and that from these it would appear that the income from the preceding year was $15,000 or any other sum. It is also clear that the offer by Mrs. Vincent and the acceptance by Shaw of the $100 was not considered as a bribe but as a fee paid Shaw for a legitimate purpose, namely, his assistance in the sale of the business. This he told Farber, and also her request for him to fix the audit so it would look better.

The only other person who testified relative to the $100 paid to Shaw and the statements made during the negotiations for the sale and purchase of the business was Mrs. Vincent. She testified that she proposed to sell her business to Farber for $20,000, but before he would trade with her he had an audit made and declined to buy at that figure; that sometime after this he approached her and offered $15,000 for the business, and she accepted it; that she never represented to him or to Shaw, or to any one else, what the amount of gross sales was, or the net earnings; she denied the testimony of Farber that she had prepared a list of figures on a piece of yellow paper purporting to show what the income was for the year preceding the sale; which amounted to $15,778.32, or that she had gotten this off of a private set of books which correctly showed the income from the business; and she had never made such statements to Farber or any one else; that she knew nothing about the adding machine figures which had been exhibited by Farber with his testimony; that she did not know how he had gotten these figures or from what source they were derived, except that she had turned her bank book over to him and he might have gotten it from that, as

that was the only way he could have gotten it; that the bank book showed deposits that didn't represent sales from the business, but included sums from rental property, borrowed money, and other items. (It was shown by a witness that the first items on the adding machine record were indentical with items which appeared as deposits on the bank book.) Mrs. Vincent stated that she had never seen the audit made by Mr. Shaw, and had never been furnished a copy of it, although she was present during the time he was working on the audit which was done at her place of business, and she knew the work was being done for the purpose of informing Mr. Farber, in order to enable him to determine whether or not he would buy the business. In reference to the $100, she stated that Shaw asked her what she would give him if he would help her sell the shop and that she told him she would give him $100; that she did pay him this sum when the sale was made.

The only testimony relating to the representations claimed to have been made by Mrs. Vincent to Farber about the set of books and that they showed an income in excess of $15,000, is the testimony of Farber himself, on the one hand, and Mrs. Vincent on the other, and when Farber's statement regarding this is viewed in the light of what he actually did and how the trade was finally consummated, it seems to us to be unreasonable and contrary to the conduct of a prudent business man, such as the evidence shows Farber to have been.

When offered the business at a certain price, before he would discuss the amount, he states he had an auditor examine the books and was told by that auditor that the income as reflected by the combined cash book and journal was a little in excess of $8,000, but that the general ledger and inventory were missing, and he had not been able to obtain them. His testimony also shows that on the receipt of the audit and the information furnished him by Shaw, which included the offer made by Mrs. Vincent to Shaw of the $100, and the request by her that he make the audit look better, Farber refused to pay $20,000 and broke off negotiations; that afterward he bought the property for $5,000 less than the sum first asked. This

testimony shows the fore-thoughtful and prudent business man, and yet further on in his testimony he assumes quite a different character. His entire character changes to that of the simplicity and confiding nature of a child, so that on the unsupported statement of Mrs. Vincent as to what the income was he was induced to pay out $5,000 in cash and to obligate himself to pay $10,000 more, when he had been previously informed of her request that the audit be changed to make a better showing of income. He told of how appellant deceived him by having some figures on a yellow sheet of paper which she had prepared from "the other set of books." He was so trustful he was willing to accept this as a true statement of the income from the business, without ever seeing these books, and so confiding he did not even obtain and retain the "yellow sheet" and as a voucher for the truth of his statement had only an adding machine slip to show, which he himself had prepared.

His testimony has but little weight with us, and fails to satisfy the rule before stated regarding the sufficiency of proof of fraud. We first conclude that the evidence, fairly weighed, preponderates against the claim of fraudulent representations, and, further, that if any were made they were not relied upon by Farber, but that he took advantage of the information gained from his investigations to beat Mrs. Vincent down $5,000. Another significant fact, in our opinion, is that Farber has never explained when or how he became apprised that the statements he claims Mrs. Vincent made to him were false. He was in charge of the business for more than a year and a half and during that time he had ample opportunity to thoroughly acquaint himself with the business, yet he made no complaint to the seller, and gave no evidence of being disappointed in the business. The only thing the record discloses he did with respect to Mrs. Vincent was to importune her for indulgence in the payment of his obligation and to secure from her a postponement of the first note then due to beyond 1935. He was making small payments on the principal and paid the accrued interest during that time, and it was only when Mrs. Vincent would no longer defer her de-

mands and brought suit to enforce them that Farber discovered that he had been defrauded. In attempting to explain how and when the discovery of the fraud was made, which Farber in his testimony did not disclose, his attorney argues that the discovery was made when the motion for the production of the books was filed and there was only the one set—the one audited—which was produced and the correct set showing the true amount of the income, as claimed by Mrs. Vincent, was not produced. This argument is not valid, for an examination of the motion for the production of the books discloses that it contains the following statement: "* * * it is necessary that said defendant have access to said books, papers, records and documents for the purpose of having the same audited; that the defendant contends and will contend that the income and value of said business was grossly exaggerated and misrepresented by the plaintiff herein, and that the defendant, relying upon said misrepresentations, entered into the contract referred to in plaintiff's complaint." This motion was filed January 2, 1933, after the suit was filed and the receiver appointed, and Mr. Farber did not, in that motion, or anywhere else, disclose how or when he discovered he had been defrauded.

During all this time the record shows that he was selling the property which had been conveyed to him by the conditional sale and using the proceeds for other purposes than for paying his debt to Mrs. Vincent, and in our opinion the sums thus gained were more than sufficient to compensate him for the money paid appellee.

We think therefore that, even if it had been shown that Mrs. Vincent deceived Farber and induced him to make the purchase by false statements, the conclusion reached by the trial court regarding the amount of material sold by Farber and allowed him as an offset is not supported by the weight of the testimony, and that in fact he has suffered no injury.

The decree is, for the reasons stated, reversed and the cause remanded with directions to dismiss the cross-complaint, and for such further proceedings in con-

formity with this opinion as may be necessary to grant to the appellant the relief prayed, with her costs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY *v.* BIERMAN.

4-3247

Opinion delivered January 29, 1934.

Owens & Ehrman, for appellant.

Fred A. Snodgress and *Sam Robinson,* for appellee.

JOHNSON, C. J., (after stating the facts). The paramount and controlling question here presented is the removability of this cause from the Pulaski Circuit Court to the Federal court for the Eastern District of Arkansas. It is the well-settled law that removability is tested solely by the complaint and the petition for removal. Appellee's complaint shows that he was seeking to recover from appellant $2,675 as damages for permanent disability. In addition to this, he sought recovery of twelve per cent. penalty upon $2,675. Twelve per cent. of $2,675 is $321. These two items, when added, aggregate $2,996. In addition to this sum, appellee sought to recover a reasonable attorney's fee.

We expressly held in *Mutual Life Insurance Co.* v. *Marsh,* 185 Ark. 332, 47 S. W. (2d) 585, that the twelve per cent. penalty, provided for by § 6155 of Crawford & Moses' Digest, was not an item of costs, and therefore should be added to the amount sought to be recovered in testing the sufficiency of a petition for removal. The headnote reads as follows:

"The amount in controversy in an action on an insurance policy for $3,000 plus 12 per cent. penalty is $3,600, which entitled the defendant, a nonresident, to removal of the cause to the Federal court, under title 28, § 71, USCA."

In the more recent case of *Missouri State Life Insurance Co.* v. *Johnson,* we had before us the question as to whether a reasonable attorney's fee should be added to the amount sought to be recovered plus the

twelve (12%) per cent. penalty, and we determined this question in favor of the insured. The effect of our holding was that the reasonable attorney's fee, provided for by statute, was an item of cost, and therefore should not be considered on the question of removability. The Johnson case was reviewed by the Supreme Court of the United States, wherein it was determined that the Supreme Court of Arkansas had erred in holding that a reasonable attorney's fee should not be added in determining the question of removability. In disposing of the question, Mr. Justice McReynolds said:

"In the State court the present respondent sought to enforce the liability imposed by statute for his benefit —to collect something to which the law gave him a right. The amount so demanded became part of the matter put in controversy by the complaint, and not mere 'costs' excluded from the reckoning by the jurisdictional and removal statutes." *Missouri State Life Insurance Co.* v. *Jones,* 290 U. S. 199, 78 L. ed. 135.

In accordance with the opinion of the Supreme Court of the United States, we must now hold that, when a reasonable attorney's fee is a matter in controversy, and when such fee, added to the specific sum in controversy, aggregates a sum in excess of $3,000, and all other requisites are present, such cause of action is removable from the State to the Federal courts.

In the instant case, when a reasonable attorney's fee is taken into consideration on the question of removability, it is made certain that the total amount in controversy is in excess of $3,000. It is perfectly evident that $4 would not be a reasonable attorney's fee in a controversy wherein practically $3,000 is involved. We therefore conclude that the trial court erred in refusing to remove this cause to the Federal District Court for the Eastern District of Arkansas.

For the error indicated, the cause is reversed and remanded with directions to enter an order of removal, in accordance with the petition and bond therefor.

McNeil *v.* Harris.

4-3312

Opinion delivered January 29, 1934.

[redacted]

Rice & Rice, for appellant.

Vol T. Lindsey, for appellee.

Johnson, C. J. This is a foreclosure action instituted by appellees against appellants in the Benton County Chancery Court. A default decree was entered, and this appeal is prosecuted therefrom. But one question is presented for determination, namely, the construction of the language contained in the notes evidencing the indebtedness secured by the mortgage. One of the notes reads as follows:

"$1,000	Endorsement	Balance
Rogers, Ark., July 9, 1928	on	due on
On or before Aug. 15, 1932	principal	principal
—days after date I, we, or	192	$..... $.....
either of us, promise to pay	192	$..... $.....
to the order of	192	$..... $.....
R. J. Jeffords	192	$..... $.....
One Thousand—Dollars	192	$..... $.....

For value received, negotiable and payable at the Farmers' State Bank, without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum, payable.....until paid, and if not paid when due with collection charges and attorney's fees, and, if interest be not paid annually, to become as principal, and bear the same rate of interest. The makers and indorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note, and agree to extension of this note from time to time without notice.

"No..... (Signed) T. S. McNeil

" Grace McNeil

"Due on or before Aug. 15, 1932.
"P. O. Rogers, Arkansas."

The following appears on the back of said note:

"For value received, I hereby assign the within note to T. E. Harris, Vol T. Lindsey and E. W. Vinson, without recourse.

"R. J. Jeffords."

The trial court, in its decree, compounded interest annually on the notes in controversy at 8 per cent., and this is the alleged error presented for decision.

We think the decree is correct. The language employed by the parties in the note as follows: "and if interest be not paid annually, to become as principal, and bear the same rate of interest," when construed with all other provisions of the note, makes it clear that it was the intention of the parties that the interest mature annually, instead of at the maturity of the note as contended by appellants.

The decree is correct, and must be affirmed.

BRADLEY *v.* ASHBY.

4-3302

Opinion delivered January 29, 1934.

Isaac McClellan and *Woodrow McClellan,* for appellant.

House, Moses & Holmes and *W. R. Roddy,* for appellee.

SMITH, J. On January 14, 1933, an adjourned day of the October, 1932, term of the Grant Chancery Court, a decree was rendered which contained the following find-

ings of fact: On July 31, 1928, J. H. Bradley executed a promissory note to Greene & Meadors for $2,500, due September 10, 1928. To secure this note, and as collateral thereto, Bradley pledged to Greene & Meadors six notes secured by a vendor's lien on a forty-acre tract of land which had been conveyed by Bradley to one A. C. Moore. Thereafter Moore reconveyed the land to Bradley, thereby vesting the title in Bradley. The court was evidently and correctly of the opinion that the reconveyance of the land to Bradley by Moore did not operate to extinguish the vendor's lien as against the holder of the purchase money notes. It was found that $936 was due on the $2,500 note, for which judgment was rendered, and it was also ordered that the land be sold. The decree was a complete and final adjudication of the questions raised by the pleadings and the testimony.

Thereafter, but before the expiration of the term at which this decree was rendered, a motion was filed by Bradley to vacate the decree upon the ground of newly-discovered evidence. Bradley had brought the original suit to cancel his note and to secure the return of the six collateral notes, upon the allegation that he had paid the $2,500 note in full. An intervention was filed in the name of Bradley's wife, in which she alleged that she had never joined in the execution of a deed to Moore, and that the land was her homestead. She prayed that the deed be declared void, and that her rights of dower and homestead be protected.

No ruling was made on the intervention or the motion to vacate the decree of January 14, 1933, until April 24, 1933, which was the first day of the April, 1933, term of the Grant Chancery Court. On that day, and before the opening of the new term, the chancellor overruled the motion to vacate, and dismissed the intervention, no competent testimony being offered in support of its allegations. A decree to that effect was entered as a proceeding had at a day of the October, 1932, term of the court. It is unnecessary to pass upon the question whether there could be a session of both terms on the same day.

An appeal has been prosecuted, and a transcript incorporating both the decree of January 14, 1933, and that of April 24, 1933, was filed with the clerk of this court on October 5, 1933.

The effect of the decree of April 24, 1933, was to leave in full force the decree of January 14, 1933, and this appeal has not been prosecuted within the time limited by law to bring the January 14th decree before us for review, as more than six months expired after its rendition before lodging the transcript in this court.

It was held, in the case of *Oxford Telephone Mfg. Co.* v. *Arkansas Nat. Bank,* 134 Ark. 386, 204 S. W. 1140 (to quote the headnote), that: "The time for taking an appeal to the Supreme Court is six months after the rendition of the judgment, order or decree sought to be reviewed; and in a proceeding in chancery this time is not extended by reason of the filing of a motion to vacate the decree." See also *Pearce* v. *People's Sav. Bank & Trust Co.,* 152 Ark. 581, 238 S. W. 1063; *Moore* v. *Henderson,* 74 Ark. 181, 85 S. W. 237.

The appeal, not having been taken within the time provided by the statute, must be dismissed, and it is so ordered.

GRAND NATIONAL BANK OF ST. LOUIS *v.* HUTCHINGS.

4-3305

Opinion delivered January 29, 1934.

W. F. Reeves, for appellant.

Connelly Harrington and *C. C. Elrod,* for appellee.

HUMPHREYS, J. This suit was brought by appellant against appellees, in the chancery court of Benton County, to recover the amount of $25,000 and interest on a note, and to foreclose two mortgages, one on real estate and

the other on household goods, given by appellees on December 1, 1930, to secure the payment of same. The complaint alleges the purchase of the note for value before maturity and default in the payment of same by appellees.

Appellees interposed the defense that the property described in the mortgage was the sole and separate property of appellee, Alma E. Hutchings, and that she executed the note and mortgage to a trustee to enable her husband, Harold G. Hutchings, co-appellee herein, who joined in the execution of the note and mortgages, to pledge or use them as collateral along with other collateral he owned to borrow $50,000 from appellant, and that the note for $50,000, in evidence of the amount he borrowed from appellant, was paid in full out of the other collateral deposited with appellant at the time, which had the effect of nullifying the $25,000 note and mortgages sued upon.

The issue joined was tried by the chancellor upon the testimony introduced by the respective parties, from which he made the following finding:

"The court finds that the said $25,000 note, together with real estate mortgage and chattel mortgage, were executed upon the property of Alma E. Hutchings, for the sole purpose of being hypothecated and pledged to secure a certain $50,000 promissory note, by Harold G. Hutchings, to the Grand National Bank of St. Louis, Missouri, dated December 1, 1930, and for no other purpose, and further finds that the property described in said mortgages was the sole and separate property of Alma E. Hutchings, and that the $50,000 note, for which the said $25,000 note secured by said real estate and chattel mortgage was fully paid and discharged on July 20, 1931, thereby fully satisfying and canceling and discharging the said $25,000 note, together with the real estate mortgage and chattel mortage securing same."

A decree was rendered in accordance with the findings canceling said note and mortgage, from which is this appeal.

We have read the testimony very carefully, and have concluded that the findings of the chancellor are sustained

by the weight thereof. We deem it unnecessary to set this evidence out, as it would unduly extend this opinion and serve no useful purpose in cases which might arise in the future.

There is no dispute between the parties that, when a pledge is made and the purposes for which same is made have been fully complied with, the property so pledged is released to the pledgeor. After conceding this proposition of law, learned counsel for appellant attempt to show as a matter of fact that, by mutual agreement, said note and mortgage were again pledged to secure whatever indebtedness might accrue to appellant by appellee, Harold G. Hutchings, in the future. The chancellor found that the evidence was insufficient to show that there was a second pledge of the note and mortgage, and, in the opinion of the court, was correct in so finding.

No error appearing, the decree is affirmed.

PARKS *v.* JOHNSTON.

4-3313

Opinion delivered January 29, 1934.

J. S. Jameson and *John Mayes,* for appellant.

James B. McDonough, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the chancellor erred in decreeing a specific performance of the contract, appellant claiming that by its terms he had the right to refuse to perform so long as an abstract of title was not furnished "that was satisfactory to him," and that no more than liquidated damages could be recovered for his breach of the contract, the $100 which he insisted had been agreed upon as liquidated damages and paid to bind the bargain.

The evidence, however, is amply sufficient to show the making of the contract, its terms and appellant's refusal

to perform it. Appellant could not arbitrarily refuse to accept a title shown by the abstract to be a good and merchantable title, a complete and perfect title in fact; and under no proper construction of the contract or agreement of purchase was he permitted to refuse to perform same for any reason and escape the obligations thereof by the payment of $100 as liquidated damages. There was no such provision in the contract. It was a contract of sale and purchase, not an option to buy, properly entered into, and he was bound by its terms upon its performance by the appellee to take the land as agreed, and the chancellor correctly held that appellee was entitled to a specific performance of the contract.

There was no right of election on the appellant's part under the terms of the contract to refuse to perform it upon the payment of $100 damages for his failure to do so; nor did any such offer lessen in any way appellee's right to a specific performance, as the chancellor held, upon his compliance with the terms of the contract.

Neither is there any merit in appellant's claim of a right to refuse to perform the contract on account of any insufficient description in the lands for the road to be laid out on. The testimony shows that there had been a road already laid out and in use on the land, and that the description of the right-of-way of said road was the same in this deed as it was in the deeds under which appellee held the land.

We find the decree of the chancellor in all respects correct, and it must be affirmed. It is so ordered.

CHAPMAN *v.* HENDERSON.

4-3321

Opinion delivered January 29, 1934.

Gaughan, Sifford, Godwin & Gaughan and *Mahony & Yocum,* for appellants.

Powell, Smead & Knox, for appellee.

MEHAFFY, J. The appellee filed suit in the Union Circuit Court against the appellants to recover damages for the death of her son. She alleged that she was the

mother and next of kin of William Henderson, deceased, who died in Union County, Arkansas, on March 7, 1932, as a result of injury sustained by him on account of the negligence and carelessness of the servants of appellants, E. L. Chapman and Sam E. Wilson, Jr. It was alleged that several days prior to the death of said William Henderson, he was employed by the appellants as a derrick man, engaged in the drilling of an oil well on a lease belonging to appellants, in Union County, Arkansas; that the deceased was a member of the night drilling crew, and was directly under the supervision and control of Homer Durio, the night driller in charge of the operations. The appellants were partners, and Henderson was employed by them.

It was alleged that on the night of March 7, 1932, the said Henderson was engaged in the drilling of said well in his capacity as a derrick man; that as a part of his duties it was necessary for him to climb up into the derrick, a distance of about 75 feet, and go out on the fourble board for the purpose of connecting the elevators with the drill pipe in order to lower the same into the well; that the appellants were negligent in failing to exercise ordinary care to provide Henderson with a reasonably safe place in which to work; that they had carelessly and negligently permitted large quantities of oil to drip over and upon said fourble board, causing the same to become slippery and dangerous; that on the night of the death of Henderson, snow was falling, and the fourble board had become covered with snow and water, and for that reason was slippery and dangerous; that the appellants, their servants, agents and employees had negligently and carelessly failed to maintain proper light upon said derrick, requiring Henderson to perform his duties in almost total darkness; that the drilling crew had great difficulty that night in getting the drill stem into the hole, and were thereby delayed, and that for that reason the said Durio, the driller in charge, was working his crew at a rapid rate of speed; that shortly before the accident Henderson had gone down to the derrick floor, to assist in the operation there, and when he had completed his labor there, he was directed by said

Durio to return to the fourble board; at the time said direction was given by Durio to Henderson to return to the fourble board, Henderson advised Durio that the fourble board was exceedingly slick and dangerous, and that before returning he desired to obtain a bucket of sand to take up with him and put on the fourble board to make his footing more secure; that said Durio, knowing the condition of the fourble board, carelessly and negligently failed and refused to permit the said Henderson to obtain said bucket of sand, assuring him that he would only run two more fourbles, and that it would not be necessary for him to get the sand, and that Henderson could perform his work without danger; that Henderson, relying on the superior knowledge of his foreman, and in compliance with the order of his foreman, ascended the derrick to the fourble board and connected the elevator to the drill pipe; that, by reason of the negligence of the appellants, he lost his footing, slipped upon said board and fell to the floor below, crushing and mangling him, thereby causing his death; that Henderson was 20 years of age, earning $5.50 per day, and gave promise of earning a much larger sum in the future; that he contributed to the support and maintenance of his mother all of his earning except the amount necessary for his own personal expenses; that he contributed to her $35 per week; his mother was a widow and solely dependent upon him for support; that he had from time to time assured appellee that he would continue to contribute to her support throughout the remainder of her life. She sued for $50,000 damages.

Appellants filed answer denying each of the allegations in the complaint, and alleging that the deceased was provided with a safety belt which was so constructed as to fasten around his waist, and when so adjusted, rendered it impossible for the employee using the same to fall; that deceased was instructed to use the same, but failed and neglected to do so, and was not using it at the time he fell; that such negligence and carelessness on his part was the sole and proximate cause of his death; that the condition of the fourble board was open and obvious, and that he assumed the risk.

There was a trial by jury, a verdict and judgment for $7,500, and the case is here on appeal.

The appellants contend first that the evidence was not sufficient to warrant the court in submitting the case to the jury, and that the court should have directed a verdict for appellants. The burden in this case was upon the appellee to establish the negligence of the appellants, and to prove that such negligence was the proximate cause of the injury.

The fourble board or platform where the deceased was performing his labor was approximately 75 feet above the floor of the derrick. No other person was with the deceased on this platform. The undisputed proof is that it was a cold night, snowing and sleeting. The evidence shows that a very short time before the injury and death of deceased, he went down to the floor of the derrick, and while there, before he started back to the fourble board, he told Durio, who was in charge of the work, that the platform was slippery, slick and dangerous, and that he needed some sand. Mr. Durio told him that he had but little more work to do, and told him to go back up and do the work, assuring him that it was safe to finish the work without getting the sand. In obedience to the order of the foreman, deceased went up to the fourble board and finished his work. One or two witnesses testified that they went to the fourble board shortly after the accident, and that it was not slippery, but it is hardly believable that, the snow and sleet having fallen on the fourble board, it would not be slippery and dangerous. At any rate, this was a question for the jury, and, under the evidence in this case, while there is some conflict, the jury had a right to believe that the fourble board was covered with snow and sleet, and was slick and dangerous, and that this condition caused the fall of the deceased, and his death.

According to the settled law of this State, it is the duty of the master to exercise ordinary care to provide his servants with a reasonably safe place in which to work and reasonably safe appliances with which to work. *Booth & Flynn Co.* v. *Pearsall,* 182 Ark. 854, 32 S. W.

(2d) 404; *International Harvester Co. of America* v. *Hawkins,* 180 Ark. 1056, 24 S. W. (2d) 340.

Of course, the burden is upon the appellee to show that the master failed to perform this duty, and that such failure was the cause of the injury and death of deceased. Whether, under the evidence in this case, the master had exercised care to furnish a safe place in which to work, was a question for the jury, and the evidence is sufficient to show that, because of the sleet and snow and slippery condition of the platform, the place was not safe, and the jury was also justified in finding that the deceased asked for sand in order to make his footing more sure, and that he, at the direction of the foreman, who assured him that it was safe, went back and undertook to perform, and did perform his duty on the platform.

As to the question of negligence of the master, the jury's finding is conclusive. If the platform was slippery and dangerous, and this was the cause of deceased's death, while he himself was in the exercise of ordinary care, the master is liable. The evidence shows not only that he had gone onto the fourble board as directed, but that he had completed his work. It is contended, however, that the appellants furnished him a leather belt about four inches wide to be worn by him, and the belt was attached to a rope so that if he slipped or fell, he could only fall a very few feet if he had the belt on. But it is contended that he did not have the belt on; that if he had he could not have fallen.

It is true that he could not have fallen when he had the belt on, but when he completed his work on the fourble board, he could not go down to the derrick floor or ground without taking the belt off. No one testified that he did not have the belt on when he did his work, and no one disputes the fact that when he finished his work, it was necessary to take off the belt, and go to the ladder to go down.

There was some testimony that on a former occasion deceased had been seen working on the fourble board without the belt. There is no evidence, however, that he did that on this occasion. Even if he at one time did

some work there without the belt, that does not show that he would go onto the fourble board covered with snow and ice without the belt, and undertake to do his work. Moreover, the evidence shows that the foreman instructed him after that time that he must not work up there without the belt. One witness testified that at one time the foreman was so careful in this particular, that he stopped the engine to require the derrick man to put on his belt. The deceased had begun work on the night that he was injured about 7 P. M., and had been working there from that time until his injury, except the few minutes that he was down on the floor of the derrick at the time he told the foreman that the platform was slippery, and that he needed sand.

Whether he had on a belt or not would neither prove nor disprove the negligence of the master. If the proof showed that he was working there without the belt, this would be evidence of contributory negligence on his part, but would in no way tend to show that the master was not guilty of negligence. The presumption is, unless there is evidence to the contrary, that the master was not negligent, and for that reason it is necessary for the servant to show that the master was guilty of negligence; but it is equally true that the servant is presumed to be in the exercise of ordinary care, and for that reason the burden is upon the master to show that the servant was not in the exercise of care. There is no evidence in this record tending to show that the deceased was guilty of any contributory negligence, and none to show that he did not wear the belt while doing his work.

The only reasonable conclusion, that can be reached, is that he wore the belt until he had finished his work, and then undertook to go to the ladder, and, while doing this, slipped and fell to his death because of the slippery condition of the platform. We think the evidence is sufficient to justify the jury in reaching this conclusion.

It is true that the appellee had to show negligence of the master, and that the injury resulted from such negligence, but he was "not bound to prove his case so clearly as to exclude the possibility of any other theory." *State ex rel. Iola* v. *Nelson*, 57 Wis. 147, 15 N. W. 14.

In civil cases it is only necessary for the plaintiff to prove his case by a preponderance of the evidence. This is all that is required in negligence cases. Negligence is proved by a preponderance of the evidence.

"It is well settled that evidence of negligence need not be direct and positive. Circumstantial evidence is sufficient. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence; and, as that fact is always a relative one, it is susceptible of proof by evidence of circumstances bearing more or less directly upon the fact of negligence, a kind of evidence which might not be satisfactory in other classes of cases, open to clearer proof. This on the general principle of the law of evidence which holds that to be sufficient or satisfactory evidence which satisfies an unprejudiced mind." Shearman & Redfield on the Law of Negligence, vol. 1, 129.

We are of opinion that, when all the evidence and circumstances are considered, there was sufficient evidence of negligence to take the case to the jury.

Two or three statements, made by Mr. Durio after the injury and before the trial, were introduced for the purpose of contradicting Durio. These statements, of course, could not be introduced for any other purpose. As to whether he told the truth at the time of the trial was a question for the jury.

There is no evidence in the record tending to show that deceased was guilty of contributory negligence. Of course, if he undertook to do the work upon the fourble board without the belt, this would be evidence of negligence; but there is no evidence of this, and it is pure speculation.

The case was submitted to the jury on correct instructions by the court, and no contention is made that there was any error in the instructions. The deceased knew that the platform on which he was performing his work was slippery and dangerous, and for that reason, he called on the foreman for sand to make his footing more sure; but he was directed to do his work by the foreman, and it was his duty to obey, unless the danger was so obvious that no prudent man would incur it under

like circumstances. Ordinarily a servant may assume that his employer has superior knowledge, and may 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 tendency of modern cases is to permit a recovery, unless the employer's direction calls for nothing less than recklessness on the part of the employee, leaving no ground for difference of opinions as to the peril of acting pursuant thereto. *Owosso Mfg. Co.* v. *Drennan,* 182 Ark. 389, 31 S. W. (2d) 762; *Sawyer* v. *Rumford Falls Paper Co.,* 90 Me. 354, 38 Atl. 318, 60 A. S. R. 260; 18 R. C. L. 655-659.

It is next contended that the judgment is excessive. Appellants cite and rely on, first, the case of *Liston* v. *Reynolds,* 69 Mont. 480, 223 Pac. 507. In that case, the father sued for damages for the death of his son. At the time of the trial the father was 47 years old, in good health, and employed as a grocery clerk. It was not shown but that he was amply able to maintain himself and family by his own efforts. His life expectancy was approximately 23 years. The verdict was for $5,500, and the court said:

"Taking into consideration the fact that the plaintiff was legally only entitled to the earnings of the deceased for a period of a little less than one year at the time of his death, the ability of the plaintiff to maintain himself and family, and the consequent improbability that the deceased would, after his majority, be expected or compelled to contribute for that purpose, as well as the earning capacity of the deceased, as shown at the time of the trial, we are led to the belief that the testimony does not warrant the conclusion that plaintiff might reasonably have expected to receive the sum of $375 per year from the deceased, so long as plaintiff lived." The deceased, at the time of his death, was 20 years old. He had contributed to his father sums ranging from $20 to $60 per month. At the time of his death, however, he was only earning $40 per month, and it was not shown whether at that time he was making any contributions to his father. That decision, we think, would be authority for the amount of the verdict in this case, or a larger amount.

The next case relied on is *Briggs* v. *Public Service Ry. Co.,* 91 N. J. Law 1, 102 Atl. 382. There was a verdict in that case for $5,000. This, however, was the third trial of the case, and on the second trial, there was a verdict for only $2,000, and the verdict and judgment on the third trial was reduced to $2,500. The deceased was earning $30 a month, but was likely to have his wages raised to $63.50 per month. He was 18 years and 8 months of age at the time of his death. The father was self-supporting, and the court held that it was not likely that after the son reached his majority, the father would have received anything very substantial from him, and, yet the court sustained in that case a judgment for $2,500.

The next case relied on as showing that the verdict is excessive is *C., R. I. & N. G. R. Co.* v. *Hanna,* 273 S. W. 280. This was a suit by the mother to recover damages for the death of her son. The son, at the time of his death, was approximately 17 years of age. The plaintiff was 59 years of age, and her husband was living at the time of the trial, but had died since. She had another son, 35 years of age, and two daughters, unmarried. The amount of the judgment was $3,100, but it was compensation merely for the period between the death of Hannah and the date when he would have attained his majority. The court said:

"Under such circumstances we feel unable to say that the jury were not authorized in concluding that a son of the characteristics shown would not have continued after his majority, to some extent at least, to care for and maintain his widowed mother and her interests."

In the case of *Walker* v. *M. P. Rd. Co.,* (Mo. App.) 253 S. W. 804, there was a verdict for $7,400, and the court reduced it to $6,000. In that case the mother was 54 years old, and the son was 18. The contributions were smaller than in the present case, and the mother was considerably older; yet the court sustained a judgment for $6,000.

We think the other cases referred to by appellants do not support their contention that the judgment in this case is excessive. In a case where a young man, 19 years old, was killed, a judgment rendered in favor of the father

for $8,500 was sustained. *Murgaviro* v. *C. B. & Q. Rd. Co.,* 239 Ill. App. 544.

A judgment for $8,600 was held not excessive in the case of *Heed* v. *Gummere,* 192 Ind. 227, 136 N. E. 5. The Kansas court said: "The court cannot interfere with the verdict upon the ground of excessive damages, unless they are so great as to appear to have been given under the influence of partiality or prejudice. Although the amount awarded was liberal, we cannot disturb the verdict on the ground of excessive damages." *A. T. & S. F. Ry. Co.* v. *Hughes,* 55 Kan. 491, 40 Pac. 919.

In the instant case the deceased was earning $5.50 per day; he was 20 years old; he was the sole support of his mother, who was 49 years of age; and he was not only contributing liberally to her at the time of his death, but the evidence shows that it was his intention to do so as long as his mother lived. The verdict is not excessive.

We find no error, and the judgment is affirmed.

STANDARD SURETY & CASUALTY COMPANY OF NEW YORK *v.* JACKSON.

4-3309

Opinion delivered January 29, 1934.

E. W. Moorhead, for appellant.

R. W. Robins, for appellee.

McHANEY, J. Appellee obtained a judgment in the Faulkner Circuit Court against one John Morgan in the sum of $750 damages for personal injuries sustained by her while riding as a guest in his automobile. Morgan carried a policy of liability insurance with appellant, and,

it defended the action for Morgan. Execution issued on the judgment, and a *nulla bona* return was made by the sheriff. She thereafter instituted this action against appellant in the Pulaski Circuit Court to recover the amount of her judgment against Morgan, as she was authorized to do both by the provisions of said policy, and of act 116, Acts of 1927, p. 667. Appellant defended the action on the ground that Morgan failed to cooperate with it in the trial of the case against him, in that he failed to testify to the same statement of facts in the trial, as he had previously given it in writing, and that he thereby violated the terms of the policy, which relieved it from any obligation to him, and that therefore it is under no obligation to her. Trial to a jury resulted in a verdict and judgment for appellee in the sum of $802.25 with interest from March 1, 1933, at 6 per cent. per annum.

The policy contained this provision: "B.—Cooperation. The assured shall at all times cooperate with the company (except in a pecuniary way), and whenever requested by the company the assured shall aid in securing information and evidence, effecting settlements, the attendance of witnesses and in prosecuting appeals. The company reserves the right to settle or defend any claim or suit, and the assured shall not voluntarily assume any liability, settle any claim or suit except at his own costs, incur any expense (other than for immediate surgical relief at the time of the injury) or interfere in any negotiations for settlement or legal proceedings."

A short time after the accident in which appellee was injured, Morgan gave appellant this statement: "I have a five-passenger Chevrolet car, and about 5 o'clock I took my wife and baby boy, and my wife's aunt, Mrs. Jim Jackson, for a ride. We had started to go to town, and then we decided to ride a little. We wanted to show her 'Park Hill,' as she was visiting us for a few days.

"I was driving down a pretty good hill, and was going to go up the same kind of a hill. There was a narrow draw where the highway had been filled with a dump. I was going about thirty miles an hour or a little more. We were on concrete pavement. The pavement

had sunk into a pretty good drop or ditch. I saw it just as I hit it. The way it dropped and still stayed in place you cannot see it until you are right on it. Then, too, I was not looking for a place like that on smooth concrete pavement. I had been over it many times before. We always take everybody there that comes to see us.

"When I hit this place, it threw my car up in the air. My four-year-old boy was thrown upon my back. I found Mrs. Jackson in the back seat limp, and unconscious. I thought she was dead. I drove up the top of the hill to a house, and called the man out. He brought a pan of water, and we bathed her face. She came to after that. She was suffering considerable. We hurried home then, and called Dr. Shelby Atkinson. He gave her a hypodermic. He came back to see her yesterday and today. She is improving today. The doctor strapped up her back yesterday. And today, he decided it would not be necessary to take an X-ray picture."

On the trial of the case in Faulkner County, he testified that he was driving "something over thirty miles an hour; I wouldn't say how fast, but I was going thirty, forty or forty-five miles an hour." Also, that his little boy had climbed on his back, and that he was playing with him as he went down the hill, and, quoting, "I won't be sure whether I was looking ahead or not at that particular time. I was not expecting anything like this to happen. If I had known this place had been broken in, of course, I would have been on the lookout." Also, that the boy had been on his back, that he had pushed him back, and that he was standing up against the seat when the accident happened. "I was looking back at the time the accident happened. That is what I told you up there. I had pushed him back."

Now, it is contended that this testimony is in conflict with his written statement made a short time after the accident, and which is quoted in full hereinabove, and that as a matter of law it constitutes a violation of the "cooperation" clause of the policy above quoted, which entitled appellant to an instructed verdict in its favor. We cannot agree. As we view the evidence, when compared with the written statement, there is no material

conflict in them. In the statement he said he was traveling "about thirty miles an hour or a little more." In his testimony he said as to speed, "something over thirty miles an hour; I won't say how fast, but I was going thirty, forty or forty-five miles an hour." Each showed uncertainty as to exact speed, and each estimated it at "about thirty or a little more," in effect. In the statement nothing is said about the little boy getting on his back, nor did he say he was looking ahead. He did say he was not looking for a place like that, and he saw it just as he hit it. His testimony does not contradict anything in the statement, except that he said he was looking back at the time the accident happened. There is no material difference between them, and, therefore, no lack of cooperation within the terms of the policy. Since, as we have shown, there was no failure to cooperate and violation of that clause in the contract, the court should have directed a verdict for appellee, as there was no question to be submitted to the jury. This view of the matter makes it unnecessary to discuss the alleged error in modifying and giving appellant's instruction No. 3.

Affirmed.

ROBERTA LODGE No. 204, F. & A. MASONS *v.* COLEMAN.

4-3318

Opinion delivered January 29, 1934.

Powell, Smead & Knox, for appellant.

T. D. Wynne, for appellee.

MCHANEY, J. Appellants are the Masonic Lodge and its officers at Princeton, Dallas County. August 5, 1929, they made a contract with the county to purchase the old courthouse and grounds in Princeton, which had

been abandoned for county purposes since the establishment of the new county seat at Fordyce. Their purpose was to repair the house, which was falling into decay, clean up the grounds, and use the building for a lodge hall. The price agreed upon between the lodge and the county was $125, and it was contemplated that the money would have to be raised by subscriptions among the inhabitants of the village and others who had formerly resided there, and who were interested in the restoration and preservation of the old courthouse. To this end a committee was appointed to solicit subscriptions or donations, and appellee, Coleman, a member of the lodge, was elected by the lodge as special treasurer of the fund to be so raised. The committee entered upon its duties and collected $45, which was turned over to appellee, who deposited same to his credit as treasurer in a bank. Thereafter the chairman of the committee died, hard times came on, and nothing further was done about the matter, except the lodge did some repairs and cleaning up to and about the premises. On June 8, 1931, appellee, Coleman, without returning the $45 to the lodge, without resigning as special treasurer, and without giving any notice to the lodge of his intention so to do, applied to the county court of Dallas County to purchase the same property, and, on the same day an order was entered by the court appointing a Commissioner to make the sale to him, and the sale was made, deed executed and approved, for a consideration of $175. Thereupon he notified the lodge officers of what he had done, and they, on June 18, 1931, raised the $125 original purchase price, paid it to the Commissioner originally appointed by the court on August 5, 1929, who executed to the lodge a deed conveying to it the same property.

This suit was thereafter instituted by appellants to cancel appellee's deed, or to have him declared a trustee for its benefit, and to have his title divested out of him and vested in it. Trial resulted in a decree for appellee, dismissing appellants' complaint for want of equity.

In this we think the court was in error. Mr. Coleman was not only a member of the lodge, but was its agent or trustee for the handling of the fund with which

to buy the property. He was the agent of the lodge in this respect. Good faith, fair dealing and equity would require him to be loyal to his principal, and, before he could act for himself, he would be required to relinquish the trust, turn back the funds held by him and notify the lodge of his purpose to buy for himself, in the event it desired to abandon the purchase. This he wholly failed to do. Nor does the fact that his agency is a gratuitous one affect this principle. *Huffman* v. *Henderson Co.*, 186 Ark. 792, 56 S. W. (2d) 176; *Lybarger* v. *Lieblong*, 186 Ark. 913, 56 S. W. (2d) 760. Appellant still holds the lodge's money, $45.

The decree will be reversed, and the cause remanded with directions to enter a decree divesting title out of appellee and vesting it in appellant on payment to him of $130, which, together with the $45 he now has, equals the purchase price paid by him.

RANDOLPH *v.* PORTER.

4-3310

Opinion delivered January 29, 1934.

Roy Gean and *D. H. Howell,* for appellant.

J. B. Perrymore and *Partain & Agee,* for appellee.

BUTLER, J. On or about the 27th day of October, 1931, there was made and filed with the clerk of the probate court of Crawford County, Arkansas, the following affidavit:

"Mulberry, Ark., Oct. 26, 1931.

"We, Dr. J. A. Wigley and Dr. S. C. Grant, hereby state under oath that we know R. H. Randolph personally, and know him to be incapable of attending to any business on account the infirmities of old age, as well as being afflicted with senile dementia.

"J. A. Wigley, M. D.

"S. C. Grant, M. D.

"Subscribed and sworn to before me this the 26th day of October, 1931.

"T. J. House, Notary Public.

"(Seal)

"My commission expires 12-15-34."

On the same day Horace Wagner filed a petition in said court for letters of guardianship of the person and estate of R. H. Randolph, together with a bond as such guardian, in the sum of $16,000. The clerk thereupon issued the letters to Wagner, and on the 16th day of November, 1931, a day of the regular November term of the probate court, an order was made approving the action of the clerk in vacation. The guardian filed an inventory showing the value of the estate of his ward to be approximately $8,000, and proceeded to administer the same under the orders of the court.

On the 12th day of January, 1933, Randolph married a woman with whom he had been boarding, and, upon learning this, the guardian filed a final accounting, and resigned, and the appellee, J. O. Porter, was appointed guardian in succession, and filed in the probate court a petition seeking authority to employ attorneys to institute proper proceedings to annul the marriage of Randolph. By his attorneys, Randolph filed a petition to set aside the order made appointing the guardian, on the

ground that it was void, because there was no appropriate and proper adjudication of his incompetency, and setting up a number of reasons for this contention. Porter filed a petition for an order *nunc pro tunc* to correct the records, notice of which was served upon Randolph. The court thereupon made an order *nunc pro tunc,* correcting the records.

Thereafter, a second petition for order *nunc pro tunc* was filed, and, upon a hearing of the same, the court made an order to the same effect as the one first made, with the additional finding that Randolph was a resident of Crawford County on November 16, 1931, the date when he was adjudicated incompetent. By the last order the court found that the 16th day of November, 1931, was a day of the regular term of the court; that, upon written statement having been made to the effect that Randolph was of unsound mind and incompetent, the court proceeded to examine into that question, Randolph being then present and actually before the court, and found that the facts were not doubtful, but that Randolph, who was a resident of Crawford County, was of unsound mind and incompetent to transact his business, and that on said date, with that information, and with Randolph present, he was duly adjudged by the court as of unsound mind and incompetent, and the court approved the letters of guardianship and the bond theretofore acted on by the clerk, but that, through clerical misprision of the clerk, the findings of fact and judgment aforesaid were not entered of record. The court thereupon ordered the judgment to be entered as of November 16, 1931.

Randolph appealed from this order to the circuit court, which court heard evidence and upheld the judgment and finding of the probate court, from which judgment is this appeal.

The same contention is made here as in the circuit court, namely, that the judgment of the probate court correcting the record was not sustained by the evidence. The matter was heard before the circuit court on appeal on the testimony of W. C. Hunter, the county clerk, who identified the affidavit first filed and certain docket notations, and the original order of November 16, 1931, and

the testimony of Judge J. C. Smalley, judge of the probate court, who was the judge of that court in 1931 and had remained since, and was the judge at the time the order *nunc pro tunc* was made and entered. The order of November 16, 1931, merely recited the presentation to the court of the action by the clerk in appointing the guardian with the letters issued, and the bond and the only order appearing in that record entry was that approving the letters and bond. From the testimony of Judge Smalley, it appears that Randolph was before the court, and that his condition was not doubtful, but that he was mentally incompetent, and the judge based his conclusions upon information derived from an examination by him of Randolph. He then and there found him to be of unsound mind and incompetent to transact his business and adjudged him to be such; also, that he knew that Randolph was a resident of Crawford County and so found, which findings and order, although made then and there, were by clerical misprision of the clerk omitted from the record, and that from his personal knowledge of the proceedings in the probate court on the 16th day of November, 1931, he made the final order *nunc pro tunc* of March 11, 1933, correcting the record and making it speak the truth.

It appears from the testimony of Dr. Wigley, one of the affiants to the original affidavit, that he was with Mr. Randolph on the date of the original order in the office of the judge of the court, and they remained there for about thirty minutes, while the judge talked with Randolph; that no witnesses were called or sworn, nor did he hear anybody call court or observe the presence of the sheriff and clerk at the time of the examination of Randolph.

The order having recited that the cause was heard on the 16th day of November, 1931, and that same was a day of the regular term of court, the presumption must be indulged that the record correctly states the facts, and the mere fact that the witness was not present at the opening of the court, or that the sheriff and clerk were not present at the hearing, is not sufficient to overturn the recitals of the judgment. The probate court, acting within its constitutional limits, is a court of record of

superior original jurisdiction, and, as such, has the inherent power to correct its records at any time so as to make them speak the truth, even after the term is ended at which the record was made, and, in the absence of evidence to the contrary, the court's recollection of what occurred must be accepted where its action in correcting the record is challenged. The probate court and the circuit court on appeal are the proper judges of the sufficiency and character of the evidence requisite to satisfy them as to what was the real order of the court and the actual proceedings before it. The rules we have stated are well settled, and may be seen by reference to *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80; *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030; and the recent cases of *Kory* v. *Less,* 183 Ark. 553, 37 S. W. (2d) 92, and *Morgan* v. *Scott-Meyer Com. Co.,* 183 Ark. 637, 48 S. W. (2d) 838.

It was not alleged by Randolph in his petition to set aside the order of the court that he was in fact sane, nor did he appear and testify in the present proceedings either in the probate court or circuit court on appeal. It is argued that he had no notice or information of the purpose for which he was being examined by the judge at the hearing on November 16, 1931, but he was present and the contention is without evidence, for, as already observed, he has not testified in the case, and, if indeed he was ignorant of the purpose for which he was before the court and the nature of the proceeding, he could have so stated. If Randolph was and is competent to transact his business, and therefore able to enter into a marriage contract, his rights are amply protected by § 5834 of Crawford & Moses' Digest, or he may set up said fact in any proceeding which may be brought to annul his marriage.

We find no reversible error in the rulings of the trial court, and its judgment is therefore affirmed.

FLETCHER *v.* DUNN.

4-3322

Opinion delivered January 29, 1934.

[redacted]

Lamb & Adams, for appellant.

John S. Mosby, for appellee.

BUTLER, J. This action was brought by the appellee under the provisions of §§ 6890, 6897, 6898 of Crawford & Moses' Digest to subject cotton raised by a tenant in the hands of his mortgagee to the payment of rent and advances made to the tenant of farm animals and implements, necessary for the making of a crop upon the plantation of appellee in Poinsett County, Arkansas. The appellants, as merchants, had advanced supplies to the tenant to aid in the making of his crop, and had taken a mortgage on the crop and certain chattels to secure the same. They defended on the ground that there had been a waiver of the landlord's lien in their behalf, and that the chattels alleged to have been sold to the tenant were not the property of the appellee, but belonged to her husband, and that as to these there could be no lien in her favor.

On the evidence adduced, the court found in favor of the appellee, sustaining the attachment and rendered

judgment for a sum agreed upon between her and the tenant as the true amount due, for the stock and implements in the sum of $600, for an item of $122.90, lands leased to the tenant and not cultivated, and a further sum of $25.81 interest, making a total of $867.21. The court further found that the appellants wrongfully converted the crops in that amount upon which the appellee had a lien, and rendered judgment against them.

It is the contention of the appellants that the evidence adduced sustains their position. It is conceded that, under § 6890, *supra,* the landlord would have a lien for the rent and for such articles as were necessary to enable him to make and gather his crop, and that stock and farm implements are such necessary articles. It may also be said that there is no contention that the finding of the chancellor to the effect that the landlord should have a lien on the crops for the land leased which was not cultivated was incorrect, it being stipulated in the lease contract that such land as was not cultivated should pay a stipulated rent per acre. Appellants pitch their sole contention for reversal on the defenses we have named which were set up in the answer.

We are of the opinion that the evidence fails to show any waiver of the landlord's lien. The two gentlemen who composed the mercantile firm both testified to the effect that they had had no agreement with the landlord about the waiver of her lien; that the tenant had been their customer before he rented the farm from the appellee, and, at his request, they furnished him necessary supplies to make his crop. They do not even say that the tenant informed them that the landlord would waive her lien. The testimony of the tenant is to the same effect.

The appellee's husband, her agent, stated that he knew that the appellants were furnishing the tenant supplies to make his crop, and that the lease contract itself stipulated that the tenant was to be furnished by some one other than the landlord, if possible. Mere knowledge that her tenant was being furnished supplies by another would not be sufficient to constitute a waiver of appellee's lien. *Jacobson* v. *Atkins,* 103 Ark. 91, 146 S. W. 133.

Neither would the fact that appellee knew that appellants were receiving the cotton be a circumstance to estop her from asserting her lien. It was in evidence that the appellants knew that the tenant was farming appellee's land, and she might well assume that they would not attempt to convert the proceeds of the crops to her prejudice, and her acquiescence in their conduct is not shown to have worked any harm to them or placed them in a situation less advantageous than they would have been had she objected to their handling the cotton.

The next contention is that the evidence introduced to establish the appellee's ownership of the mules and farm implements was incompetent because given by her husband, and that his knowledge with respect to the evidence given by him was not obtained while acting as her agent. The third subdivision of § 4146 of Crawford & Moses' Digest provides as follows: "The following persons shall be incompetent to testify: * * * Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent."

The testimony of appellee's husband regarding the ownership of the property began by an answer to a question propounded by the appellants inquiring as to the time when appellee acquired title to the mules sold to the tenant. He answered that she acquired title to them when she bought the farm in 1925. It is then shown by one of the appellants that the appellee's husband had mortgaged this property since that date to secure an indebtedness of his own in which mortgage the appellee had not joined, and that in a previous lawsuit, since 1925, she had testified to the effect that the personal property on the farm belonged to her husband. The husband was called in rebuttal, and stated that the appellee had paid off from funds derived from a sale of some property of her own a judgment rendered in favor of the appellants in the previous litigation, and that he had then made a formal conveyance to her of the personal property on the farm,

to evidence which he had executed a bill of sale on December 15, 1929, which he exhibited as part of his deposition.

It is contended that this testimony was incompetent within the meaning of the statute last above quoted. It seems that the statute is a re-enactment of the common law which had its origin because of the legal identity of husband and wife, and, as under the common law no person in interest was permitted to testify in a case, married persons were prohibited from testifying for or against each other, since, because of their identity, the interest of one would clothe the other with the same relation to the suit. The rights of married women have been enlarged by our statutes so that for all intents and purposes their legal identity at common law has been destroyed (*Katzenberg* v. *Katzenberg,* 183 Ark. 626, 37 S. W. (2d) 696), and the wife's power to make her own separate contracts and deal with property is the same as if she were a *feme sole.* Married persons therefore are not to be supposed as constantly partaking of the confidence of each other, but rather as persons having adverse interests to maintain or else that they deal with respect to the property of each other in the relation of principal and agent. The plantation in question was the property of the appellee; the stock and farm implements used upon it were appurtenant and necessary to its operation, and in dealing with this property appellee's husband is presumed to have been acting as the agent of his wife. Section 5594, Crawford & Moses' Digest.

The bill of sale was evidence of the wife's ownership, and we are of the opinion that the evidence is sufficient to establish the agency of the husband, and to make his testimony competent. The fact that there are some discrepancies and contradictions in his testimony as to the time when the appellee first became the owner of the property and his dealings with it as contradictory of her testimony relating to her ownership, were questions of fact for the chancellor. On the whole case, we are of the opinion that the decree of the trial court is supported by a preponderance of competent testimony, and it is therefore affirmed.

SEWER IMPROVEMENT DISTRICT NO. 1 OF WYNNE
v. DELINQUENT LANDS.

4-3343

Opinion delivered February 5, 1934.

John C. Patterson and *Ogan & Shaver,* for appellant.

Henry Moore, Jr., Coleman & Gantt and *L. H. Southmayd, amici curiae.*

JOHNSON, C. J. This appeal brings into question the constitutionality of act 278 of the General Acts of 1933. The trial court held the act constitutional and valid, and this appeal is prosecuted therefrom.

Act 278 of 1933, in effect, provides: Section 1 amends § 5673 of Crawford & Moses' Digest by giving to property owners, within the district, 90 days in which to make payment of past-due assessments instead of 30

days, as provided in § 5673 of Crawford & Moses' Digest; also it reduces the penalty for nonpayment from 20 per cent. to 3 per cent.

Section 2 of said act gives to property owners six months in which to answer the complaint, after suit is instituted, instead of 5 days, as provided in § 5678 of Crawford & Moses' Digest.

Section 3 of said act gives to nonresident landowners six months after publication of notice to file answer, instead of fifteen days, as provided in § 5679 of Crawford & Moses' Digest.

Section 4 of said act gives to the chancery court wherein the suit is pending, power to grant to the property owner twelve months in which to pay the judgment or decree rendered, instead of ten days, as provided in § 5684 of Crawford & Moses' Digest.

Section 5 of said act is the emergency clause, and directly repeals §§ 5686, 5687, 5688 and 5689 of Crawford & Moses' Digest. The sections of Crawford & Moses' Digest directly repealed by said act are to the following effect: § 5686 provides for the advancement of all causes pending in the Supreme Court wherein the foreclosure of assessments of benefits are involved. Section 5687 of Crawford & Moses' Digest gives to any aggrieved owner appealing only twenty days in which to file an authenticated transcript of the proceedings. Section 5688 of Crawford & Moses' Digest restricts the record on appeal to such matters as may affect the property of the one so appealing. Section 5689, Crawford & Moses' Digest, restricts the right of appeal to those who perfect the transcript of the record within twenty days from the date of rendition of the decree.

The contention urged is that act 278 of 1933 violates § 17 of article 2 of the Arkansas Constitution of 1874 and § 10 of article 1 of the Constitution of the United States, which sections provide against impairment of contract. Stated another way, appellant contends that the State Legislature is without authority to amend or repeal the sections of the digest referred to for the reason

that they were the law at the time the district bonds were issued and sold.

In considering the important question here presented, it is necessary that we take into consideration the economic conditions existing in this State at the time act 278 of 1933 was enacted. The conditions sought to be alleviated should be considered as a part of the enactment itself. At the time of the enactment, Arkansas was in the midst of the worst depression any member of this court has ever experienced. Thousands of home owners in the State were without employment, and the bare necessities of life, because thereof, were denied them and their families. All real property in this State was without market value, the net result being that in many instances a five or ten thousand dollar home was sacrificed at public sale for from ten per cent. to twenty-five per cent. of its intrinsic value. The charitable spirit of the members of the Legislature must be commended by all, as the gravity of the question considered by them cannot be gainsaid or denied.

It must be remembered that all political power is inherent in the people, and the State Legislature has the absolute right to invoke this power in all cases except in such as may be prohibited by constitutional mandate. Section 1 of article 2 of the Arkansas Constitution of 1874 provides: "All political power is inherent in the people, and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish same in such manner as they may think proper." Section 22 of the same article provides: "The right of property is before and higher than any constitutional sanction." It will thus be seen that, by constitutional mandate, all political power in this State is reserved in the people, except such as may be expressly prohibited by constitutional mandate.

In the *State* v. *Chester Ashley,* 1 Ark. 513, this court expressly held: "A State Legislature can exercise all power that is not expressly or impliedly prohibited by the Constitution; for whatever powers are not limited or restricted they inherently possess as a portion of the sovereignty of the State."

The constitutional doctrine thus announced has been consistently followed by this court up to the present time. *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9. All legislative enactments are presumed to be constitutional and valid until it is otherwise made to appear. *Patterson* v. *Temple,* 27 Ark. 202.

"Neither should a statute be declared unconstitutional unless there is a clear incompatibility between the act and the Constitution." *Eason* v. *State,* 11 Ark. 481.

"All doubts should be resolved in favor of the constitutionality of a statute." *Duke* v. *State,* 56 Ark. 485, 20 S. W. 600; *Graham* v. *Nix,* 102 Ark. 277, 144 S. W. 214.

It is the long established policy of this court to declare no act of the Legislature unconstitutional save with greatest caution. *State* v. *Moore,* 76 Ark. 179, 88 S. W. 929.

And "a statute will not be declared unconstitutional unless no doubt exists on the question." *Stillwell* v. *Jackson,* 77 Ark. 250, 93 S. W. 71.

There is a line of demarcation between the inherent reserved rights of the people and those prohibited by constitutional mandate. The question always arises upon which side of the line the enactment may fall. The question should be approached with the gravest consideration, and all cases bearing on the question should be most seriously considered. Section 10 of article 1 of the Constitution of the United States and § 17 of art. 2 of this State's Constitution should not be considered as all inclusive. The dignity of these provisions rises no higher than the reserve power in the people.

From the synopsis of the act herein given, it necessarily appears that act 278 of 1933 affects only the remedy in the enforcement of contracts, and has nothing to do with the contract itself. Therefore the question narrows down to one of remedy. The rule seems to be well settled, by all American decisions on the subject, that the remedy of enforcing contracts in existence at the time of its execution cannot be taken away by subsequent legislation. On the other hand, subsequent legislation affecting the remedy only which leaves a valid remedy

in effect does not impair the obligations of contract, and is therefore valid. In re *Sturges* v. *Crowninshield,* 4 Wheat. 122. In the case just referred to, the Supreme Court of the United States, on the question here under consideration, said: "The distinction between the obligation of a contract and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."

The same court, in *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, said: "It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights."

In *Antoni* v. *Greenhow,* 107 U. S. 769, 2 S. Ct. 91, the Supreme Court of the United States said: "In all such cases the question becomes therefore one of reasonableness, and of that the Legislature is primarily the judge."

A number of decisions of the Supreme Court of the United States are urged upon us as decisive of the question here presented. Among them are *Bronson* v. *Kinzie,* 1 How. 311. The act there under consideration required the property to be appraised and to bring not less than two-thirds of its appraised value upon sale. Act 278 of 1933 has no such requirement. This is entirely sufficient to differentiate the Bronson case from the one here under consideration. *McCracken* v. *Hayward,* 2 How. 608; *Lessee* v. *Ewing,* 3 How. 707, and *Howard* v. *Bugbee,* 24 How. 461, may be likewise differentiated. In Penniman's case, 103 U. S. 714, the Supreme Court of the United States drew the line of demarcation as follows: "The general doctrine of this court on the subject may be thus stated: In modes of proceeding and forms to enforce the contract the Legislature has the control,

and may enlarge, limit or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right."

The Supreme Court of the United States seems to be unalterably committed to the rule that all sovereign States retain a measure of control over remedial process and legislation, and to safeguard the vital interests of its people. *Jackson* v. *Lamphire,* 3 Pet. 280; *Hawkings* v. *Barney,* 5 Pet. 451; *Railroad Co.* v. *Hecht,* 95 U. S. 168; *South Carolina* v. *Gillord,* 106 U. S. 433; *Louisiana* v. *New Orleans,* 102 U. S. 203; *Red River Valley Bank* v. *Craig,* 181 U. S. 548, 21 S. Ct. 703; *Security Savings Bank* v. *California,* 263 U. S. 282, 44 S. Ct. 108. The same court is also committed to the doctrine that the mere modification of existing remedies for enforcing contracts is not the controlling question. *Stephenson* v. *Binford,* 287 U. S. 251, 53 S. Ct. 181.

All such contracts and legislation must be read in the light of the retained sovereignty of the State. *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct. 231.

Moreover, the Supreme Court of the United States is committed to the doctrine that the constitutional provision against impairment of contracts was not impaired by an amendment of the State Constitution which puts an end to a lottery theretofore authorized by the State Legislature. *Stone* v. *Mississippi,* 101 U. S. 814. To the same effect is *Douglas* v. *Kentucky,* 168 U. S. 488, 18 S. Ct. 199, and *New Orleans* v. *Houston,* 119 U. S. 265, 7 S. Ct. 198.

The same court has many times held that the respective States retain adequate power to protect the public health and the public safety. *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659; *Chicago, B. & Q. Rd. Co.* v. *Nebraska,* 170 U. S. 57, 18 S. Ct. 513; *Texas & N. O. R. Co.* v. *Miller,* 221 U. S. 408, 31 S. Ct. 534; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548, 34 S. Ct. 364. Again, in *Manigault* v. *Springs,* 199 U. S. 473, 26 S. Ct. 127, that court held that the economic interest of the State may justify the exercise of its continuing and dominant protective

power, notwithstanding interference with contracts. The statute there in question was sustained upon the ground that private interests were subservient to the public right. Continuing, the court there said: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

All doubts heretofore existing in reference to the retained protective power of the several states was recently removed by the decisions of the Supreme Court of the United States in the following cases: *Block* v. *Hirsh,* 265 U. S. 135, 41 S. Ct. 458; *Marcus Browning Holding Co.* v. *Feldman,* 256 U. S. 170, 41 S. Ct. 465; *Edgar A. Levy Leasing Co.* v. *Siegel,* 258 U. S. 242, 42 S. Ct. 289; and *Home Building & Loan Ass'n* v. *Blaisdell, supra.*

In the Blaisdell case, *supra,* the Supreme Court of the United States upheld the constitutionality of a Minnesota statute which gave to property owners relief during the present emergency. The attack was made there as here that the Minnesota statute impaired the obligations of contract. The act was upheld, however, upon the expressed theory that it fell within the reserved power of the State to protect its people from disaster. The court there said: "Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as

its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may not be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake."

Act 278 of 1933 comes within the spirit and letter of the Minnesota statute and the holding of the Supreme Court of the United States upholding it. The court there held that, since the Minnesota statute affected the remedy only and gave to the mortgagee the rents and profits accruing during the statutory delay, it took from the mortgagee no substantial right.

It is true that act 278 does not, in terms, give the mortgagee rents and profits accruing from the property during the pendency of the suit, but this right may be invoked by the mortgagee under other legislation in this State.

Chapter 150, Crawford & Moses' Digest, vests full power and authority in the chancery courts of the State to appoint receivers in all equitable proceedings, when it is shown that the trust property is in danger of being lost, removed or materially injured, or that the conditions of the trust have been broken and the property is probably insufficient to discharge the mortgage debt. Thus it will be seen that the mortgagee, by invoking the provisions of chapter 150 of Crawford & Moses' Digest, has the legal status of a mortgagee under the Minnesota statute.

Our attention has been directed to *Adams* v. *Spillyards,* 187 Ark. 641, 61 S. W. (2d) 686, as sustaining the contention that the act under consideration is unconstitutional and void. Such is not the effect of the case referred to. Section 1 of the act there under consideration reads as follows:

"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."

Certainly there is no analogy between the acts in question. A mere comparison will convince any one of the many differentiations.

Since the Legislature is primarily the judge as to when it becomes necessary to exercise the sovereign right of the State for the protection of its people; and, since the act in question impairs no contractual right existing between the parties other than to affect the remedy, and this to no substantial extent, we are unwilling to hold that the Legislature was without power to enact the legislation in question.

The chancellor's views conforming to the reasons here expressed, his decree will in all things be affirmed.

McHaney, J., (dissenting). I regret that I cannot agree with the majority opinion in this case. It seems to me that we have departed from the ancient and modern landmarks of judicial construction and interpretation of statutes, and entered upon the sea of uncertainty, an exigency to meet what is thought to be an emergency. But emergency does not create power.

Under the law as it existed prior to the passage of act 278 of 1933, property owners in municipal improvement districts had thirty days in which to pay their assessments after the date of the notice required to be given by the collector and published by him. Section 5671, Crawford & Moses' Digest. If not paid within that time, the collector was required to add a penalty of 20 per cent. to the delinquents and immediately make a return of delinquents to the board of improvement. Section 5673, *Id.* The board was required straightway to bring a suit against delinquents to enforce collection of such assessments. Section 5674, *Id.* In case of personal service, which the law requires (§ 5677, *Id.*), defendants were given 5 days to appear and answer, and upon de-

fault a decree was required to be then rendered against the property for the amount of the assessment, penalty, costs and attorney's fee. Section 5678, *Id.* In case the defendant property owner is a nonresident or unknown, 15 days constructiive service is required before default decree. Section 5679. In case of decree for the board, property owners were given 10 days in which to pay, but, if not paid in that time, the property was ordered sold upon 20 days' notice. Section 5684, *Id.* If an appeal were prosecuted by any property owner, he was given 20 days to file his transcript with the clerk of the Supreme Court. Section 5687, *Id.* The Supreme Court was required to advance the case and determine it at the earliest date practicable, usually three weeks. So, it will be seen, that, from the time the assessment list was delivered to the collector until a sale of the delinquent property could be had, only 65 days were required in which to sell on personal service and 75 days on constructive service, in case there was no appeal to the Supreme Court, in which case only about 50 days more were required. Act 278 changes all this in the following particulars: Instead of thirty days for collection by the collector, the time is extended to 90 days at the expiration of which time 3 per cent. penalty is added instead of 20 per cent., and, instead of making an immediate return of delinquents, the collector is required to wait 90 days more to make such return. Section 1, act 278. Instead of five days' personal service in which to appear and answer, before default, the time is extended to six months. If no answer, default may be had at that time. Section 2, act 278. Constructive service is the same. Section 3, *Id.* Instead of 10 days given in the decree after default in which to pay before sale, the time is extended to twelve months, and then upon six months' notice instead of 20 days. Section 4, *Id.* So it will be seen that the very minimum time in which to effectuate a foreclosure and sale under act 278 is 900 days. The sections relating to appeals have all been repealed.

Under the statute as it existed prior to 1933, property owners had five years in which to redeem from such sales, (§ 5644, Crawford & Moses' Digest), but the tax pur-

chaser was given the right of possession from the date of confirmation until redemption without accounting for rents and profits. Section 5642, *Id.* This latter section was repealed by act 129, Acts 1933, p. 375. The five-year redemption period was changed to four years. Act 252, Acts 1933, p. 790. The repeal of the provisions relative to speedy appeals would require all cases in the future to take the course of any other appeal. Instead of 20 days to file a transcript on appeal as given by § 5687, six months could now be taken, and, instead of advancing the case on the docket, it would take the usual course, 40 days to appellant, 30 days to appellee and 7 days for reply, or a total of 77 days before it would be subject to submission under the rules of this court after being docketed.

Now, when appellant district was formed and sold bonds, the law was as heretofore stated prior to act 278, and the other acts mentioned. Instead of a speedy method of enforcing payment of taxes on assessments, one which forcibly encouraged prompt payment, a slow and dilatory system is substituted, one which encourages taxpayers to become delinquent.

But the majority opinion says this "affects only the remedy in the enforcement of contracts, and has nothing to do with the contract itself." Let us see if this statement is correct. It must be admitted as a fundamental right of both the district and its bondholders to pay and have paid the obligations of the district at the time and in the manner provided in the contract between them. This can only be accomplished by prompt collection of taxes on assessed benefits which were so fixed and bond maturities so arranged that the annual collections would meet the bond interest and maturities. Under the new act, No. 278, unless all the property owners, or substantially all, voluntarily pay their improvement taxes, bonds and coupons will necessarily become delinquent, as they are not required to pay for a period of two and one-half years before sale, with four years for redemption after sale, and then a penalty of only 3 per cent. (not per annum) is permitted for nonpayment. This not only affects the remedy, but, in my opinion, virtually destroys it, and is therefore unconstitutional.

This is not a new question in this court. As said in the early case of *Burt* v. *Williams,* 24 Ark. 91: "The constitution prohibits the passage of any law that impairs the obligation of contracts, and it is well-settled that any law which destroys the remedy for enforcing a contract, or so obstructs the remedy as to make the contract valueless, or greatly lessen its value, impairs its obligation. A right without a remedy to declare it is not a valuable right; a contract that cannot be enforced has no legal obligation; and one that was enforcible by law when made, but which cannot be compelled to be performed, by the law for its performance being repealed, or being so changed or clogged as materially to diminish its worth, has suffered from unconstitutional legislation."

And in *Jacoway* v. *Denton,* 25 Ark. 625, it is said: "A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertakings, and this is of course the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day, and this is its obligation."

Also in *Leach* v. *Smith,* 25 Ark. 247, it is said: "The objections to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law affects in it. Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, and dispensing with those which are, however minute or immaterial in their effect upon the contract of the parties, impairs its obligation."

The above is a quotation from *Green* v. *Biddle,* 8 Wheaton (U. S.) 84, and immediately following is a quotation from *Ogden* v. *Sanders,* 12 Wh. 256, that "it is perfectly clear that a law which enlarges, abridges, or *in any manner changes the intention resulting from the stipulation of the contract,* necessarily impairs it."

Again in *Oliver* v. *McClure,* 28 Ark. 555, this court said: "A State law, passed subsequently to the execution

of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents a sale, unless two-thirds of the amount at which the property had been valued by appraisers shall be bid therefor (as applied to prior contracts), is within the clause of the tenth section of the first article of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of contracts."

In the recent case of *Adams* v. *Spillyards,* 187 Ark. 641, 61 S. W. (2d) 686, 86 A. L. R. 1493, after reviewing former decisions on the question of impairing the obligation of contract, this court, among other things, said: "The attack made on the validity of the act is based on article 1, § 10, Constitution of the United States, and article 2, § 17, of the Constitution of Arkansas, both prohibiting the State from passing any law impairing the obligation of contracts. * * * We said in *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9, 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. * * * 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 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 Wall. 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, dis-

charge and 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.' " To the same effect are the decisions of the Supreme Court of the United States. *U. S.* v. *City of Quincy,* 4 Wall. 535; *Sturges* v. *Crowninshield,* 4 Wheat. 122; *Bronson* v. *Kinzie,* 1 How. 311; *McCracken* v. *Hayward,* 2 How. 608; *Port of Mobile* v. *Watson,* 116 U. S. 289, 6 S. Ct. 398.

In *Port of Mobile* v. *Watson, supra,* the court said: "Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void."

Barnitz v. *Beverly,* 163 U. S. 118, 16 S. Ct. 1042, is a very interesting case on the subject and so much in point, I feel justified in quoting from it at length. It was there said: "Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

"Let us briefly apply the conclusion thus reached to the facts of the present case. The plaintiff was the holder of several promissory notes, dated November 1, 1885, secured by a mortgage of the same date upon a tract of land in Shawnee County, Kansas. The mortgage con-

tained an express waiver of an appraisement of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisement, that the proceeds arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption.

"Under the law as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title, or right in any way to the premises.

"Under the new law the mortgagor shall have eighteen months from date of sale within which to redeem, and, in the meantime, the rents, issues, and profits, except what is necessary to keep up repairs, shall go to the mortgagor or the owner of the legal title, who in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest, and costs, but of the amount paid by the purchaser, with interest, cost, and taxes.

"In other words, the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrance), but a remainder—an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits.

"The 23rd section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution, or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any

judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem.

"Obviously this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect release the debtor from his personal obligation.

"We, of course, have nothing to do with the fairness of the policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but it is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months?" * * *

"When we are asked to put this case within the rule of those cases in which we have held that it is competent for the States to change the form of the remedy or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties.

"It is contended that the right to redeem, granted by the new statute, only operates on the purchaser and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson* v. *Kinzie,* 42 U. S. (1 How.) 319, where this court said:

"It (the new act) declares that although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor to continue for fifteen months.

If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditors (meaning creditors other than the mortgagee) an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution.

"The judgment of the Supreme Court of Kansas is reversed, and the cause remanded to that court with directions for further proceedings not inconsistent with this opinion."

In the opinion of the majority it appears that the decision of the Supreme Court of the United States in the recent case of *Home Building & Loan Ass'n* v. *Blaisdell,* was of controlling influence. As I read this case, it has no bearing on this, and is not at all in point. The Minnesota statute, there under consideration, was temporary in character, expiring of its own terms May 1, 1935, and purported to be an emergency measure for a short period of time. There the court was given the power to determine the necessity for the delay and to require the owner to pay a reasonable rental for retaining possession in the event delay was decreed. Here the measure is permanent in character, and it is no answer to say that the Legislature may repeal it when the occasion for its enactment has ceased to exist. And no right to possession or to the rents and profits is accorded during the more than two years' delay, in addition to the four years allowed for redemption. The act of 1915, heretofore referred to, did give the right of possession, but

the same Legislature that enacted act 278 of 1933 also repealed the statute giving such right by act 29. If, as indicated in the majority opinion, an improvement district may have a receiver appointed for all delinquent property in the district under the authority of chapter 150, Crawford & Moses' Digest, I think they have dug up a bunch of snakes that will be harder to kill than the job St. Patrick had in Ireland. That chapter, dealing with the powers of courts of equity to appoint receivers has been the law since January 15, 1857, except §§ 8611 to 8615, inclusive, which are parts of the Civil Code, and up to this time it has never been invoked in a proceeding to collect delinquent taxes in improvement districts. Moreover, it could not be invoked under the provisions of § 8612 relating to mortgaged property, as the court has jurisdiction to appoint a receiver under this section only "where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." Undoubtedly the kind of mortgage referred to is the ordinary mortgage given to secure a personal indebtedness and not a lien upon the benefits assessed against property in an improvement district.

It is therefore clear to my mind that act 278 of 1933 is unconstitutional and void as to all contractual obligations of improvement districts created prior to the passage of said act.

I am authorized to say that Mr. Justice SMITH concurs in this dissent.

BLAKEMORE *v.* STEVENS.

4-3333

Opinion delivered February 5, 1934.

[redacted]

[redacted]

Reid, Evrard & Henderson, for appellant.

Harrison, Smith & Taylor, for appellee.

JOHNSON, C. J., (after stating the facts). There are but two questions argued in briefs for determination. First, that appellant was guilty of no negligence in cutting the wheels of his car at the time of the injury, and that A. W. Stevens was guilty of contributory negligence in failing to get out of danger.

Negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand whereby such other persons suffers injury. *St. L. I. M. & S. Ry. Co.* v. *Secht,* 38 Ark. 357; *Railroad Co.* v. *Lewis,* 60 Ark. 409, 30 S. W. 765; *Missouri & North Arkansas Ry. Co.* v. *Clayton,* 97 Ark. 347, 133 S. W. 1124.

It will be seen from the statement of facts that the jury was warranted in finding that appellant was negligent in cutting the front wheels of his car at the time and under the circumstances then existing without giving timely warning thereof to the deceased, Stevens. Appellant admitted, when testifying in his own behalf, that he knew Mr. Stevens was stationed on the right-hand side of his car in a position to assist in extricating the car from the mire. In the exercise of ordinary care, appellant should have known that the cutting of the front wheels at the time and under the circumstances might do injury to those assisting him in extricating the car. There is no testimony indicating that Mr. Stevens was guilty of contributory negligence in being at the place he was at the time he was injured. The fact is, he was invited by appellant to assist in pushing his car out of the mire. It would, indeed, be a strange doctrine which would hold him guilty of contributory negligence in doing the thing he was requested to do. We therefore conclude that the trial court was correct in submitting the

issue of appellant's negligence to the jury, and certainly no reversible error was committed in submitting the question of contributory negligence.

It is next contended that the verdict is excessive. The jury found as a matter of fact that Mr. Stevens' death was caused from diverticulum. Therefore the only elements of damages considered by the jury in the award were for pain and suffering from September 30, 1932, until March 12, 1933, and his diminished earnings during this period of time. The jury awarded damages in the sum of $3,000. It was stipulated by counsel that Mr. Stevens' doctor's bill and hospital expenses attendant upon the car injury was $167.03. Also Mr. Stevens lost from his work twenty-three weeks, and the testimony shows that he was capable of earning $25 per week. These items, when added, aggregate approximately $750. The jury therefore awarded Mr. Stevens estate $2,250 for pain and suffering. Practically the uncontradicted testimony shows that Mr. Stevens was confined to his bed for six weeks after the injury; a part of which time he suffered excruciating pain; thereafter and until his death he was required to wear a sacroiliac support; he was never able to walk without the assistance of a cane. We are unwilling to say that the jury's award is excessive.

Therefore the judgment will be affirmed.

DILLINGHAM *v.* KAHN.

4-3323

Opinion delivered February 5, 1934.

[redacted]

Fred A. Isgrig, for appellant.

Louis M. Cohn and *Trieber & Lasley*, for appellee.

JOHNSON, C. J., (after stating the facts). The foregoing statement of facts demonstrates that appellee violated the terms and conditions of his bill of assurance, which was made a part and parcel of the deed from appellee to appellant conveying plot 23 in Prospect Terrace. The evidence on this point is too plain and certain to be ignored. In very plain language the bill of assurance provides: "No residences shall be erected on plot 1 to 39, inclusive * * *, the actual *bona fide* cost of which, exclusive of any outbuildings, shall be less than $10,000." This language conveys what it means and means exactly what it says. "Exclusive of any outbuildings" means that no building other than the residence can or should be considered, and "the actual *bona fide* cost" does not include 25 per cent. or 30 per cent. of the contract price for supervision of construction.

The undisputed evidence shows that appellee, almost before the ink had dried on his bill of assurance and deed to appellant, contracted with one Bracy, a contractor and

builder in Little Rock, for the construction of a dwelling house on plot 26, which lot lies within the restricted area of the bill of assurance, at a contract cost price of $7,750. This is a palpable violation of the bill of assurance. Appellee undertakes to justify this construction contract by contending that he personally supervised the construction of the building, and that his services in so doing were worth 25 per cent. to 30 per cent. of the contract price of construction. If the bill of assurance may now receive the interpretation contended for by appellee, it would become absolutely worthless. If supervision costs can be invoked in this manner, then it may likewise be extended to 50, 60, 75 per cent. or any greater percentage of construction cost, and thereby nullify the clear intention of the parties as evidenced by their contract.

Appellee contends that a rescission should not now be directed because of appellant's long delay in demanding it. It is true the deed was executed in 1926, and no demand was made for rescission until the cross-complaint was filed, but appellant could not possibly complain of something which he did not know. Appellant had the right to assume that appellee would live up to his contract in good faith until otherwise advised; he testified most positively that he knew nothing of the violation of the building restrictions until just prior to the filing of his cross-complaint. This testimony was entirely reasonable and consistent. Certainly, appellee's contractor, Mr. Bracy, would not advise appellant of the violations of the building restriction so long as he was in the employ and good graces of appellee; certainly appellee would not be expected to advise appellant of his own infidelities. No other sources of information were open to appellant, and we think his testimony is entitled to full credence in this regard. Thus, when so considered, appellant's cross-complaint seeking rescission was brought within a reasonable time. In *Snyder* v. *Bridewell,* 167 Ark. 8, 267 S. W. 561, we stated the rule as follows: "An offer to rescind a contract must be made within a reasonable time after having had an opportunity to discover the grounds therefor."

We think appellant asserted his right of rescission within a reasonable time after the facts came to his knowledge.

Neither can we agree that appellant's letters to appellee requesting additional time for payment preclude his asserted rights under his cross-complaint. These letters were written at a time when appellant was not advised of appellee's violation of the covenants in the bill of assurance, and, when thus considered, do not preclude his right of rescission.

Since the restrictions contained in the bill of assurance, in reference to the cost of dwellings constructed within the restricted area, are a material part of the consideration; and, since the usual basis of the covenants for payments and restrictions are concurrent and dependent, the purchaser is entitled to rescind upon breach of such covenant. *Smith* v. *Home Seekers' Realty Co.*, 97 Fla. 236, 122 So. 708, 67 L. R. A. 809; *Laser* v. *Forbes*, 105 Ark. 166, 150 S. W. 691.

For the reasons assigned, the case is reversed, and the cause remanded to the Pulaski Chancery Court, with directions to ascertain the total amount paid by appellant to appellee on the purchase price, exclusive of interest and taxes paid by appellant, and render a decree therefor, after restoring the fee simple title in appellee.

It is so ordered.

SMITH and MCHANEY, JJ., dissent.

EBBING *v.* HASSLER.

4-3334

Opinion delivered February 5, 1934.

A. D. Whitehead, for appellant.

Brewer & Cracraft, for appellee.

SMITH, J. Appellee sued the Detroit Edge Tool Works, a Michigan corporation, for a broker's commission, and, upon allegations that the Pekin Wood Products Company, an Arkansas corporation, domiciled in Phillips County, was indebted to the defendant, caused a writ of garnishment to issue requiring the Arkansas corporation to answer in what sum it was indebted to the defendant. The garnishee filed an answer, admitting indebtedness to the defendant in excess of the sum sued for. The defendant filed no answer.

An intervention was filed, however, by W. F. Ebbing, as trustee for the defendant, in which he alleged that he was in possession of all the defendant's assets under a certain writing dated May 10, 1932, which had been executed in Detroit, Michigan, the home office of the defendant, and which had been duly recorded in the county in which Detroit is situated. This intervention alleged that the assets in the hands of the trustee were held by him in trust for all the defendant's creditors, and were not therefore subject to garnishment.

The instrument creating the alleged trust is lengthy, and we copy only so much of it as is important here to consider. It transferred to W. F. Ebbing, the president of the defendant corporation, as trustee, for the benefit of its creditors, all the cash, stocks, bonds, accounts receivable, miscellaneous items, and certain physical properties. None of the items of cash, accounts receivable, or miscellaneous items, were listed, and only the aggregate value thereof was set forth. The instrument appears to have been recorded as a chattel mortgage in Detroit,

Michigan, on July 13, 1932, but was never recorded nor filed for record in Phillips County, where the garnishee corporation has its situs.

The instrument recites that it does grant, sell and mortgage to the trustee, for the purpose of securing payment of said sums of money so owing to said creditors, and all future sums for which it may hereafter become indebted to said creditors while the agreement is in force. It contains the following defeasance clause: "Provided always, and these presents are made upon the express condition that if first party, on May 15th shall pay to the second party as trustee the amount of the various claims scheduled in schedule 'A' and simultaneously delivered to second party, and the charges and expenses herein provided for and all other claims for which this instrument is security, then this obligation shall be void, otherwise to be in full force and effect."

The instrument further provides that, if default be made in the payment of the debts as provided, or if the grantor shall sell or dispose of the goods except in the ordinary course of retail trade, the trustee shall take possession and sell same, and, with the proceeds of sale, pay the expenses of the trust and the claims referred to, it being intended to secure all liquidated claims. It directs that the trustee shall notify all creditors to file their claims, and, unless the claims are filed within sixty days, the trustee is not obliged to accept them. In the event the trustee and creditor cannot agree as to the allowance of a claim, the creditor must file suit in a court of competent jurisdiction, and, if he fails to do so, he shall forfeit his right to the security of the instrument. From the money realized under the instrument there shall be paid, in order, (1) the expenses of the trust; (2) trustee's expenses; (3) the claims of creditors *pro rata;* (4) any residue shall go to the grantor.

The instrument covers not only existing debts but future indebtedness, and apparently authorizes the continued operation of the business and incurring additional obligations, and excludes creditors not complying with the method provided for establishing claims.

There was offered in evidence a letter received from the trustee, in answer to an inquiry addressed to the defendant about the claim sued on, in which it was stated: "Just because we are in the hands of a trustee does not mean that we are through. I am operating the plant as trustee for the benefit of creditors, pending a reorganization." It will be remembered that the trustee who wrote the letter was also the president of the defendant corporation.

There was a verdict and judgment for the plaintiff, from which is this appeal.

It is very clear that the instrument under review is not a deed of assignment, but is rather a chattel mortgage, in which a trustee is named to execute its provisions. Numerous cases have pointed out the difference between a mortgage and an assignment. In one of these, *Marquese* v. *Felsenthal,* 58 Ark. 293, 24 S. W. 493, it was said that the distinction between a mortgage and an assignment is well understood; that one is intended to secure, the other to satisfy, a debt; that a mortgage contemplates personal effort on the part of the mortgagor to pay the debt and reserving the right, by doing so, to restore his title to the mortgaged property, or of such of it as is not consumed in paying the debt, whereas an assignment implies surrender of property to the use of creditors "without the hope of redeeming it."

In the case of *Robson* v. *Tomlinson,* 54 Ark. 229, 15 S. W. 456, it was said that: "The controlling guide, according to the previous decisions of the court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title and so make an appropriation of the property to raise a fund to pay debts? (Citing cases.) If the equity of redemption remains in the debtor, his title is not divested, and an absolute appropriation of the property is not made. In arriving at the intent of the parties, therefore, the question is, not whether the debtor intended to avail himself of the equity of redemption by payment of the debt, but was it the intention to reserve the equity? If so, the instrument is a mortgage, and not an assignment."

These and other cases were reviewed in the later case of *Brown* v. *Wilkes,* 153 Ark. 545, 241 S. W. 383, where it was held that a conveyance to trustees for the payment of the grantor's debts without a defeasance clause in the event of payment by the grantor constituted a general assignment for the benefit of creditors.

The instrument here under review not only contains a defeasance clause, but contemplated the continuance of the business and the sale of assets in the usual course of retail trade, also the incurring of additional obligations, which, when incurred, were to be paid *pro rata* along with existing obligations. It is certain therefore that the instrument was not an assignment for the benefit of creditors, and did not create a trust which is exempt from legal process by creditors to collect their debts. Cases cited and relied upon by appellant, like that of *State National Bank* v. *Wheeler-Motter Mercantile Co.,* 104 Ark. 222, 148 S. W. 1033, holding that funds of a debtor held by a trustee to be paid *pro rata* to all of his creditors cannot be seized by garnishment or other process at the instance of one of the creditors, do not apply to the facts of this case.

It may be said also of the instrument, which we construe to be a mortgage and not to be a deed of assignment, that it attempts to mortgage certain choses in action, and does so by merely designating them as "accounts receivable, $4,913.62." It may be seriously questioned whether the instrument, if otherwise sufficient to constitute a valid mortgage lien, was sufficient to constitute a lien on the mortgage debt which furnished the subject-matter of the garnishment. In the chapter on Chattel Mortgages, at § 53 of 5 R. C. L., page 422, it is said: "There is some question whether choses in action are proper subjects of chattel mortgage; but, in any event, they must be referred to with sufficient definiteness to enable third persons to identify them." The question is discussed in the annotator's note to the case of *Milwaukee & Minnesota R. R. Co.* v. *Milwaukee & Western R. R. Co.,* 88 Am. Dec. 740.

But, considering the instrument as an intended chattel mortgage, it affords no defense to this suit. As has

been said, it contemplated the continued operation of the business and the sale of its assets and products in the usual and ordinary course of business. In *Endicott-Johnson Corporation* v. *Davis,* 186 Ark. 791, 56 S. W. (2d) 178, it was said: "It is true also, as was said in the case of *Coffman* v. *Citizens' Loan & Inv. Co.,* 172 Ark. 889, 290 S. W. 961, that goods and chattels exposed daily for indiscriminate sale to the general public, at the place of business of the owner, and over which the dealer or merchant is permitted to exercise dominion, cannot be made the subject of a valid chattel mortgage."

Finally, it may be said that this mortgage was never recorded in Phillips County (or elsewhere in this State), where the garnishee resided and was served with process. It has many times been held that, while a mortgage is good between the parties, though not acknowledged and recorded, yet it constitutes no lien upon the mortgaged property as against creditors unless it is acknowledged and recorded, even though they may have actual notice of its existence. It is so expressly provided by statute. Section 7381, Crawford & Moses' Digest. *Combs* v. *Owen,* 182 Ark. 217, 31 S. W. (2d) 127.

Other reasons are assigned for the affirmance of the judgment, which appear to be well taken, but which we find it unnecessary to discuss, as the judgment must be otherwise affirmed. It is so ordered.

WASSON *v.* TAPSCOTT.

4-3328

Opinion delivered February 5, 1934.

Brundidge & Neelly, for appellant.

John E. Miller, C. E. Yingling and *Rowland H. Lindsey*, for appellee.

HUMPHREYS, J. This appeal comes from the chancery court of White County, and involves the sole question of the priority of two mortgage liens on the same property, both of which secured valid subsisting debts. The oldest mortgage in point of time, and the one first recorded, was executed by W. H. Capps to the Union Bank & Trust Company on January 21, 1920. The other mortgage was executed on January 9, 1925, by W. H. Capps to the Union Bank & Trust Company. Each mortgage was duly recorded a few days after its execution. At the time of the execution of each mortgage, J. E. Lightle was vice-president of said bank and actively in charge of its affairs, and continued in the active management thereof until it became insolvent on November 4, 1930. S. P. Tapscott was a customer of said bank during the entire period from 1920 until the State Bank Commissioner took charge thereof, and, during all that time, J. E. Lightle, as his representative and that of the bank, was authorized to use the funds he had on deposit to purchase notes from the bank on his account, and to collect the interest and principal of said notes. On February 23, 1920, J. E. Lightle sold the W. H. Capps note then owned by the bank to S. P. Tapscott and assigned it to him without recourse on the bank. Thereafter, J. E. Lightle collected the interest on the note for seven years and placed the amount to the credit of Tapscott, the last collection being made on January 1, 1927. No notations of these collections or payments were entered on the margin of the record where the mortgage was recorded. At the time

said bank took its own mortgage on the same property from W. H. Capps, the debt and mortgage which it had sold to Tapscott was still a valid and subsisting lien against said land, and, according to the weight of the evidence, it was the intention and agreement of the bank that this mortgage should constitute a second lien on said property. After the bank went into liquidation, there was entered on the margin of the record of the last mortgage by the special deputy commissioner, a payment of $257, which had been paid on the note and mortgage on March 3, 1929.

The Bank Commissioner acquired only such rights as existed in favor of the bank on the day the doors closed. He stepped into the shoes of the bank and could not by any act change the relationship existing at that time between the bank and Tapscott relative to these mortgages. If the bank had estopped itself to claim priority of it own mortgage over that of Tapscott, the Bank Commissioner could not change the status by making the marginal entry mentioned above.

The bank in the instant case is not a third party or stranger to these mortgages, and cannot invoke the benefit of § 7382, Crawford & Moses' Digest, by complying with the requirements therein. The Bank Commissioner gained nothing by an attempt to comply with the provisions of said act.

Again, the agreement that its mortgage should not have priority over the Tapscott mortgage and its conduct in reference to the Tapscott mortgage equitably estops it and the Bank Commissioner from claiming priority of the second over the first mortgage. The facts bring the instant case well within the case of *Merchants' & Planters' Bank* v. *Citizens' Bank of Grady*, 175 Ark. 417, 299 S. W. 753. In that case, we find this excerpt from Jones on Mortgages, 7th ed., vol. 1, § 608, peculiarly applicable to the instant case:

"Parties may, as between themselves, make a valid agreement, though it be verbal only, that one of two mortgages shall be prior to the other."

No error appearing, the decree is affirmed.

BOOE *v.* STATE.

Crim. 3871.

Opinion delivered February 5, 1934.

Claude Cruse, C. C. Beard and *Reed & Beard,* for appellant.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for appellee.

HUMPHREYS, J. Appellant was indicted, tried and convicted in the circuit court of Pulaski County, First Division, for the crime of murder in the first degree for killing M. E. Stephens, and was adjudged to serve a life term in the State Penitentiary as punishment therefor, from which is this appeal.

Appellant's first assignment of error is that the evidence is insufficient to support the verdict and judgment

and, for that matter, any degree of homicide except manslaughter.

It is argued that the evidence fails to reflect any malicious intent on the part of appellant to kill M. E. Stephens which was put into execution after premeditation and deliberation. The suggestion is made that appellant and deceased were entire strangers, and that the killing occurred in such a short time after they met that the elements of malice, premeditation and deliberation could not have been conceived in the mind of appellant before he shot and killed deceased. The law fixes no time in which the elements of murder in the first degree must be formed in the mind of one who takes life, but the existence of the fact is a matter for determination by a jury from all the facts and circumstances surrounding and entering into the homicide. *Green* v. *State,* 51 Ark. 189, 10 S. W. 266; *Ferguson* v. *State,* 92 Ark. 120, 122 S. W. 236; *Weldon* v. *State,* 168 Ark. 534, 270 S. W. 968. Applying this rule to the facts and circumstances in the instant case, we are of opinion that they fully warranted the jury in finding that the killing of M. E. Stephens by appellant was murder in the first degree. Stating the facts most strongly in favor of the State, the record of the evidence reflects that appellant, in company with a friend and companion by the name of Jim Jones, drove his car to the filling station of deceased, ordered some gasoline, and killed him when he demanded payment for his gasoline. According to the testimony of Jones, when appellant refused to pay for the gasoline, deceased got on the running board and tried to stop them so as to get his pay by striking at appellant with his fist; whereupon appellant picked up a pistol lying between them on the seat and shot at deceased twice, one shot taking effect and killing him, and that they then absconded and successfully made their escape. Appellant himself confessed that he killed deceased.

Appellant also contends that the confession of appellant after arrest that he killed deceased was not sufficient corroboration of his accomplice, Jones, to warrant

the conviction. The rule is to the contrary. *Knowles* v. *State,* 113 Ark. 257, 168 S. W. 148, Ann. Cas. 1916C, 568.

Appellant also contends that the confession did not show the degree of the crime, but merely admitted the killing. The rule is that the corroborating evidence need not be sufficient to convict, but is sufficient if it tends to connect the defendant with the commission of the crime. *Hawkins* v. *State,* 148 Ark. 351, 230 S. W. 5. Certainly appellant's confession connected him sufficiently with the commission of the crime.

The court also properly admitted the confession for consideration of the jury after finding that it was made voluntarily and without the promise of immunity.

Appellant also assigns as error the refusal of the court to give his requested instruction No. 2A, which proposed to tell the jury that accomplice Jones' testimony must be corroborated by other testimony connecting him with the crime before they can convict him. This was a correct declaration of the law, and should have been given, but the error was cured by instruction No. 19, which was given by the court before submitting the case to the jury. Instruction No. 19 fully covered instruction No. 2A requested by appellant.

Appellant also assigns as error the refusal of the court to give his requested instruction No. 3A, which is as follows: "There has been evidence offered tending to show that the witness Jones has been promised some immunity from the part witness Jones took in his acts connected with the killing of Stephens. If you believe from the evidence in this case that witness Jones had been promised by any one as an officer of this court any less punishment or immunity for testifying against this defendant, you have a right to take into consideration, in determining whether witness Jones is telling the truth in this case, or is testifying against defendant, Booe, in order to incur favor with the State to the end that his punishment would be lighter for the part he took, either in taking the life of Stephens, or in accessory after the fact to said killing of Stephens."

This instruction is clearly argumentative, and, for that reason, the court properly excluded it.

By reference to the instructions, it will be seen that the court gave the following instruction:

"You may judge of the credibility of a witness by the manner in which he gives his testimony, his demeanor upon the stand, the reasonableness or unreasonableness of his testimony, the means of knowledge as to the facts about which he testifies, the consistency or inconsistency of his testimony with itself or the other testimony in the case, his interest in the case, the feeling he may have for or against the defendant, his bias for or prejudice against the defendant, or any other fact or cricumstance tending to shed light upon the truth or falsity of such testimony, and it is for you at last to say what weight you will give the testimony of any or all witnesses."

The other assignments of errors discussed by appellant were not prejudicial.

No error appearing, the judgment is affirmed.

QUICK *v.* KNIGHT.

4-3335

Opinion delivered February 5, 1934.

Patterson & Patterson, for appellant.

Williams & Williams and *J. H. Brock,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment for damages for the wrongful taking of the property of appellees by appellants. The property consisted of house-

hold goods, such as furniture, beds, bedding, etc. The property was removed from appellees' home on January 29, 1932, by Andy Crabtree, who ran a truck, on the written order of C. E. Quick, who claimed to be the owner of a chattel mortgage thereon which he had theretofore purchased from the mortgagee, Thompson Brothers. The suit for damages was based upon the theory that the mortgage had been paid, and this became an issue of fact in the case upon which testimony was introduced pro and con. Appellees also introduced testimony to the effect that, on account of the removal of their household goods, Cora Knight was compelled to sleep on the floor without sufficient bedding or covering, which resulted in her contracting "flu," which developed the following day into pneumonia lasting seven weeks in addition to pain, suffering, and loss of time incident to her illness, and that she had to expend large sums for medical treatment.

Appellant contends for a reversal of the judgment because the court instructed the jury to the effect that if they should find that the mortgage had been paid, and that it was not extended by agreement as security for further advances, then the seizing and removing of the property would be wrongful, and, in addition to the value of the property, appellees would be entitled to recover damages on account of sickness resulting directly from the wrongful taking of the property. Appellant argues that the measure of damages for the wrongful taking was the market value of the property taken. If the taking was wrongful, and the jury so found, the takers were tortfeasors, and this court has announced the following rule as to tort feasors in the case of *Carson* v. *Fort Smith Light & Traction Company,* 108 Ark. 452, 158 S. W. 129:

"A tort feasor is answerable for all damages directly traceable to the wrong done and arising therefrom without an intervening agency and without fault of the person injured."

No error appearing, the judgment is affirmed.

BANK OF CABOT *v.* WILSON & COMPANY.

4-3329

Opinion delivered February 5, 1934.

John R. Thompson, for appellant.

Reed & Beard, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony showed that Lucas, appellee's salesman, purchased the draft from the bank as he was authorized to do, indorsed the checks and drafts to be collected by the bank in payment of the purchase money, and gave his

own personal check for the balance, $162.79; that his personal check was not paid, and, upon being notified thereof, he gave two checks for the amount upon other banks in the State, both of which were returned marked "insufficient funds"; that the bank drew on appellee company for the amount of the checks, attaching said unpaid checks to the draft in accordance with the draft purchasing agreement, and that appellee company paid said draft.

It is true that appellee claimed in its action to recover this amount from the bank, as for money had and received, paid through mistake, that the bank had failed to notify it by wire of the return of the checks of Lucas given for part of the purchase money of the draft, and that therefore under the contract it was not liable to the repayment of such money. The purchasing agreement provides, however, that the bank get in touch with appellee's salesman, if possible, notifying him that the item had been returned, etc., and also gives the bank authority to draw on appellee at Kansas City, Kansas, attaching to the draft a memorandum of the checks, etc.

Appellee knew the provisions of the draft purchasing contract, and knew necessarily, when these particular checks were attached to the draft drawn by the bank, that they were unpaid and presented for payment to the company because of the money sent in the draft purchased by the agent not having been collected or realized, and made no objection to the payment of this draft refunding to the bank the money it had advanced under the draft purchased by the company's agent. It is therefore estopped to deny that the payment was not made in satisfaction of the balance of the amount of the draft purchased for appellee company, which was paid for with said checks returned to it unpaid, and for the payment of which the Bank of Cabot was duly authorized to draw on appellee company under the draft purchasing agreement. Although, the Bank of Cabot did not wire the appellee company about the failure of the maker of the checks to pay them, it called that fact to the attention of appellee's agent, J. H. Lucas, maker of the checks, as required under the contract; and, as already said, the

company had sufficient notice of the return of the checks when it paid the bank's draft for the collection of it, and it cannot now repudiate its action, and recover the money it was liable to the payment of under said contract and draft.

The court erred in holding otherwise, and the judgment is reversed, and, the case appearing to have been fully developed, the cause will be dismissed. It is so ordered.

McDonald *v.* Wasson.

4-3330

Opinion delivered February 5, 1934.

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

Trieber & Lasley, for appellee.

MEHAFFY, J. This suit was instituted by Marion Wasson, Bank Commissioner, against Ed McDonald, Secretary of State, by filing in the Pulaski Chancery Court the following complaint:

"The plaintiff, Marion Wasson, is the duly appointed, qualified and acting Bank Commissioner of the State of Arkansas, and as such he is charged with the execution of all laws of the State of Arkansas, relating to the organization, inspection, supervision, control, liquidation and dissolution of the banks and the banking business of the said State.

"The defendant, Ed McDonald, is the duly elected, qualified and acting Secretary of State of the State of Arkansas, and as such he is charged by act 632 of the Acts of the General Assembly of the said State for the year 1921 with the duty of receiving, filing, attesting and returning articles of incorporation of persons associating themselves together as a cooperative association, for the purpose of conducting a banking business on the cooperative plan pursuant to the provisions of said act.

"On July 6, 1933, the said plaintiff, as such Bank Commissioner, duly made and promulgated, and the requisite number of members of the Bank Advisory Council of the said State duly approved, rules and regulations relating to the organization, supervision, control, liquidation and dissolution of the cooperative banking associations aforesaid, which said rules and regulations were so made and promulgated, and were so approved, under and pursuant to the provisions of act 88 of the Acts of the General Assembly of said State for the year 1933. A copy of the said rules and regulations bearing

the signature and seal of office of the said plaintiff, and the signatures of said members of said Bank Advisory Council, and marked Exhibit A, is hereto attached as a part of this complaint.

"The plaintiff is informed, and believes, and so charges, that certain citizens of the State of Arkansas are now about to associate themselves together as such cooperative banking association for the purpose of conducting a banking business at Corning, Arkansas, and that the said persons are about to file their articles of incorporation with the said defendant as such Secretary of State, and further that the said defendant, unless restrained by this court, will, upon the filing of said articles with him as aforesaid, take such steps, as set out in said act 632 of the Acts of 1921, as will result in the authorization of said cooperative banking association to commence business as such, although the said persons so associating themselves together, have not applied to the plaintiff, Bank Commissioner, for a certificate of public necessity in respect of said banking association, as required by the said rules and regulations, and the said persons have not in any otherwise complied with, or attempted to comply with, and have no intention of complying with, any of the other requirements of said rules and regulations.

"That plaintiff has no adequate remedy at law, and as immediate restraining order is necessary herein in order to prevent the said proposed cooperative banking association from beginning its business without authority of law, and to the detriment of the community wherein the said association proposes to conduct its business and to the public.

"Wherefore plaintiff prays that this court issue forthwith, and pending final determination of the within cause, its order restraining the said defendant from in any wise authorizing the said applicants or any other applicants to conduct a banking business, without first applying to the plaintiff for a certificate of public necessity respectively thereof, and otherwise complying with the said rules and regulations; that upon final hearing the said order be made perpetual, and the said defendant

enjoined accordingly; for costs herein expended, and for all other and further relief."

The court issued a temporary restraining order, and thereafter appellant filed a demurrer, the court overruled the demurrer, and this appeal is prosecuted to reverse the decree and judgment of the chancery court in overruling said demurrer.

There is but one question for our consideration, and that is whether act 88 of the Acts of 1933 suspended by implication act 632 of the Acts of 1921, or, as stated by appellee: "Whether or not the Legislature, in its passage of act 88 of the Acts of 1933, intended, as stated in the title of the act, that the provisions of act 88 should have reference to all banks."

It is contended by the appellee that by the use of the words "all banks" the Legislature intended to suspend act 632, which was an act for the formation and carrying on of cooperative associations, and providing for the rights, powers, liabilities and duties of same.

The primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. 25 R. C. L. 960.

The first section of act 632 is as follows: "The purpose of this act is to provide for the formation and carrying on of cooperative associations and to provide for the rights, powers, liabilities and duties of such cooperative associations. The provisions of this act shall be administered by the Commissioner of Mines, Manufactures and Agriculture, who shall have power to employ such help as in his judgment is necessary to carry into effect the provisions of this act."

Section 11 provides, among other things: "No association organized under this act shall be required to do or perform anything not specifically required herein, in order to become a corporation, or to continue its business as such."

It should be remembered that, at the time this law was passed by the Legislature in 1921, we already had a general banking law. The 1921 act provided for a cooperative association. Any number of persons more than 20 could associate themselves together as a coopera-

tive corporation for the conducting of the business of agriculture, dairy, mercantile, banking, mining, manufacturing or other mechanical business on the cooperative plan. It has no reference to banking in the ordinary sense. It is not only not organized under the general banking law, but, under the express provisions of the act, the Bank Commissioner has nothing to do with corporations organized under the cooperative act.

Under the general banking law five persons can organize a bank. The cooperative act also expressly provides that the votes of the association are by members and not by stock. It also provides that it shall distribute its net profits first by paying a fixed dividend, and, second, that the remainder of its profits are prorated to its several stockholders.

The act further provides that the title of a corporation organized under the cooperative plan shall begin with "The" and end with "association," "company," "corporation," "exchange," "society," or "union." Everything in the act shows that whatever business it did was to be done on the cooperative plan, and its business was in no way connected with the banking system.

Again in 1923 the Legislature passed another act, No. 627, amending the banking act, the title to which is as follows: "An Act to Amend Act 113 of the Acts of the General Assembly of 1913, entitled 'An Act for the Regulation and Control of Banks, Trust Companies and Savings Banks' as amended."

Section 19 of act 627 of the Acts of 1923, provides as follows: "Nothing in this act shall repeal, modify or in any manner affect act 632 of the Acts of the General Assembly of 1921, approved March 29, 1921, nor shall it affect any bank or other corporation organized thereunder, and said act 632 and every part thereof shall stand and be in full force and effect the same as if this act had not been passed."

It is clear that when act 88 was passed, and all times prior thereto, the Bank Commissioner had no supervision or control over associations formed under the cooperative act, and had no connection with such associations. We think therefore that it is clear that when act

88 uses the word "bank" it means a bank under the supervision of the Bank Commissioner, and has no reference to cooperative associations.

Under the cooperative plan no person is allowed to own or have an interest in more than 10 per cent. of the capital stock of such corporation, and voting upon all questions shall be by members and not by stock. The organization, management, control and purposes of an association organized under the cooperative plan is wholly different from the organizations, management, control and purposes under the general banking law.

There is, we think, no conflict between the provisions of act 88 and the provisions of act 632 of 1921.

Appellee calls attention to 57 C. J. 903, and says that in some jurisdictions such a clause is referred to as an express repeal. The clause referred to in C. J., cited by appellee, was the clause that "all laws and parts of laws in conflict or all acts and parts of acts inconsistent with the statute are repealed." There is no such provision in act 88.

Section 12 of the act says that the act is cumulative and shall not repeal, but merely suspend any law in conflict therewith. There is no repealing clause found anywhere in act 88. Therefore, so far as this citation is concerned, it has no application, because it could be neither express nor implied repeal, when no such clause is found in the act. It could not suspend the act by implication because there is no conflict, as we conclude that the word "bank" used in act 88 necessarily means the bank over which the Bank Commissioner has jurisdiction.

The contention by the appellee is that act 88, an act regulating the banking department, suspends for two years the operation of the law regulating cooperative associations, without mentioning said law. The laws are on different subjects, and we know of no rule of construction that would justify the conclusion that a law passed on one subject would suspend the operation of a law on a different subject by implication, and without mentioning the law claimed to be suspended.

The law as to implied repeal is stated in 59 C. J. 904, as follows: "An implied repeal is one which takes place when a new law contains provisions which are contrary to, but do not expressly repeal, those of a former law. A statute, or a provision thereof, may be repealed by implication. Whether it has been so repealed is a question of legislative intent. While such a repeal is not favored, nevertheless it must be recognized and accorded effect where it is apparent that it was intended. Conversely, there is no room for repeal by implication where no legislative intent to repeal is indicated or expressed, or an intent not to repeal is apparent or manifest."

The same authority also states: "The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication, nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable, and a very clear and definite reason therefor can be assigned. Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intention to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary and irresistible." 59 C. J. 905 *et seq.*

Keeping these rules of interpretation in mind, it seems clear to us that there was no intention on the part of the Legislature to repeal or suspend the Act of 1921.

Appellee concedes that if the Legislature did not intend that act 88 should have reference to all banks but only some banks, then there is no conflict. There is no repugnancy, and there was no intention to repeal or suspend any part of the provisions of the Act of 1921, relative to cooperative banks.

Appellee calls attention to 59 C. J. 958, § 570. That section provides: "While the intent of the Legislature is to be found primarily in language of the statute, where such language is vague, ambiguous, or uncertain, the court may look, not only to language but to the subject-matter of the act, the object to be accomplished, or the purpose to be subserved; it may also look in this connection to the expediency of the act, or its occasion and necessity, the remedy provided, the condition of the country to be affected by the act, the consequences following upon its enactment, or various extrinsic matters which throw some light on the legislative intent."

These things are to be considered where the language of the statute is vague, ambiguous or uncertain. Under this authority we think it is proper to take into consideration that the two acts are for wholly different purposes; the one having reference to the banking system, and the other to cooperative associations, and certainly it cannot be said when these things are considered that it is clear and inevitable that the Legislature intended the Act of 1921, the act which authorizes cooperative associations, to be suspended by act 88. As to whether it is wise or unwise legislation is a matter for the Legislature and not for the courts.

R. C. L. states the rules as follows: "The intention and meaning of the Legislature must primarily be determined from the language of the statute itself, and not from conjectures *aliunde*. * * * No motive, purpose, or intent can be imputed to the Legislature in the enactment of a law other than such as are apparent upon the face and to be gathered from the terms of the law itself." 25 R. C. L. 961 *et seq.*

"The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws." 25 R. C. L. 964.

This court has many times announced the principles and rules governing the courts in the construction of statutes. We recently said: "It is a well-settled principle of statutory construction that repeals by implication are not favored." *La. Oil Ref. Co.* v. *Rainwater,*

183 Ark. 482, 37 S. W. (2d) 96; *Ark. Tax Commission* v. *Crittenden County,* 183 Ark. 738, 38 S. W. (2d) 318.

We should consider the two acts, the banking act and the cooperative act, legislating upon entirely different subjects, and consider the purpose of each act in order to arrive at the intention of the Legislature. *Rose* v. *W. B. Worthen Co.,* 186 Ark. 205, 53 S. W. (2d) 15; *Rural Special School Dist. No. 19* v. *Special School Dist. No. 37,* 186 Ark. 370, 53 S. W. (2d) 579.

We said in a recent case: "Such a construction ought to be put upon the statute as may best answer the intention which the lawmakers have in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other considerations; and, whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contradictory to the letter of the statute." *Koser* v. *Oliver,* 186 Ark. 567, 54 S. W. (2d) 411; *Broadway-Main Street Bridge Dist.* v. *Taylor,* 186 Ark. 1158, 57 S. W. (2d) 1041.

The fact that the acts are for wholly different purposes, the fact that the Legislature has uniformly treated them as separate and distinct acts, covering separate and distinct subjects, together with the fact that no mention is made of the act of 1921, the act providing for cooperative associations, and the fact that the Bank Commissioner at the time of the enactment of act 88 had no supervision over associations created by the act of 1921, all seem to indicate that the Legislature did not intend to repeal or suspend the act of 1921. It would have been an easy matter to mention the act of 1921, and since this was not done, and the acts had always been treated as relating to different subjects, we think there was no manifest intention of the Legislature to repeal the act of 1921. In fact, act 88 did not undertake to repeal any act, but only to suspend acts in conflict.

The decree of the chancery court is reversed, and the cause remanded with directions to sustain the demurrer.

BUTLER, J., (concurring). I agree to the opinion written by Mr. Justice MEHAFFY, but go further and think the court should have defined the powers of the association. I take this view because, while the opinion does not warrant it, associations formed under act No. 632 of the Acts of 1921 may assume that they are authorized to do a general banking business. This position, if taken, is not warranted by any reasonable interpretation of that act when it is viewed in the light of, and considered in connection with, contemporaneous legislation.

At the session of the General Assembly at which act No. 632, *supra,* was passed, the Legislature, by act No. 496, covered the entire field of the control of banks and the manner in which their affairs might be conducted, and, as there was no reference made to this legislation by act No. 632, which was approved only three days later, it is clear that the Legislature did not intend to clothe cooperative associations with the power to carry on the business intrusted to banks. In arriving at the meaning of any statute, it should be placed beside other relevant statutes giving it a meaning and effect derived from the combined whole (*State* v. *Sewell,* 45 Ark. 387), for the Legislature must be presumed to have had knowledge of existing statutes and to have had reference thereto when dealing with any subject embraced in prior acts and intend the provisions of later statutes to be read in the light of the provisions of the former relating to the same subject. This is especially true where the statutes were enacted at the same session of the Legislature. Ex parte *Trapnall,* 6 Ark. 9; *Town of Benton* v. *Willis,* 76 Ark. 443, 88 S. W. 1000; *Lonoke County* v. *Reed,* 122 Ark. 111, 182 S. W. 563.

The nature of the association, its membership, voting power and manner in which its income is to be disbursed is pointed out in the opinion. The act itself defines cooperative associations as "a business concern that distributes the net profits of its business by: First, by the payment of a fixed dividend upon its stock; the remainder of its profits are pro-rated to its several stockholders upon their purchases from, or sales to, said concern, or both such purchases and sales." By section 2, it is pro-

vided that twenty or more persons may form the association "for the purpose of conducting any agricultural, dairy, mercantile, banking, mining, manufacturing, or mechanical business on the cooperative plan."

When the definition quoted is read in connection with the grant of power, the real reason and purpose of the act is better understood. This was to give groups of individuals an opportunity to co-ordinate their efforts, provide for collective bargaining and share the profits of the enterprise conducted. The conduct of any of the acts named is ancillary and in aid of this main purpose, and the right to pursue and perform these is not unlimited but is to be confined within the bounds of the association's membership where such acts comprise the engaging in any business clothed with a public interest, and, as such, subject to regulation and supervision by the State. Banks are such institutions over which, by appropriate legislation, the State had exercised its powers of regulation prior to the passage of act No. 632. Therefore, the banking business mentioned in that act must be deemed to be different from the business conducted by a bank properly so-called and of a special and restricted character limited solely to the membership from which perhaps it may receive deposits and make loans to the members, but has no power to engage in the business of a bank which deals with the public generally and which was created and regulated by existing laws.

I am authorized to state that JOHNSON, C. J., joins in the views I have expressed.

BIRNBACH *v.* KIRSPEL.

4-3342

Opinion delivered February 5, 1934.

J. A. Watkins, for appellant.

D. K. Hawthorne and *Dean A. Phillips*, for appellee.

MEHAFFY, J. The appellant, R. M. Birnbach, filed suit in the Pulaski Circuit Court alleging that on or about February 4, 1933, the appellee, John Kirspel, approached him and advised him that he had an option for 20 days on certain property situated in the city of Little Rock; that said option was taken in the name of George Porbeck, but that he, Kirspel, was the real party in interest. Appellant alleged that Kirspel employed him to make a sale of said property within the limit of the option of 20 days. Kirspel at the time advised appellant that there were taxes against said property of about $2,000 and he wanted to sell the property for $6,500, the purchaser to assume $2,000 of taxes, and Kirspel agreed to pay appellant whatever sum he might sell the property for in excess of $8,500. The appellant immediately went to work to secure a purchaser, and one Otto Finkbeiner offered for the property $7,000 in cash, and to assume the $2,000 taxes.

Prior to February 13, 1933, appellant advised Kirspel that Finkbeiner was considering the purchase. On February 13, 1933, Finkbeiner agreed to purchase the property and appellant accompanied by Finkbeiner, went to Kirspel's office and demanded an abstract and deed, advising Kirspel that Finkbeiner had the cash to pay when the title was approved. Kirspel declined to make the deed or to have the owners of the property to make it, and refused to comply with the contract with Birnbach. It was alleged that Finkbeiner was able to pay and ready and willing to assume the $2,000 taxes and pay $7,000 in cash. Appellant alleges that under their contract, Kirspel owes him a commission of $500 which he refuses to pay.

Appellant then filed an amendment to his complaint alleging that he was a real estate salesman and licensed as such under act 148 of the Acts of 1929. Appellees answered, denying all the allegations in the complaint. The evidence was taken, and, at the close of appellant's

evidence, the court directed a verdict for appellee. The case is here on appeal.

There is very little conflict in the evidence. The evidence tends to show that Porbeck had a written option of 20 days to sell a certain piece of property in Little Rock; that Kirspel was interested with Porbeck; that Kirspel secured the services of Birnbach to make a sale of the property within the 20 days, promising to pay Birnbach all that Birnbach sold the property for in excess of $8,500; that Birnbach secured a purchaser ready and willing to pay $9,000 for the property, and that Kirspel and Porbeck declined to make the sale to the purchaser, but had already sold or agreed to sell it to others. Birnbach had a license under act 148 for 1932. About February 1, 1933, Birnbach went to the office of the Arkansas Real Estate Commission, and the secretary informed him that the issuance of licenses had been suspended pending the outcome of a bill in the Legislature to repeal the act creating the Arkansas Real Estate Commission. Birnbach's license for 1932 expired on December 31, 1932.

W. A. Reed, secretary of the Arkansas Real Estate Commission, testified that Ray Birnbach came to his office about February 1, 1933, to see about a license. He explained to Birnbach about the bill pending in the Legislature, and told him that, if he paid his fees, there was no provision for returning them, and that he thought it would not be fair to take the money for the license until the bill in the Legislature was disposed of, but that he would take his application and put it on file. He also testified that when the applications were taken, they were put on file and when the fee was paid, license would be issued as of the date of the application. Birnbach made no application for license during the month of January, 1933, and at the time he talked to Reed about license, he did not make any application in writing, as required by law, and did not make application until February 21, 1933, when the transaction for which he seeks to recover a commission was on February 13, 1933.

Section 5 of act 148 provides that every applicant for real estate broker's or salesman's licenses shall ap-

ply in writing upon blanks furnished by the commission. It also provides that the application shall be accompanied by the recommendation of at least five citizens, real estate owners not related to the applicant, who have owned real estate for a period of five years or more in the county. The law requires the application to be accompanied by the fee.

Section 2 of act 148, among other things, provides: "No recovery may be had by any broker or salesman in any court in this State on a suit to collect a commission due him, unless he is licensed under the provisions of this act, and unless such fact is stated in his complaint."

Act 148 was amended by act 142 of the Acts of 1931, but the amendment is not important here.

The appellant correctly states that the only question presented for our consideration is, did the failure of Birnbach to have a license as a real estate broker or salesman under act 148 of the Acts of 1929, deny him the right to go forward with his business as a real estate agent and collect his commissions in the event of a successful sale? Appellant also states: "If Birnbach made no effort to secure such license, he would have no cause of action."

The undisputed proof shows that Birnbach's license expired December 31, 1932. He does not claim to have made any effort to secure license during the month of January, 1933. The evidence shows that about February 1, 1933, he went to the office of the Arkansas Real Estate Commission to see about license, and was advised by the secretary that there was a bill pending in the Legislature to repeal act 148, and that they were not issuing any licenses and would not until after the adjournment of the Legislature; but Reed at that time advised him that they were taking applications, and that, if license was thereafter granted, they would be dated back to the time that the application was made. The law requires the application to be in writing. Birnbach does not claim that he made any application in writing until February 21, 1933. The transaction with appellees was on February 13, 1933. At the time of the trans-

action, the sale to Finkbeiner, the appellant does not claim that he had any license or that he had made any written application, as the law requires.

Act 148 provides: "No recovery may be had by any broker or salesman in any court in this State on a suit to collect a commission due him, unless he is licensed under the provisions of this act, and unless such fact is stated in his complaint."

Under the provisions of this statute, a salesman without license cannot recover any commission. However, this court, long before the passage of act 148, stated: "The law is well established that where a statute prohibits engaging in a business or calling without having procured a required license, or where it expressly vitiates all contracts made by unlicensed persons while engaged in such business or calling, a contract made by one who has no license is invalid and cannot be enforced." *Stiewel* v. *Lally,* 89 Ark. 195, 115 S. W. 1134.

In that case the ordinance of the city merely prescribed the amount of the license fee, and, as stated by the court in that case, it contained neither a penalty nor a prohibition against engaging in this business without license, nor did it undertake to invalidate a contract made by an unlicensed person.

In the instant case the law contains a penalty, a prohibition against engaging in the business without a license, and expressly invalidates the contract for commissions, and provides that commissions cannot be recovered.

"It is the rule in most jurisdictions that a broker who fails to procure a license to carry on his business, as required by law, is barred recovery of commissions for acting as a broker." Walker on Real Estate Agency, (2d ed.) 541; *Whitfield* v. *Huling,* 50 Ill. App. 179; *Yount* v. *Denning,* 52 Kan. 629, 35 Pac. 207; *Richardson* v. *Brix,* 94 Iowa 626, 63 N. W. 325; *Buckley* v. *Humason,* 50 Minn. 195, 52 N. W. 385; Law of Real Estate Brokerage, Nelson, 140.

This court recently said: "It is unimportant whether he had a license as a salesman for appellee at the time of such agreement, or a license on his own ac-

count, or any license at all, since he was duly licensed at the time he perfected the sales and earned the commissions." *Talley* v. *Tuggle,* 183 Ark. 957, 39 S. W. (2d) 707. In the above case the court impliedly holds that he must have a license at the time he earned the commission.

It is, however, contended by the appellant that it was through no fault of his that he did not have license, and that he did all he could to procure license. We have already shown that he made no application for license in January, 1933, and made no application in February until the 21st. He was told by the secretary of the Commission that, if he would make application, when his license was issued, it would be dated the same date as his application, and notwithstanding this he still neglected to make application until some days after his transaction with appellees. At the time of this transaction he had no license and no right to sell real estate, and could not recover commissions therefor. He could have made his application, and could have gone further than that. In order to have done all that he might have done, if he was refused a license after making his application, he could have compelled the issuance of license by mandamus.

Appellant relies first on the case of *Wicks* v. *Carlisle,* 12 Okla. 337, 72 Pac. 377. In that case the court held that the city of Guthrie had ceased to collect an occupation tax from the real estate agents, and, while the ordinance requiring it was never repealed, the mayor and city council instructed the city officers to collect no more tax from them. The applicant had paid tax as long as the officers would receive it, and the court held it was the fault of the city that the tax was not paid. The applicant in that case, however, offered to pay the tax and did all that he could to pay it, but the mayor and city council, the very persons who passed the law, had abandoned it. The court also held in that case that under ordinary circumstances an agent could not collect commissions without complying with the law.

In the case of *Woodside* v. *Baldwin,* 4 Cranch C. C. 174, a physician practiced medicine and charged for his

services, and the court held that he could collect because at that time there was no medical board, and it was admitted that there had been no election of officers of the society for several years, and that there was no board of examiners during all the time the physician practiced.

In *Mead* v. *Lamarch,* 150 App. Div. 42, 134 N. Y. S. 479, referred to and relied on by appellant, the court said: "There being no board of examiners, and it being impossible for plaintiff to obtain a certificate of competency, his position was in effect as though an impossibility of performance had been created by the law." No such condition exists in the instant case.

The other cases relied on by appellant are very similar to those to which we have called attention, and we deem it unnecessary to review them further, or to call attention further to the distinction between those cases and the instant case. We think that the case of *Stiewel* v. *Lally, supra,* settles this case. This seems to be the settled law in this State. The judgment of the circuit court is affirmed.

COLUMBIAN MUTUAL LIFE INSURANCE COMPANY *v.* HIGH.

4-3331

Opinion delivered February 5, 1934.

Scott P. Fitzhugh and *Trimble, Trimble & McCrary,* for appellant.

George E. Morris and *Ralph E. Ray,* for appellee.

McHaney, J. In December, 1911, appellee became a member of a fraternal beneficiary society known as Eminent Household of Columbian Woodmen of Georgia, and was issued a beneficiary certificate by it in the sum of $3,000. Dues in the sum of $4.91 plus 10 cents for collection were payable monthly, without notice, on the first day of each month, to the secretary of the local branch, and, if not paid by the 10th day of such month, the member became suspended and all rights under the beneficiary certificate should cease until reinstated in accordance with the constitution and bylaws of the society, which were referred to and made a part of the certificate. Appellee paid his dues for a number of years to the secretary of the local branch at England. This local branch was later disbanded, and his dues were paid elsewhere. Later appellant succeeded to all the rights of the fraternal society and assumed all its outstanding policy liabilities, among them being appellee's policy. No new policy was issued, but the old beneficiary certificate was permitted to remain as the contract between the parties. Appellee kept his premiums paid both to appellant and its predecessor by paying any time during the current month and as late as from the first to the 8th of the succeeding month without any objection from appellant or its predecessor, so far as this record discloses. The premium for March, 1932, was not paid within the time specified in the policy, but was mailed by appellee by check on April 2, 1932, to the Memphis office of appellant, and was received there April 5th. The general agent in Memphis refused to accept the check for the March premium, and required appellee to execute an application for reinstatement, on the ground that the policy had lapsed for nonpayment of the premium on or before the 31st day of March. The check was not accepted as a payment of the March premium, but was placed in the suspense account, as was also a check sent to cover the April premium. Appellee finally executed an application for reinstatement, which was submitted to appellant's medical examiner, who required, as a condition for reinstatement, that appellee submit to a physical examination by a physician

of his choice in England, which he refused to do. Appellant canceled the policy, and appellee brought this action as for a breach of the contract to recover the premiums paid by him thereon. A trial resulted in a verdict and judgment in his favor for $1,262.52, this amount to bear interest from May 24, 1933, at 6 per cent. per annum, the date of the judgment.

The principal contention made for a reversal of the case, if not the only one, is that the evidence is insufficient to support the verdict, and that the court should have directed a verdict in appellant's favor at its request. We cannot agree. It was testified by appellant's agent that, after it assumed the obligations of the fraternal society, it permitted policyholders to have the benefit of the 30 days of grace provided for in policies issued by it, and that it did not insist on payment by the 10th day of the month as provided in the fraternal policies. It is also true that it did not take up the old policies and issue new ones of its own. It is undisputed in this record that appellee did not pay his premiums by the 10th day of the month in which the premiums were due at any time, or at least at any time after appellant took over the business of its predecessor. It is also true and undisputed that appellee's check in payment of his premiums was received by appellant on numerous occasions after the lapse of the 30 days of grace which appellant allowed its policyholders. In a great many of these instances the check was mailed by appellee on or before the last day of the month in which the premium was due and payable, but was not received by appellant until one or more days later. It is also true and undisputed in this record that, on at least three occasions prior to March, 1932, appellee's check had been mailed after the last day of the month in which the premium was payable, and was accepted by appellant's agent as payment of the premium. The agent in Little Rock who received such checks testified that he had advanced such premiums himself out of his own fund in order to keep appellee's policy in force, and later collected from appellee. We are therefore of the opinion that the evidence is sufficient to establish a custom of appellant to accept payment of premiums after

the expiration of the grace period, both as fixed in the policy and as appellant says it permitted to the fraternal policyholders. At least, the evidence was sufficient to submit the question to the jury as to whether appellant had established such a custom. In Cooley's Briefs on Insurance (2d ed.), vol. 5, p. 4392, it is said: "Thus, where defendant insurance society, prior to April, 1906, had been in the habit of receiving payment of monthly assessments from insured during the month for which they were made, without requiring him to be reinstated, it thereby waived the requirement that insured must pay the assessment on or before the last week day of the month preceding the month for which they were made, and could not, without first giving insured reasonable notice of its intent to change its custom, require him to make payments strictly in accordance with the contract, nor require his reinstatement without notice of such change for his failure to pay the April, 1906, assessment prior to the last week day in March."

See also *Sovereign Camp, W. O. W.*, v. *Newsom,* 142 Ark. 132, 219 S. W. 759. After such custom had been established, appellant could not change the custom and lapse the policy where payment was made within the customary time, without notice of its intention to abandon the custom. *Sovereign Camp, W. O. W.*, v. *Condry,* 186 Ark. 129, 52 S. W. (2d) 638.

Nor does the fact that appellee signed a petition for reinstatement change the result, if, in fact he paid his premium within the time, as we so held in *Columbian Woodmen* v. *Simmons,* 150 Ark. 325, 234 S. W. 182.

Appellant argues that the court erred in giving appellee's requested instructions 1 and 2. These instructions correctly stated the law as we have above outlined it, and were therefore correct. We find no error, and the judgment is affirmed.

SMITH *v.* GIBBS.

4-3332

Opinion delivered February 5, 1934.

[redacted]

John L. McClellan, for appellant.

H. B. Means and *W. H. Glover*, for appellee.

BUTLER, J. From a verdict and judgment in favor of the appellee against the appellant in a justice of the peace court, an appeal was prosecuted to the circuit court of the county where, on a trial of the case, there was again a verdict and judgment in favor of the appellee for the sum of $86.44, from which this appeal comes.

At the conclusion of the evidence, the appellant moved for a directed verdict, which motion was overruled and the case submitted to the jury on instructions given by the court. The contentions made for reversal are that the verdict of the jury was based on incompetent testimony and that on competent testimony the appellant's request for a directed verdict should have been granted and that the court erred in giving instructions for the appellee and refusing to give certain others requested by the appellant.

From the evidence it appears that a business was conducted in the city of Malvern under the name of "The Smith Funeral Home," which purchased various items of merchandise at intervals from the appellee. On the 8th of May, 1931, the balance due him was $116.20. Subsequently, beginning on the 10th day of May, following, and from time to time thereafter, other items of merchandise were purchased and charged to the same account as those prior to May 8th. After May 10th, various payments were made by the appellant to the appellee, so that on June 6, 1931, there appeared to be

a balance due the latter, as shown by his books, to recover which this suit was instituted.

On the evidence adduced, and from the charge given by the court to the jury, it seems that the suit was brought against the appellant on the theory that The Smith Funeral Home was a partnership composed of the appellant and her husband, Phillip M. Smith; that Phillip M. Smith died on May 8, 1931, and appellant continued the business as surviving partner, and, as such, was liable for the debts of the firm made prior to her husband's death as well as for subsequent purchases.

The appellant contends that there was no partnership, but that prior to her husband's death the business belonged to him individually, and she had no connection with it other than working as her husband's assistant; that after his death she and her son, Robert Smith, formed a partnership and continued the business under the same trade name it had previously borne; that she and her son continued buying from the appellee, making payments on their own account from time to time in sums sufficient to pay in full the debt she and her son were due appellee, but that without right the appellee applied enough of these payments to the debt of her deceased husband to pay the same and claimed a balance of her own indebtedness as unpaid.

In order to establish the partnership, appellee, over the objection of the appellant, was permitted to testify in effect that he knew from advertisements carried in the local newspapers that The Smith Funeral Home was a partnership composed of Phillip M. Smith and Ada E. Smith. Over the objection of appellant, appellee was permitted to introduce several newspapers purporting to be issues of a local newspaper published in the city of Malvern, where The Smith Funeral Home was located. The inference to be drawn from these advertisements was that appellant and her husband jointly owned and conducted the business. On cross-examination of the appellee there was also introduced, and without objection being made, what purported to be a booklet published for circulation in Malvern called "The Bride's Book,"

in which appeared an advertisement bearing the name of Phillip M. Smith and Ada E. Smith over the words "Smith Funeral Home," and commending this business to the public.

At the request of the appellee the court instructed the jury, submitting for its determination the question of whether or not a partnership existed between appellant and her husband and whether or not she permitted her name to be used in the advertisement which would carry the implication that she was a partner. The court also charged the jury, at the request of the appellant, on the law of application of payments on open accounts. The court refused certain instructions requested by the appellee.

It is the opinion of the majority, to which the writer does not agree, that the testimony objected to was competent and was sufficient to submit to the jury the question whether or not appellant was liable as a surviving partner, and that the court properly refused to direct a verdict in her favor, and that the instructions given were proper declarations of law applicable to the evidence adduced and that the appellee's requested instructions which were refused by the court were sufficiently covered by the charge given. This being the conclusion reached, it follows that the judgment of the trial court is correct, and it is hereby affirmed.

FURST AND THOMAS *v.* ROWLAND.

4-3294

Opinion delivered February 12, 1934.

[redacted]

Barber & Henry, for appellant.

Tom F. Digby, for appellee.

JOHNSON, C. J., (after stating the facts). We think this case is ruled by *Athletic Tea Co.* v. *McCormack*, 159 Ark. 407, 252 S. W. 7. In the case referred to, this court had under consideration the liability of sureties on a sales contract, in all essential respects not dissimilar to the one here under consideration. There, as here, the

contract provided for weekly reports by the principal to the obligee, which provision was ignored by the principal and acquiesced in by the obligees, and we stated the law as follows:

"Where one employed as sales representative of appellant gave a bond, with appellee as surety, obligating himself to make weekly reports of "stock on hand and in transit," such provision was for the benefit of appellee as well as of appellant; and where appellant failed to require such report and to notify appellee of such omission, he thereby discharged appellee from liability on the bond."

Appellants contend that the instant case may be differentiated from the case referred to in that in the instant case appellees are guarantors, whereas, in the case referred to, the contract was one of suretyship.

We need not here determine whether appellees are sureties or guarantors. In either event, their obligations were assumed without compensation. In either event, they are entitled to all the protections usually attendant upon accommodating sureties.

We are definitely committed to the doctrine that an accommodation surety is bound only by the strict letter of his contract of suretyship. *Miller* v. *Friedheim*, 82 Ark. 592, 102 S. W. 372.

Under these circumstances, it was the duty of appellants to require the weekly reports from its dealer according to the terms of the contract, and, if and when omissions were encountered, to immediately notify appellees of such defaults. This appellants wholly failed to do.

When thus viewed, it is apparent that the trial court, in giving instruction No. 2 and refusing to direct a verdict in favor of appellants, was following the letter of our holding in the case referred to.

Other alleged errors, in reference to the introduction of testimony, are urged upon us in briefs, but, since the views above expressed are decisive of the case, it is unnecessary to discuss them.

No error appearing, the judgment is affirmed.

YAFFE IRON & METAL COMPANY *v.* PULASKI COUNTY.

4-3354

Opinion delivered February 12, 1934.

Owens & Ehrman, John M. Lofton, Jr., and *J. M. McFarlane,* for appellant.

Carl E. Bailey, Prosecuting Attorney, and *Murray O. Reed,* Assistant, for appellee.

JOHNSON, C. J., (after stating the facts). Four reasons are urged by counsel for appellee for an affirmance of the judgment. First, it is argued that there was no valid contract between appellant and Pulaski County for the purchase of the materials; the theory being that the contract of purchase was made with the purchasing agent of the county, and without any order of the county court directing it. It is immaterial that the contract was void. Appellee cannot accept and hold appellant's money, also retain the bridges, and at the same time plead the invalidity of the contract in bar of recovery. This contention has been definitely and certainly determined by this court in a number of cases. *International Harvester Co.* v. *Searcy County,* 136 Ark. 209, 206 S. W. 312; *Howard County* v. *Lambright,* 72 Ark. 330, 80 S. W. 148; *Forrest City* v. *Orgill,* 87 Ark. 389, 112 S. W. 891; *Ft. Smith* v. *United States Rubber Co.,* 184 Ark. 588, 42 S. W. (2d) 1004.

Appellee's second contention is that no appropriation was made by the quorum court of Pulaski County for the purpose of this claim. On this contention it suffices to say that it is fully answered by the cases heretofore referred to and cited. As a matter of common honesty, a county should not be permitted to accept and hold money as the purchase price for material purchased, and at the

same time retain ownership and control of the materials so purchased, and assert, in bar of any recovery, that no previous appropriation had been made therefor. The doctrine here announced does not in any way impair the holding of this court in *American Disinfecting Co.* v. *Franklin County,* 181 Ark. 659, 27 S. W. (2d) 95. There appellant's right to recover rested solely upon the validity or invalidity of the contract.

The third contention is, that appellant's claim was barred by the five-year statute of limitations. Appellant's alleged cause of action against Pulaski County did not arise until the county appropriated the two bridges, and this, we understand, did not occur until sometime about 1931. At any rate, there is no testimony showing that the appropriation of the two bridges by the county occurred within any statutory period of limitations prior to the filing of the claim in the county court. The law is well settled in this State that the burden is upon the one pleading the statute of limitations in bar to establish its application by testimony. This appellee has wholly failed to do.

The fourth and last contention is that appellant's claim is precluded by estoppel. An estoppel does not arise in favor of the party claiming it, unless misled by the acts or conduct of the other party. *Rhodes* v. *Cissel,* 82 Ark. 367, 101 S. W. 758; *Rogers* v. *Galloway Female College,* 64 Ark. 627, 44 S. W. 454.

Just how and when Pulaski County was misled, to its detriment, by the acts of appellant is not pointed out in briefs. The uncontradicted testimony shows that Pulaski County accepted and now holds $1,475 of appellant's money. This money was paid to and accepted by it on the theory that the materials purchased would be delivered. The county now holds the money and the bridges. Certainly, under these circumstances, an estoppel could not possibly arise.

From what we have said, it necessarily follows that the trial court erred in disallowing the claim of appellant as a whole. Upon remand, the trial court will hear testimony to determine the value of the White truck, the

scrap iron and the three bridges, which were accepted by appellant (one of which was destroyed by high waters), and deduct the aggregate thereof from the claim of $1,475 and allow the claim for the balance thus obtained or direct its allowance by the county court.

The judgment is reversed, and the cause remanded for further proceedings, in conformity with this opinion.

[redacted]

WILSON *v.* FOUKE.

4-3356

Opinion delivered February 12, 1934.

[redacted]

James D. Head, for appellant.

Will Steel, H. M. Barney and *Frank S. Quinn*, for appellee.

SMITH, J. C. W. and H. P. Fouke, being indebted to the State National Bank of Texarkana, Arkansas, in the sum of $32,000, evidenced by certain notes, executed their trust deed to a trustee for said bank, whereby they con-

veyed to said trustee approximately eight thousand acres of land. The trust deed was executed to secure the debt then due and any other debt thereafter incurred. The indebtedness secured not having been paid, suit was brought to enforce payment, and a decree was rendered, which declared the amount then due the bank, and a foreclosure of the lien of the deed of trust was ordered.

It was decreed that the commissioner named for that purpose, in selling the lands, should first offer them for sale in 40-acre tracts, and should thereafter again offer them for sale at an upset price of $3 per acre, and the commissioner was directed to accept and make report of the sale which produced the largest sum of money. The decree recites that, after the execution of the deed of trust, both grantors therein had died testate, leaving minor children as devisees, who had been made parties.

The trustee has appealed from this decree, and it is urged for its reversal that its provisions in regard to the manner of selling the land are in contravention of law and render it void, and it is prayed that it be reversed with directions to offer the lands for sale to the highest bidder without limitation as to the minimum price at which it might be sold. It is urged that the decree appealed from operates to deprive the trustee of his contractual right to subject the lands to sale, and thus impairs the obligation of the contract which the deed of trust created and evidenced.

It may be said that the practice has not prevailed to any considerable extent in foreclosure proceedings in this State to fix a minimum price at which the lands ordered sold may be offered for sale; but we know of no law which prohibits this practice, nor do we think the procedure here attacked operates to impair the obligation of the contract created and evidenced by the deed of trust. The creditor is not denied the right to subject the mortgaged lands to sale. On the contrary, they have been ordered sold, and, if and when they have been sold pursuant to the decree, a fund will be derived which exceeds the debt secured by the deed of trust. Under the decree, this debt will first be paid, and the trustee has

no interest, of course, in the proceeds of the sale in excess of the debt to the bank.

Obviously, the purpose of the decree is not to prevent the trustee from subjecting the lands to sale and thereby collecting his debt, but is rather to realize something from the sale for the benefit of the devisees, who are minors. The trustee has the right, of course, to have the lands sold. The deed of trust confers that right. But the power inheres in the court to protect not only the rights of the mortgagee, but those of the mortgagors as well, if this may be reasonably done.

Testimony was heard in the court below, before rendering the final decree from which this appeal comes, which has not been brought into the record, and we must therefore presume that it was made to appear to the court that the decree rendered conformed to the equities of the case, and, in the absence of such testimony, we may consider only the power of the court to make the decree rendered.

It may be that the lands cannot be sold at the minimum price fixed by the decree, but that fact has not yet been made to appear. It may also be true that the lands can be sold for that price, and, if so, no substantial prejudice will result, as the interest upon the principal debt is accumulating all the while at the contract rate. If, upon offering the lands for sale on the terms provided by the decree, it shall be made to appear that a sale cannot be had at the minimum price fixed in the decree here appealed from, the court may, and should, make such additional orders as are necessary to effectuate a sale. The power of the court has not been exhausted, and its jurisdiction to foreclose the deed of trust continues.

At § 392 of the chapter on Mortgages in 19 R. C. L., page 579, it is said: "It is regarded as a very proper and wise exercise of the discretion of the court to fix a minimum bid that will be received at a foreclosure sale if the court is at the time of making the order of sale so advised or informed as to enable it fairly to judge of the probable value of the property." And, in the absence of the oral testimony heard by the court below, we must pre-

sume that the court was so advised in rendering the decree which this appeal seeks to reverse.

The power of courts to protect the interests of opposing litigants in foreclosure proceedings is the subject of an extended note to the annotation of the case of *Suring State Bank* v. *Ernestine Giese,* reported in 210 Wis. 289, 85 A. L. R. 1477, 246 N. W. 556.

That the courts of this State have a discretion in foreclosure sales, not to deny the right of foreclosure, but to reasonably enforce that right so that unnecessary injustice may not be done, was recognized in the early case of *Sessions* v. *Peay,* 23 Ark. 39. After saying that in foreclosure cases the proceeding is under the supervision and control of the court, it was added that: "If not restricted by statute, it is within the power of the chancellor to prescribe, by the decree, the time, place, terms and mode of sale; and the varying circumstances of cases render it necessary that he should be invested with discretion in these matters in order to prevent the sacrifice of property, and to promote advantageous sales."

See also § 41 of the chapter on Judicial Sales in 35 C. J., page 49, and the cases there cited.

It may be said that the practice is common, and, so far as we are advised, is invariable, to incorporate into mortgages and deeds of trust a power to sell without invoking the aid of chancery courts to decree a foreclosure, and such a power appears in the instrument here sought to be foreclosed. As to all such instruments, the statute provides the procedure under which the power may be exercised. Section 7405, Crawford & Moses' Digest, requires an appraisement of the property in such cases, and § 7407, Crawford & Moses' Digest, provides that the property may not be sold under the power of sale for less than two-thirds of the appraised value thereof, provided that, if the property shall not sell at first offering for two-thirds of the amount of the appraisement, another offering may be made in twelve months thereafter, at which offering the sale shall be to the highest bidder, without reference to the appraisement. It is reasonably certain that no greater delay will result under the provi-

sions of the decree than would result in a sale under the statute, provided the property was not sold at the first offering for as much as two-thirds of its appraised value.

It is insisted that the opinion in the recent case of *Adams* v. *Spillyards,* 187 Ark. 641, 61 S. W. (2d) 686, 86 A. L. R. 1493, requires the reversal of the decree here questioned. But such is not its effect. The statute there held unconstitutional required the mortgagee, before obtaining a decree of foreclosure, to file a statement that he would bid the amount of the debt secured by the instrument sought to be foreclosed, and prohibited the rendition of any judgment for any deficiency, whereas the decree here appealed from contains no such limitations.

We conclude that the decree is not in excess of the power inhering in the court, and it is therefore affirmed.

ARKANSAS POWER & LIGHT COMPANY *v.* HEYLIGERS.

4-3327

Opinion delivered February 12, 1934.

Rose, Hemingway, Cantrell & Loughborough, N. A. McDaniel and *J. W. Barron,* for appellant.

Paul E. Talley and *W. A. Utley,* for appellee.

SMITH, J. The testimony at the trial from which this appeal comes is in irreconcilable conflict as to the cause and extent of the injury, to compensate which a verdict was returned by the jury in plaintiff's favor for the sum of $2,200.

The testimony in appellee's favor, which we must assume was credited by the jury, is to the following effect: She was riding as a guest in an automobile traveling east on Markham Street, in the city of Little Rock. Automobiles were parked along and adjacent to the sidewalk on the south side of Markham Street. Two other lines of automobiles, approaching the intersection of Main and Markham streets, had halted on account of the adverse signal light. One line of automobiles was traveling along the street car track on the south side of Markham Street with a small space between them and the automobiles parked adjacent to the sidewalk. The third line of automobiles was nearer the center of Markham Street, and plaintiff was riding in one of them. A street car, moving north on Main Street, had made the turn into Markham Street, and was proceeding west along that street, when it ran into the automobile in which plaintiff was seated. She was riding on the rear seat, and was injured by the impact. The motorman did not observe the condition of the traffic as he made the turn into Markham Street, but was apparently engrossed in something he was looking at in a hotel at the street corner.

The wife of the driver of the car, who was riding on the front seat with him, was permitted to testify that she said to her husband just as the impact was about to occur, "Lookout, the car is going to hit us," and he was permitted to testify that he replied, "I can't help it; I

can't move for that other car." Objection was made to this testimony, and its admission is assigned as error.

It is also insisted that error was committed in giving certain instructions at the request of the plaintiff. It may be said, in this connection, that all the instructions requested by defendant were given except a peremptory instruction, which directed the jury to return a verdict for the defendant.

It is earnestly insisted that error was committed in the admission of the testimony just quoted, it being contended that the maxim, *Res inter alios acta alteri nocere non debet,* renders it incompetent.

In the case of *Royal Neighbors of America* v. *McCullar,* 144 Ark. 447, 222 S. W. 708, the maxim was applied in holding incompetent the testimony of the husband of the insured person to the effect that he had sent his wife the money with which to pay the insurance premium in question, and had insisted on her paying her lodge dues for the remainder of the year, the purpose of the testimony being to show that her attention had been called to the importance of paying the dues and that she had the money with which to make the payment. We there quoted from Broom's Legal Maxims, (8th ed.) 748, the following statement of the law: "On the principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; yet it would not only be highly inconvenient, but also manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers; and, if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him."

It is obvious that the testimony there held incompetent had no direct probative value as tending to show that the payment of dues had actually been made, but showed only that the insured had the funds with which to pay, and that her attention had been called to the necessity for making the payment.

Here the testimony to which objection is made has a direct and immediate connection with the collision occa-

sioning the injury. It was a warning given that the collision was about to occur, and the reply to the warning, made as the collision occurred, explained the helplessness of the driver of the car to prevent it. The warning and the response may therefore be said to be a part of the *res gestae.*

In the case of *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 1053, the remark of a boy, so young that he himself was incompetent as a witness, made directly after the injury occurred, was held competent. It was insisted that the child's remark was a mere narrative of what had occurred, and was inadmissible for that reason. In overruling the objections to the admission of this testimony, it was said: "It is contended on behalf of appellee that the testimony was not admissible for the reasons (1) that the declaration of the boy was a narrative of the incident and not a part of the *res gestae,* and (2) that the tender age of the child rendered his statements, even though admissible as a part of the *res gestae,* incompetent. It is not easy, always, to determine when a declaration is a part of the *res gestae.* It is dependent upon the particular circumstances under which the declaration is made. This court, in *Clinton* v. *Estes,* 20 Ark. 225, said: 'It may be difficult to determine at all times when declarations shall be received as a part of the *res gestae.* But when they explain and illustrate it, they are clearly admissible. Mere narratives of past events, having no necessary connection with the act done, would not tend to explain it. But the declarations may properly refer to a past event as the true reason of the present conduct.' "

The cases and authorities there reviewed and quoted from convince us that the testimony was competent as being a part of the incident, and as explaining the circumstances under which it had occurred. *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816; *Public Utilities Corporation of Arkansas* v. *Cordell,* 184 Ark. 878, 43 S. W. (2d) 746.

The instructions are discussed at great length, and a discussion of the objections made to them would protract this opinion unduly and would involve the considera-

tion of no legal principle which has not already been definitely settled.

The essence of these objections is that the instructions take no account of the contributory negligence of the plaintiff, and improperly invoke the doctrine of the "last clear chance."

As to the first objection, it may be said that it is virtually conceded that the plaintiff was guilty of no negligence contributing to her injury. The concession is not expressly made, but it need not be, as there was no testimony to require the submission of that question. The plaintiff had no control over the automobile in which she was riding. It is true she might have warned the driver that a collision was about to occur, but that warning was, in fact, given by the driver's wife, and serious objection was made to its competency, as appears from what we have just said. Any additional warning by the plaintiff would have been unavailing. A younger and more athletic person might have escaped from the car to a place of safety. But the plaintiff was sixty-nine years old, and an effort to leave the car might have caught her off balance and the impact might have resulted in consequences much more serious than those sustained. However, the instructions given at the request of the defendant told the jury that, if negligence on the part of the plaintiff proximately contributed in any degree, however slight, to the happening of the collision, a verdict should be returned for the defendant.

The jury was told, in an instruction to which objection was made, that if "* * * the person in charge of said street car discovered the position of said automobile and the perilous condition of the occupants thereof, or could have discovered same by the exercise of due care, that it became the duty of the operator of said street car to use all reasonable means within his power, consistent with the safe operation of said street car, to avoid the striking of said automobile, and, if he failed to exercise such precaution after he discovered, or could have discovered, such peril, and you should further find by a preponderance of the testimony that the injury to plaintiff, if any, was caused by such failure on the part of the operator of

said street car, then your verdict should be for the plaintiff."

The objection is made to this instruction that it submits the case upon the "last clear chance" doctrine. It is argued that this doctrine cannot be applied to the facts of this case, and that "the ordinary rules of negligence and contributory negligence alone control." And further, it is insisted that: "The doctrine of last clear chance presupposes prior contributory negligence on the part of the plaintiff which has ceased activity, and that, as a result of such contributory negligence, the plaintiff is in a position of peril or danger from which he cannot escape by the exercise of ordinary care, and that the defendant then had, or by the exercise of ordinary care could have had, an opportunity to avoid the accident or injury, and failed to do so."

The doctrine known as that of "last clear chance" is well defined and requires no discussion. At § 398, vol. 1, of White's Personal Injuries on Railroads, it is said that the rule "may now be stated to be well established that the injured person, or his representative, may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part to avoid the injury, after discovering the peril of the injured person."

It would appear to be a sufficient answer to appellant's argument upon this subject to say that, if the failure to use care to avoid injuring the person whose negligence had placed him in a perilous position was the proximate cause of the injury, when proper care, after discovery of the peril, would have averted the injury, such failure to use proper care would likewise be the proximate cause of the injury to a person in peril without fault or negligence on his part, and we concluded therefore that there was no error in the instruction.

Objections are urged to the instruction on the measure of damages; but they require but little discussion. Two physicians who had examined and attended the plaintiff testified that she had sustained permanent injuries,

and had suffered much pain, and the verdict for $2,200 does not appear to be excessive.

The objection is made that the instruction permitted a recovery to compensate "the necessary expenses incurred or to be incurred for medicine and medical attention, if any," without, as it is insisted, any testimony upon which to base a finding that additional expense for medicines and medical attention would be required. This, however, is not true if plaintiff's injuries are as serious as her physicians testified they were. She testified that she still visited her doctor, and required medicines to ease her pain, and that from August 6, 1932, the date of her injury, to May 15, 1933, the date of the trial of the cause, she had spent over $40 for medicines alone, and it is fairly inferable from the testimony that additional expenses for medicines and medical attention will be required.

Upon the whole case, we find no prejudicial error, and the judgment must be affirmed. It is so ordered.

MASSACHUSETTS PROTECTIVE ASSOCIATION, INC., *v.* JURNEY.

4-3268

Opinion delivered February 12, 1934.

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Frank L. Harrington and *Cravens, Cravens & Friedman*, for appellant.

Robert Bailey, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the court erred in refusing to instruct a verdict for appellant, and this contention must be sustained. Under the undisputed testimony there was no repudiation of the contract of insurance by the association, nor any breach of it. Had the association repudiated the contract even, it would still have been entitled to a directed verdict in its favor for the reason that the plaintiff, with full knowledge of its repudiation, elected to stand on the contract. The suit was not one to recover installments under an insurance policy, but was brought on the theory that plaintiff was entitled to recover the present value of future installments under the contract on account of an alleged repudiation of it by the appellant company. A careful examination of all the evidence in the case shows by the undisputed proof that the association at no time either repudiated the contract or breached any of its terms, but always relied upon it. The only controversy between appellant and appellee was as to the meaning of the contract and the coverage afforded by its provisions.

Under the terms of the rider, which was correctly construed by the court below, appellee was only entitled to the indemnity benefits thereunder beyond the sixty weeks provided in the policy itself in the event that a disability occurred within the said period and continued thereafter, totally disabling him and of such a nature as necessarily confined him to the house under the care of a physician, etc. No such contingency was shown here, but rather the contrary. It was agreed by the parties hereto that the sixty weeks provided in the policy for payment of indemnity expired on August 4, 1932, and that a settlement was made with appellee by the association whereby he was paid indemnity under the policy up to and including September 22, 1932. The undisputed proof shows that no disability which existed within the sixty-week period continued thereafter, or continuously disabled the insured or confined him to the house, or disabled him from

following a gainful occupation. As already said, he came to Little Rock after the expiration of the sixty-week period, and secured employment with the Missouri Pacific Railroad Company, where he worked for approximately three months, drawing pay at the rate of $3.56 per day; and he made no claim of any disability after August 4, 1932, until December 17, 1932, when he claimed to have had an attack of influenza which confined him to his home from December 11th. A field representative of the association was informed by plaintiff's attorney on November 7, 1932, three months after the expiration of the 60-week period, that appellee was in the best of health, and not objectionable as an insurance risk. Appellee himself testified that he was in good health during this time.

In *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433, it was held that there could be no recovery for damages for an alleged repudiation of payment of indemnity under an insurance contract when it appeared that there was no repudiation, the insured's remedy being to sue for the installments as they matured. In the instant case, there was no refusal to carry out the contract or renunciation of the agreement, but, as shown by the correspondence between the parties, when default was claimed to have been made, the association only contended that, under the existing facts, the insured was no longer entitled to the weekly indemnity, having been paid all that was due him under the terms of the contract. See 13 C. J., §§ 725-27, page 651.

Moreover, it was said in *Mutual Life Ins. Co.* v. *Marsh, supra,* that, if the insured, with knowledge of the facts, elects to continue with the contract, he cannot subsequently make a second and inconsistent election to treat it as abrogated. See also *McNamara* v. *Cerf,* 4 Fed. (2d) 997.

Said instruction No. 5, given by the court without objection from appellee, correctly declared the law, and, in addition, the court instructed the jury that plaintiff, to be entitled to recover, must show by a preponderance of the evidence that the defendant insurance company

breached the contract or repudiated the provisions thereof. The undisputed testimony, as already shown, discloses that no disability arose during the sixty weeks' period and continued thereafter as was necessary to entitle appellee to recover; and that the insurance company had performed its contract in the payment of the sixty weeks' indemnity thereunder, and could not be held to further liability.

Under the circumstances of this case, the court erred in not directing a verdict for the appellant company and in submitting the cause to the jury, since there was no sufficient evidence to warrant its being done. The judgment is accordingly reversed, and the cause, appearing to have been fully developed, is dismissed.

CHERRY *v.* FALVEY.

4-3346

Opinion delivered February 12, 1934.

John E. Harris and *C. W. Smith*, for appellant.

Mahony & Yocum and *John Sherrill*, for appellee.

KIRBY, J., (after stating the facts). It is insisted by appellant that his cause of action alleged necessarily falls within the 5-year statute of limitations, not being covered by the general statute of 3 years, and concedes that otherwise, if the 3-year statute applies, the cause of action is barred thereby.

The evidence is virtually undisputed that Dr. Falvey, appellee, dissolved his partnership with the other physicians in El Dorado, with whom he had been associated, had his household goods removed to Longview, Texas, in February, 1931, the doctor having moved there in January, 1931. He had a contractor to build him a home and garage apartments there in February, 1931, the doctor paying a half year's rent in advance and moving into it. He had been living with his brother at the hotel before getting into the house. One of the attorneys for appellee testified: "It was after that service of the summons in the second suit that I knew he had actually moved to Texas. I knew he had relatives in Longview, and I saw Dr. Falvey down there several times during the months that he stated in his testimony a while ago."

The original summons was issued on March 24, 1931, on this second suit, and on August 13, 1931, a *non est* return was made thereon by the sheriff, stating that appellee could not be found in Union County, Arkansas. Another, an alias summons, was issued upon this complaint June 4, 1932, and served on the appellee in Union County, where he had returned on a visit.

Appellee contends, and we have concluded his contention must be sustained, that the cause of action is controlled by § 6950, Crawford & Moses' Digest, which reads as follows:

"Contracts or liability not in writing.

"The following action shall be commenced within three years after the cause of action shall accrue, and not after.

"All actions founded upon any contract or liability, expressed or implied, not in writing."

The testimony shows that appellee had moved his residence from Union County, Arkansas, to Longview, Texas, after the nonsuit was taken in the suit first filed and before summons was issued in the second suit, and that he has continued to reside in Longview since that time. The issuance of the summons therefore for him in the second suit and delivery thereof to the sheriff of Union County was not the commencement of a new action within one year after the nonsuit suffered. An action properly commenced in this manner arrests the statute of limitations, even though summons is not served until after the statutory period elapses. In order for it to have that effect, however, the action must be properly commenced, if it be a transitory action, in the county where the defendant is served with summons or may be served. Such an action instituted in a county other than the residence of the defendant does not arrest the statute of limitations until the writ is served, and when served it relates back to the date of the issuance of the writ. The commencement of the action is by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon. *Simms* v. *Miller,* 151 Ark. 377, 236 S. W. 828.

The services of summons upon appellee on June 4, 1932, upon a return visit to Union County was more than 3 years after the injury on January 27, 1929, and more than one year after the dismissal of the prior suit which was filed on September 10, 1930. A summons was issued and served on June 4, 1932, but the issuance and service of summons on that date constituted the bringing of a new action against the appellee upon June 4, 1932, and said action was barred by the statute of limitations and also by the statute of nonsuit. *Field* v. *Gazette Pub. Co.,* 187 Ark. 253, 59 S. W. (2d) 19.

Such being the case, the court did not err in granting the motion to dismiss the cause of action, and its judgment must be affirmed. It is so ordered.

LYNCH *v.* STATE.

Crim. 3868

Opinion delivered February 12, 1934.

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

KIRBY, J., (after stating the facts). It is insisted, first, that the evidence is not sufficient to support the verdict. Notwithstanding appellant testified in his own behalf and denied any participation in the robbery, the truth of the defense was, of course, a question for the jury, and has been settled by its verdict against the appellant upon testimony sufficient to support the verdict. *Norrid* v. *State, ante* p. 32.

The fourth assignment of error is that the trial court erred in overruling a motion to quash the indictment because certain members of the grand jury which returned the indictment had served on juries within the period of two years contrary to the provisions of act 135 of 1931. It was shown that three of the jurors had served on a jury in the Danville district of Yell County within two years last past at the August, 1931, term of court, one on

the grand jury and two as members of the petit jury. It does not appear that any of these jurors were challenged as disqualified for service upon the impaneling of the jury; and no error was committed in overruling the motion to quash the indictment on that ground. The statute provides that no indictment "shall be void or voidable because any of the grand jury failed to possess any of the qualifications required by law." Section 3030, Crawford & Moses' Digest; *Weaver* v. *State,* 185 Ark. 147, 46 S. W. (2d) 37.

The fifth assignment of error is to the effect that the court erred in overruling a motion for a continuance based on the fact that one of appellant's attorneys, Mr. Horton, was a member of the General Assembly and required to be in attendance at the extraordinary session between August 14 and 24. It appears that Mr. Horton was the representative from Logan County and appellant's regular attorney, and had been employed to defend him in the instant case; and also that Mr. Horton employed Mr. May, of the Booneville bar, to assist in representing appellant, and, within a few days after appellant was arrested, also employed Mr. B. F. Madole, of Danville, who appeared at the examining trial and all three of the attorneys appeared before the judge of the circuit court seeking a reduction of the amount of the bond set for appellant. The crime was committed on June 19, and the General Assembly did not convene until August 14, and the trial of appellant did not take place until August 27, several days after the adjournment of the General Assembly.

Section 1, act 4 of 1931, reads as follows:

"That any and all proceedings in suits pending in any of the courts of this State in which any attorney for either party to any suit is a member of the Senate or of the House of Representatives or is a clerk or sergeant-at-arms or doorkeeper of either branch of the General Assembly, and any and all proceedings in suits pending in any of the courts of this State in which any member of the Legislature or clerk or sergeant-at-arms or doorkeeper of either branch of the General Assembly is a

party, shall be stayed for not less than fifteen days preceding the convening of the General Assembly and for thirty days after its adjournment, unless otherwise requested by any interested member of said General Assembly."

It has not been determined whether the act quoted above applies to proceedings in criminal prosecutions, it having been construed only in the case of *Cox* v. *State,* 183 Ark. 1077, 40 S. W. (2d) 427. We do not regard it necessary now to determine whether it relates only to civil suits, since the attorney employed to defend the appellant, recognizing that he would probably be engaged otherwise, employed the services of two attorneys at the bar of the court to assist in representing appellant, and both of them were present and participated in the trial. Appellant could not have been prejudiced by reason of the trial taking place 3 days after the adjournment of the Legislature and was not deprived of the services of counsel of his own choice, the assistants chosen by his chief counsel conducting the trial. No prejudice was shown to have resulted on account of it, and the court did not err in refusing the continuance under the circumstances.

No error was committed in overruling the motion for a continuance because of the absence of a witness, the motion not being made in the statutory form, the appellant not stating therein that he believed the testimony of the absent witness to be true. Sections 1270 and 3130, Crawford & Moses' Digest; *Estes* v. *State,* 180 Ark. 656, 22 S. W. (2d) 172; *Weaver* v. *State,* 185 Ark. 147, 46 S. W. (2d) 37.

The other assignments of error, 7 and 8, alleging that the court erred in permitting the State to introduce "the evidence of divers witnesses, over the objections of the defendant," and in refusing to permit defendant to introduce "divers testimony" in his own behalf, which was material to his defense, "and which action of the court was prejudicial to the interest and rights of said defendant," are too indefinite to present any question for review on appeal. *Lomax* v. *State,* 165 Ark. 386, 264 S. W. 823.

The above also applies to assignment number 22, relative to the giving of various instructions. An examination of the instructions given show them to be correct declarations of the law, and only a general objection was made to the giving of said instructions, which objection was to the instructions *en masse*.

The court did not err in permitting the introduction of the testimony of witness, Myran Wright, the accomplice. The law does not prevent an accomplice from testifying, and the court properly instructed the jury concerning the testimony of such accomplice.

Assignment number 23, relative to an objection to the qualification of jurors after a verdict rendered is without merit, since no showing was made that any diligence was exercised by appellant such as would justify the granting of a motion for a new trial on the ground of a juror's disqualification. *Fones Bros. Hardware Co.* v. *Mears,* 182 Ark. 533, 32 S. W. (2d) 313.

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

CONSOLIDATED INDEMNITY & INSURANCE COMPANY *v.* DEAN.

4-3347

Opinion delivered February 12, 1934.

Reinberger & Reinberger, R. M. Priddy and *Arnold Fink,* for appellant.

Robert Bailey and *Hays & Smallwood,* for appellee.

MEHAFFY, J. This suit was begun in the Pope Circuit Court against the appellant to recover $2,999. The complaint alleged that Mrs. Effie Dean is the duly appointed, qualified and acting administratrix in succession of the estate of W. L. Dean, deceased; that Smith & Sandusky is a partnership composed of Thurman Smith and Lonnie Sandusky; that the appellants, Consolidated Indemnity Insurance Company, is a foreign corporation authorized to do a general insurance business in the State of Arkansas; that on April 14, 1931, W. D. Eakes, administrator of the estate of W. L. Dean, recovered judgment in the Pope Circuit Court against Smith & Sandusky in the sum of $25,000 and costs; a copy of said judgment was attached to, and made part of, the complaint; W. D. Eakes died in May, 1932, and Mrs. Effie Dean was appointed administratrix in succession, and the judgment was revived in her name; that on February 24, 1931, Smith & Sandusky applied for and secured liability insurance with the appellant through its agents, Matthews Investment Company; that the premium was paid and accepted by the agents of appellant, who immediately gave coverage to Smith & Sandusky; that the injury occurred after the contract of insurance was entered into, and while it was in full force and effect. It was alleged that the coverage was $2,999; that, under the laws of Arkansas, appellee is entitled to be subrogated to the rights of Smith & Sandusky in the contract of insurance, and en-

titled to bring this action, and prayed judgment in the sum of $2,999.

The appellants filed answer, denying all the material allegations in the complaint, and further answered, stating that Smith & Sandusky made application to Matthews Investment Company for a policy of insurance covering any injury that might occur to an employee of said Smith & Sandusky at their mill at Dover, Arkansas, but that said application was made after Dean was injured on February 24, 1931. The answer alleged that Dean was injured a little after one o'clock, and it was after two o'clock when application was made to Matthews Investment Company for insurance, and was after Dean had been injured; that, by reason of such fact, no policy could be issued, either by its agent or itself, that would cover an accident that happened prior to the application. The appellants further alleged that said Matthews Investment Company was not authorized to issue policies of insurance, and their only authority was in accepting applications, which were to be submitted to the general agents for the issuance of a policy, and that, if said application was accepted, there has never been any policy issued on the same, and there was no policy in force and effect at the time Dean was injured; that there was no contract in force at the time of the injury.

The evidence showed that W. D. Eakes, administrator of the estate of W. L. Dean, recovered judgment against Smith & Sandusky in the sum of $17,500 for the administrator, and $7,500 for Mrs. Dean for her own use and benefit; that execution was issued and returned *nulla bona.*

There was a trial and judgment for appellee in the sum of $2,999, and this appeal is prosecuted to reverse said judgment.

The appellants earnestly insist that the judgment should be reversed, first, because the Matthews Investment Company was a mere soliciting agent with no authority either to issue policies or make any contract of insurance upon the payment of premium; second, that Dean was injured before application for insurance was

made by Smith & Sandusky. If appellants are correct in either of these contentions, the case should be reversed. Both questions, however, are questions of fact, and are to be determined from the evidence.

The burden of proof was upon appellee to show by the evidence that the Matthews company had authority to put the insurance in effect immediately, and the burden of proof was also upon appellee to show that this took place before the injury to Dean. The appellee introduced a certificate from the Insurance Commissioner of the State of Arkansas, which certified that A. J. Matthews and W. H. Norwood were licensed agents of the Consolidated Indemnity Insurance Company of New York for the insurance year from March 1, 1930, to March 1, 1931.

Mr. Norwood testified that it was his understanding that they had authority to receive applications and issue binders; that Smith, when he made application for the insurance, gave him a check for $100, which was the amount of premium charged, and witness told Smith at the time that the insurance went into effect as soon as the premium was paid, and that Smith then paid him the $100; that he, witness, had charge of the insurance business, and continued to have charge of it. Witness further testified that it was his understanding, through the field agent, that they could bind the risk that way. The field agent is a man who travels around for the general agents, E. B. & F. R. Bloom, of Pine Bluff, as their representative, and he came about every two or three weeks. When a policy is issued, it dates back to the time when the application was made; it dates from the application.

A. J. Matthews, a member of the firm of Matthews Investment Company, testified that it was his understanding that Matthews company had general authority to bind or to make the policy effective immediately.

J. G. Williams also testified that Matthews Investment Company had authority to put the insurance in effect immediately. He also testified that this authority was never disputed by anybody so far as he knew; that they had authority to bind until the policy was written.

Smith was told that the insurance was in effect immediately when he paid the premium.

This evidence was introduced without objection, and is not denied by any witness. Neither the field agent nor the general agents testified in the case. It therefore appears that there was substantial evidence from which the jury might have found that the Matthews Investment Company had authority to make the insurance effective immediately upon the payment of the premium.

It is contended, however, that Dean was injured before the application was made by Smith for the insurance. The testimony on this question is in conflict. Thurman Smith testified that he went to the insurance company's office about 11 or 11:30 in the morning; that in the office he met Mr. Norwood and another man whom he did not know. The insurance agents told witness the insurance would go into effect immediately, and he gave them a check for $100 in payment of premium. After he left the insurance office, he went to lunch, and after lunch went back to Burkles' Buick Company, where he had left his car, and when he got back it was about 1:30 or 1:40. They quit work at the mill at 12 o'clock and went back at 1 o'clock. According to Smith's testimony, it could not have been later than about 1 o'clock when he was at the insurance company's office, and paid the premium.

B. R. Dean testified that he was the son of the man that was killed, and that the accident occurred around two o'clock. Arley Skelton also testified that it was about two o'clock. He also testified that they were paid that day up until 2:30. This would indicate that the injury occurred about 2:30. George Carter testified that Dean was injured 15 or 20 minutes after 2 o'clock.

There was some other evidence in conflict with the above, but the jury found that the insurance was in effect before the injury. It is the province of the jury to pass upon the credibility of witnesses and the weight to be given to their testimony, and it cannot be said that there was no substantial evidence from which the jury could find that the insurance took effect prior to the injury.

This court has many times held that it is the province of the jury to reconcile conflicts which exist in the testi-

mony, 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. *Dixie Bauxite Co.* v. *Webb,* 187 Ark. 1024, 63 S. W. (2d) 734; *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 evidence in this case is not very strong on either proposition, but even heresay evidence, admitted without objection, should be considered and given its natural probative effect subject to any infirmative suggestion due to its inherent weakness, and may establish a material fact in issue, and sustain a verdict or judgment. *Mo. Pac. Rd. Co.* v. *Harding, ante* p. 221; 64 C. J. 230.

Appellants contend that the court erred in refusing to give its instruction No. 5 as requested, and erred in modifying the same. No. 5, as requested, in effect told the jury that, if they believed from the evidence that the Matthews Investment Company were local agents, and as such were to receive applications for policies of insurance, and did not have authority to issue policies, but only to take applications and transmit them to the general agents, then there was no contract, and the jury were told that they should find for the defendant. The court modified the instruction by adding the following: "Unless you find that the insurance company had expressly authorized the Matthews Investment Company to bind the insurance company in advance of the issuance of the policy."

The court did not err in adding this to the instruction, because there was evidence to the effect that the agents were given this authority, and this evidence was submitted to the jury for its determination, and, if it believed that authority had been given as claimed by the appellee, it had a right to so find, and modifying said instruction was not prejudicial.

The important questions in this case are questions of fact, and there is substantial evidence to sustain the verdict, and this court has no authority to disturb it.

The judgment is affirmed.

BANKS *v.* CORNING BANK & TRUST COMPANY.

4-3362

Opinion delivered February 12, 1934.

Buzbee, Harrison, Buzbee & Wright, for appellant.

Oliver & Oliver, for appellee.

MEHAFFY, J. The appellee filed suit in the Pulaski Chancery Court against the appellant, alleging that it is a banking corporation at Corning, Arkansas; that on January 12, 1932, in a case pending in the Pulaski Circuit Court, it recovered a judgment against said appellant in the sum of $29,432.52 with interest and costs; that on December 22, 1930, appellant, A. B. Banks, filed in the district court of the United States, Western Division of the Eastern District of Arkansas, his voluntary peti-

tion in bankruptcy, and was on said date duly declared to be a bankrupt; that J. K. Riffle is the duly qualified and acting trustee in bankruptcy of said estate; that Riffle has in his possession the sum of $2,800, the property of A. B. Banks; that no payments have been made on appellee's judgment against Banks; that A. B. Banks is insolvent; that the appellee has no legal remedy to subject said fund to the payment of its judgment, and, unless prevented by order of court, the said Riffle, as trustee, will pay said sum of money to A. B. Banks, to appellee's irreparable injury; that appellee has procured from the United States District Court permission to make the said J. K. Riffle, as trustee a party to this proceeding; appellee prayed for a temporary injunction enjoining J. K. Riffle, as trustee, from paying said sum of money to Banks, and that upon final judgment Riffle be directed to pay said sum to appellee.

A temporary restraining order was issued. The appellant filed motion to dissolve the restraining order. The motion alleged that the judgment obtained against him was obtained in the action wherein the complaint was as shown in exhibit A; that Banks was discharged in bankruptcy on March 1, 1932. A certified copy of the discharge was attached to the motion. Appellee was scheduled as one of Banks' creditors, and advised of the bankruptcy proceedings.

Exhibit A, above referred to, is a copy of complaint in the Pulaski Circuit Court, wherein the Corning Bank & Trust Company was plaintiff, and Vann M. Howell Company, John R. Hampton and J. J. Harrison were defendants. The complaint alleged that the Vann M. Howell Company was a corporation, organized under the laws of Arkansas, and had a paid-up capital of $600,000. It was further stated that money was loaned to the Vann M. Howell Company on November 29, 1929, for which a note was given for $15,000. Said note was renewed from time to time, the last date on which it was renewed being August 23, 1930; that the Corning Bank & Trust Company became insolvent on November 17, 1930. The Vann M. Howell Company owned stock in the Corning Bank &

Trust Company to the amount of $12,000, on which there was an assessment of 100 per cent. There was due on said note $16,233.33, and on the assessment of stock, including interest, $12,800. It is further stated that A. B. Banks and the other defendants named in the complaint were, during the months of September and October, 1929, the directors of the Vann M. Howell Company; that on September 27, 1929, by resolution of said board of directors, there was declared and made a cash dividend of 50 per cent., to be paid to the stockholders of said Vann M. Howell Company, said dividend to be paid as of October 1, 1929, in the total sum of $300,000; and that A. B. Banks was paid $150,000, said sums being paid on October 7, 1929; that, at the time of making the payment of said dividend, the Vann M. Howell Company had no net earnings or surplus of its assets over its liabilities, including its capital stock, out of which to pay said dividend, and that, despite the fact that it did not have such net earnings or surplus, the defendants wrongfully, unlawfully, negligently and wilfully made and declared said dividend, ordered it to be paid, and received for themselves the various amounts set forth, and to pay to the stockholders the balance of said dividend.

The Vann M. Howell Company filed petition in bankruptcy, and J. K. Riffle was appointed and now is trustee. The complaint then alleges that the trustee's attention was called to the wrongful payment above mentioned, and he was requested to institute suit; that defendants concealed the fact of the payment of said dividend, and neither the plaintiff nor those under whom its claim arose had any knowledge or notice of the payment until January 30, 1931.

The court entered a decree, stating that the cause was submitted to the court upon the complaint, upon a copy of the order of the Federal court giving permission to sue the trustee, upon motion to dissolve the temporary restraining order, together with exhibits to said motion, and upon the complaint filed in the Pulaski Circuit Court in the case of *Corning Bank & Trust Company* v. *A. B. Banks,* and upon the judgment rendered in said circuit court in said cause, and upon plaintiff's response

to defendant's motion to dissolve, and the stipulation entered into between the parties, and upon amendment to defendant's motion to dissolve, together with the response thereto.

This shows the evidence and documents considered by the court when he rendered his decree, and, upon considering these things, he entered a decree perpetually restraining the trustee from paying the money to Banks, and ordered and directed the trustee to pay to the Corning Bank & Trust Company the amount of money which should be credited on the judgment in the Pulaski Circuit Court.

Appellant contends for a reversal, first, because he claims that the money is exempt from liability or seizure under act 102 of the Acts of 1933 of the Arkansas Legislature. This question was not before the lower court, and therefore cannot be considered by us.

"The authorities are agreed on the proposition that the case on appeal must be decided on the same theory on which it was tried in the court below. Thus issues, which were treated in the lower court by the appellant as not involved, cannot be raised on appeal." 2 R. C. L. 183.

"The rule that questions not raised in the lower court will not be considered on appeal generally prevents a party from obtaining on appeal relief which was not asked for in the court below. Nor can it be set up for the first time that, in view of the allegations of the bill or complaint, or the prayer for relief, or because of waiver or abandonment in the trial court, or for other like reason, plaintiff was not entitled to the relief given him." 3 C. J. 694; *Warmack* v. *Zingg,* 179 Ark. 391, 16 S. W. (2d) 17; *Winfrey* v. *Peoples' Savings Bank,* 176 Ark. 941, 5 S. W. (2d) 360; *Jones* v. *McDowell,* 176 Ark. 986, 4 S. W. (2d) 949; *Burke Const. Co.* v. *Bd. of Imp. Dist. No. 20,* 161 Ark. 433, 256 S. W. 850; *Connelly* v. *Earl Frazier Sp. Sch. Dist.,* 170 Ark. 135, 279 S. W. 13; *White Co.* v. *Bragg,* 168 Ark. 670, 273 S. W. 7; *So. Ins. Co.* v. *Hastings,* 64 Ark. 253, 41 S. W. 1093.

Appellant, however, contends that the stipulation became evidence in the case, and that the pleadings will

be considered amended to conform to the proofs. It appears, however, from the record that the stipulation referred to was filed on November 30, 1932. The parties at that time could not have had in mind exemptions under act 102 of 1933, because that act was not passed until March 16, 1933, long after the stipulation referred to was filed. It clearly appears that the question of exemption under act 102 was never called to the attention of the trial court, and the trial court did not pass on this question, and it therefore cannot be considered here. Besides, the judgment sued on was long before the passage of the act, and the issues were made up before the act was passed, and it has no application to the facts in this case. But it is unnecessary to discuss or construe act 102, because, as we said, it was not an issue in the court below.

It is next contended by the appellant that Banks had been discharged from liability for the claim represented by the judgment. The facts with reference to A. B. Banks' receiving $150,000, paid as a dividend by the Vann M. Howell Company, are not disputed. We think the record shows conclusively that, at the time the resolution was passed and the dividend paid, the Vann M. Howell Company was hopelessly insolvent, and had no earnings out of which to pay a dividend; that this condition of the company, and the fact that it paid this dividend, was unknown to the appellee, and the record shows that it was concealed from it.

On the complaint filed in the circuit court, alleging fraud and misappropriation of funds, there was a judgment, and this judgment was considered by the chancellor in arriving at his decision in this case.

Appellant argues at length that the discharge of Banks in bankruptcy relieved him from liability. We do not agree with this contention of appellant. Whether the judgment taken by default after due service should have been different cannot be determined here. This is a collateral attack on a judgment apparently valid, and the judgment itself settled this controversy against the appellant.

We do not deem it necessary to review the authorities cited by counsel on both sides, but we hold that the

judgment which was considered by the chancellor is such that its obligation cannot be discharged or liability of Banks relieved under the bankruptcy act and decisions thereunder. See Bankruptcy Act, § 14, USCA, § 32, and decisions thereunder.

It is argued at length that the judgment was by default, and that Mr. Banks did not answer because he supposed that they were only seeking a judgment for the purpose of filing a claim in bankruptcy, and did not think a personal judgment was sought against him.

He had no right to think this or assume this attitude. He was served with summons, and he had the right to appear and contest the suit, and, since he did not do so, he cannot now complain.

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

WILSON *v.* STATE.

Crim. 3866

Opinion delivered February 12, 1934.

John P. Roberts, for appellant.

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

McHaney, J. Appellant was indicted in three counts jointly with Clifford and Gene Harback for the murder of Dolph Guthrie. In the first count they were charged with said murder in that they conspired to and did rob the First National Bank of Paris, and in doing so did kill and murder said Guthrie, a teller in said bank, by shooting him. In other words, all were charged with shooting Guthrie. The second count charges them with the same offense in the same way, except the actual shooting of Guthrie is charged to Clifford Harback, and that appellant and Gene Harback were accessories before the fact. The third count, after alleging the conspiracy to rob and the actual robbing of said bank as in the first and second counts, further charged that the offense was committed as follows: "the said John Wilson, Clifford Harback and Gene Harback, in carrying out said intentions and common purpose of robbing said bank and effecting their escape, and while executing the purpose of said conspiracy aforesaid, feloniously, wilfully and of their malice aforethought and for their own protection from arrest and attack by officers or other persons from arresting them, the said John Wilson, Clifford Harback and Gene Harback, or either of them, compelled and forced Dolph Guthrie, against his will and consent, to accompany them out of said bank from a place of safety to a place known by said John Wilson, Clifford Harback and Gene Harback to be a place of great danger and exposed the said Dolph Guthrie to said danger from said attack upon them, the said John Wilson, Clifford Harback and Gene Harback by officers or other citizens in arresting them and preventing their escape, it was apparent to the said John Wilson, Clifford Harback and Gene Harback that the said Dolph Guthrie would naturally and necessarily be exposed to death and likely to lose his life, compelled the said Dolph Guthrie to accompany them from said place of safety to said place of danger as a shield from said attack from said officers or other persons and Andy Connoughton, the city marshal of the city of

Paris, while attempting to arrest them, the said John Wilson, Clifford Harback and Gene Harback, and preventing their escape, and intending to shoot the said John Wilson, Clifford Harback and Gene Harback, the said Andy Connoughton accidentally, innocently and with no intention to injure the said Dolph Guthrie, he the said Andy Connoughton did shoot at them, the said John Wilson, Clifford Harback and Gene Harback, but did shoot, accidentally and unintentionally, the said Dolph Guthrie in and upon the head and body, from the effect of said wounds so inflicted, he, the said Dolph Guthrie, died on the 30th day of May, 1933, against the peace and dignity of the State of Arkansas."

Appellant was convicted under said indictment and sentenced to life imprisonment.

For a reversal of the judgment against him, appellant first says the court erred in refusing him a continuance or postponement from Monday to Wednesday. No formal motion was filed and no attempt was made to comply with § 1270, Crawford & Moses' Digest. The case was set for trial on August 24 for September 11, and, while it is true appellant was confined in the penitentiary, it is also true he was represented by counsel on August 24, and thereafter up to and during the trial. He had ample time to prepare his case for trial. Continuances and postponements of trials in criminal cases rest in the sound discretion of the trial court, and this court does not reverse for failure to grant them unless an abuse of discretion is shown. No abuse of discretion is shown in this case.

Appellant next says the court erred in not requiring the State to elect upon which count of the indictment it would go to trial. We cannot agree. Counts one and three charged appellant with murder in the first degree for the killing of Guthrie in different ways. Count two charged him with accessory before the fact to the murder of Guthrie. The statute, § 3015, Crawford & Moses' Digest, provides that: "An indictment except in cases mentioned in the next section, must charge but one offense, but, if it may have been committed by different modes and by different means, the indictment may allege

the modes and means in the alternative." The next section referred to gives a number of offenses that may be joined in one indictment. This court has frequently held that an indictment for murder may charge the killing in different ways in separate counts. See *Owens* v. *State,* 159 Ark. 505, 252 S. W. 25, where a number of cases are collected to the same effect. It is also the holding of this court and generally that it is permissible to charge one as principal and as accessory before the fact to murder in the same indictment, since they are only different modes of charging the same offense. *Lay* v. *State,* 42 Ark. 105; *Gill* v. *State,* 59 Ark. 422, 27 S. W. 598; 2 Bish. Cr. Pr., § 7. Therefore the court did not err in refusing to require the State to elect.

The final and most interesting assignment of error relates to count three of the indictment, to which a demurrer was interposed, and to an instruction based thereon. While there is some evidence tending to show that Guthrie may have been killed by one of the robbers, we prefer to base this decision on the assumption that he was accidentally killed by the town marshal. While the robbers were engaged in robbing the bank, the marshal, Andy Connoughton, thinking something was wrong, walked to the front door of the bank, shook the door and looked in. He met Mr. Wayne Cook and told him to get a gun. The robbers knew they had been discovered and hastened to leave the bank with their loot. One of them with a drawn pistol forced Guthrie to go with them. When they emerged from the bank the marshal ordered them to halt and fired at appellant, who returned the fire, wounding the marshal, who fired another shot after he fell. One, perhaps the first, of the shots by the marshal, killed Guthrie.

The question raised by the demurrer and the exception to the instruction is a new one to this jurisdiction, for we have never before, so far as the diligence of counsel and our own investigation discloses, had the precise point presented for determination. Other jurisdictions have. Appellant cites and relies upon the cases of *Commonwealth* v. *Moore,* 121 Ky. 97, 88 S. W. 1085, 2 L. R. A. (N. S.) 719, 123 Am. St. Rep. 189; *Commonwealth*

v. *Campbell,* 89 Mass. 540, 83 Am. Dec. 705, and *Butler* v. *Illinois,* 125 Ill. 641, 18 N. E. 338, 1 L. R. A. 211, 8 Am. St. Rep. 423; the two last cited being cited in the Kentucky case. The principle in all three is the same, and is this: A attempts to rob B. B, while resisting the attempted robbery, shoots at A and accidentally kills C who is an innocent third party. A cannot be convicted of the murder of C. The reason for the rule in such a case is stated in the Kentucky case as follows: "In order that one may be guilty of a homicide, the act must be done by him actually or constructively, and that cannot be unless the crime be committed by his own hands or by the hands of some one acting in concert with him, or in furtherance of a common object or purpose." We agree entirely with the principle announced in these cases, but cannot agree that the same principle is involved in this case. The facts are different. Here the robbers compelled Guthrie, over his objections and against his will to accompany them from a place of safety, so far as outsiders were concerned, to a place known by them to be a place of danger from those on the outside. They knew they had been discovered and apprehended danger from the outside, else they would not have taken Guthrie with them. They wished to use him as a breastwork, as it were, or they thought perhaps the outsiders would not shoot at them for fear of killing Guthrie. In doing this, they committed another crime, kidnapping, and caused Guthrie's death. "A person," says 29 C. J. 1077, "may be responsible for a homicide and guilty of murder, or manslaughter, according to the circumstances, in whatever manner or whatever means the death was caused, provided it was caused by his unlawful act or omission." Further on in the same section (54) it is said: "Defendant's act or omission need not be the immediate cause of the death; he is responsible if the direct cause results naturally from his conduct." Examples: exposing a helpless child to inclement weather; forcing a sick and weak sailor to go aloft; causing one to jump from a moving train. Note 29 C. J. 1079. Directing a blind man in a direction so that he walks off a precipice.

The case most nearly in point that has been called to our attention is *Taylor* v. *State,* 11 Tex. Cr. Rep. 564, 55

S. W. 961. There, the robbers stopped a train to rob the express car. They forced one of the trainmen, the fireman, to take a stand in a place of danger, where he was accidentally shot by a passenger who appeared on the platform of another car and began firing at the robbers. The court held "that, since the death of the fireman was directly caused by accused and the other robbers in placing him in a dangerous place, accused was liable, whether the shot was actually fired by him or the passenger." This holding was followed in the later case of *Keaton* v. *State,* 41 Tex. Cr. R. 621, 57 S. W. 1125, where Keaton, one of the trio of robbers with Taylor, was convicted of the same murder, which case was affirmed. The reasoning in these cases appears to us to be sound and unanswerable. The only difference between this case and those is that in this the robbers were using Guthrie as a breastwork in an attempt to escape, after having robbed the bank, whereas in the Texas cases they were using the fireman during the attempted robbery. This can make no difference, for the conspiracy to rob the bank had not been completed until they had made their escape. *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849; *Maxwell* v. *State, ante* p. 111. Having forced Guthrie to accompany them in an attempt to escape, another felonious act, and having compelled him to take a known place of danger, as they had already been discovered by the marshal and others, they must abide the consequences of their unlawful act, although the result was not intended. As stated in *Ringer* v. *State,* 74 Ark. 262, 85 S. W. 410: "If the act he intended to do was criminal, then the law holds him responsible for what he did, even though such result was not intended." In line with this is *Gilmore* v. *State,* 92 Ark. 205, 122 S. W. 493, where it was held that if "defendant struck deceased blows which caused him to fall from a wagon in which he was riding, so that a wheel of the wagon passed over his body and killed him, the jury were justified in finding that the blows were the cause of his death." While these cases are not directly in point, they are persuasive in the application of the principle here involved. Section 2339, Crawford &

Moses' Digest, provides: "The manner of the killing is not material, further than it may show the disposition of mind, or the intent with which the act was committed." Appellant's action in forcing Guthrie to a place which was known by him to be perilous was just as much the cause of his death as if he had himself fired the fatal shot. This action was murder at common law and is murder under the above statute.

Affirmed.

EVANS *v.* SEIZ.

4-3363

Opinion delivered February 12, 1934.

W. D. Swaim, for appellant.

A. D. Shelton, for appellee.

BUTLER, J. M. O. Evans, the appellant, sued Bill Seiz, the appellee, in the justice of the peace court for tearing down some signs he had erected along the highway on property belonging to the Gillham estate, and laid his damage in the sum of $45, which amount he recovered in that court. The case was appealed to the circuit court, where evidence was adduced on behalf of Evans tending to show that he had obtained permission from Mrs. Gillham to nail a sign on an old log truck near her premises; that he noticed one day that his sign was gone. He had a similar sign made and put on the truck, and this one was also torn down. Then he asked Buddy Gillham if he tore it down, and Buddy said, "No," and that it would be all right to put another back. Evans then had an iron sign made and firmly affixed it to the truck with eight-inch rivets, and this sign, too, was re-

moved. He then went to Buddy Gillham and said, "Bud, I believe you know who is tearing those signs down," and Bud answered, "I believe Bill Seiz is doing it." Evans then called Bill Seiz over the telephone and he admitted that he, or his agents, had removed the signs, but refused to pay for them.

On the witness stand Bill Seiz admitted that his agents had torn down these signs at his direction; that he had had a contract from year to year before the death of Mr. Gillham for the exclusive right to post signs on the Gillham property, and after Mr. Gillham's death he had made a like contract with Bud Gillham, the son of Gillham, deceased, and Mrs. Gillham, his widow; that he had given general directions to keep the premises clear of signs except his own, but that he had no actual knowledge of the removal of the first two signs belonging to Evans, and if he had he would have called it to Evans' attention and requested him to stop putting them up.

Buddy Gillham and Mrs. Gillham testified, corroborating the testimony of Bill Seiz. Bud stated, in addition to what he said in corroboration of the testimony of Seiz, that he told Evans when he first talked of putting up a sign that it would be all right if it was all right with Bill; that he would have to get Bill's permission. The testimony was to the effect that the contract between Bill Seiz and the Gillhams was an oral one, renewed from year to year.

The court submitted the case to the jury on the theory that the owners of the Gillham estate had the right to enter into a contract with Seiz, giving him the exclusive use of the property for the placing of signs or other advertising matter, and if he had such a contract and Evans, without his permission, placed his own signs thereon, Seiz had a right to remove them, and Evans therefore would not be entitled to recover damages because of the removal of the signs. The only objection interposed to this instruction was made by the attorney for the plaintiff: "I would like to request a modification of one of the court's instructions there—there is no lease of record to Bill Seiz." The court then stated he thought the instruction sufficiently stated the law, whereupon, Mr.

Swaim, the attorney, objected and excepted, "on the grounds that no mention was made to plaintiff of defendant's rights as lessee, and, unless the jury finds that the plaintiff had knowledge of the lease between the Gillham estate and the defendant as lessee, their verdict should be for the plaintiff."

The contract was shown to have been one to be performed within a year from its making, and was renewed from year to year, and it therefore was not necessary that it be in writing to be valid, nor was it necessary that the plaintiff be given notice that it had been made. We are of the opinion that the objections raised to the declarations of law are not tenable, and, as this is the sole ground upon which plaintiff bases his contention for reversal, the judgment of the trial court is affirmed.

PREAS *v.* PREAS.

4-3349

Opinion delivered February 12, 1934.

Martin, Wootton & Martin, for appellant.

Murphy & Wood, for appellee.

BUTLER, J. Dr. Hugh L. Preas, the appellee, brought this suit against his wife, Louise Lamb Preas, the appellant, on the 25th day of January, 1933, in the Garland Chancery Court. The complaint alleged grounds for divorce, to which the proof was directed, that his wife, immediately after marriage, "began a course of cruel and barbarous treatment towards him and continued such treatment, and offered such indignities to his person, as to render his condition intolerable, and that he, as a result thereof, was no longer able to live with her; * * * that she treated him with unmerited reproach, rudeness, contempt and open insult, habitually and systematically pursued, and that such conduct on her part rendered his condition in life intolerable, all without fault on his part." He prayed for a decree of absolute divorce, which prayer was granted by the chancellor upon a hearing of the case. From that decree is this appeal.

The contention of the appellant is that the proof fails to establish the grounds of divorce alleged. The appellee argues to the contrary, and further states as ground for affirmance that, from the decree, it appears that the testimony of a witness taken orally in open court was not preserved and incorporated in the transcript of the testimony, and that therefore the conclusive presumption follows that the evidence contained in the testimony of that witness must be deemed sufficient to sustain the findings and decree of the trial court.

There is presented for our consideration a record containing 760 pages of typewritten matter, most of which preserves the testimony of the witnesses, with the exhibits offered as part of the evidence. From the evidence, certain facts are proved about which there is no

dispute, and which are important in determining the main question presented in the case.

Dr. Preas and his wife, Louise, were both reared in Johnson City, Tennessee, a small city, we are informed, of not more than 5,000 inhabitants, one of those towns where everybody knows everybody else, and all their virtues or their vices. Both parties to this litigation were members of prominent families who had resided in Johnson City for many years. They were of equal social rank and universally regarded with esteem. Preas began to pay attention to Louise Lamb when she was a mere girl of not more than fifteen or sixteen years of age. He was perhaps ten years older than she. Prior to their marriage he had been a frequent visitor at her home and had paid her marked attention for at least a year and a half or two years. During this time she paid no attention to any other man and gave to Preas her full confidence and love, and he seemed to be devoted to her. He had the entree into her home at all times and enjoyed the perfect confidence of her father and mother.

Dr. Lamb, the father of Louise, was a retired physician, and about the time of the marriage was past fifty-five years old, and an invalid. Louise was a member of one of the churches of the city, in which she took a prominent part and was regarded with favor by the inhabitants of the little city. Preas appears to have also been regarded generally as a man of honor. He and Louise were married in the State of Tennessee on September 15, 1932, at which time Dr. Preas must have been about 28 years old and Louise about eighteen, if that old. After the marriage she stayed in the home of her parents for a few days, when Preas took her and established her in a hotel in a town nearby. He is a dentist, and continued to practice his profession in Johnson City. She remained in this hotel but a very short time, when Preas secured board for himself and wife in Johnson City, at the boarding house of a Mrs. Crockett. They remained there until about the 22d day of November, when Preas informed his friends that he was going to New York to enter the sanitarium of his brother, a physician residing in that city. He gave the sanitarium as his forwarding address,

and his mail was sent there. Instead of going to New York, however, he went directly to Hot Springs, Arkansas, and his mail was forwarded to him at Hot Springs from New York. It was his admitted purpose to establish a residence in Arkansas in order to take advantage of its ninety-day divorce law, and to bring this suit.

The greater part of the testimony was directed to the association of Preas and Mrs. Preas previous to their marriage, and to the events leading up to and bringing about the marriage on September 15th. This testimony we do not detail for the reason that it is immaterial and incompetent, except as it tends to explain the subsequent conduct of the parties. The testimony of Preas is to the effect that he was forced into marrying Louise Lamb by her father, who put him in fear of suffering bodily violence, and that he was falsely accused of improper conduct with Louise. These contentions of Preas are contradicted by the evidence adduced by his wife, the effect of which is that, when reproached for his conduct, Preas acknowledged his illicit relations with her, pleaded their approaching marriage, and that he was not threatened with any personal violence, but knew that he had violated the criminal statutes of the State of Tennessee and of the general government, and that he was liable to prosecution. About three or four days after this the marriage took place in the presence of the father of Preas and of Mrs. Lamb, the father of Louise not being present.

The evidence is undisputed that, while Preas and his wife were living in the boarding house, they both seemed unhappy. The girl was sick much of the time and was frequently seen in tears. Preas often took his meals away from the boarding house, and on occasion would leave his young wife alone and spend his week-ends away without her knowing where he was. From the date of his marriage until his clandestine departure from the State of Tennessee, he neglected his wife, gave her no presents or furnished her any money during the entire time. The extent to which his care extended was only to provide her a shelter and food. These facts, coupled with what happened just before the marriage, which we have related, viewed either as contended for by Preas or as testified

to by his wife and her parents, to our minds result in but one just inference, that is, when Preas married he never intended to conform to, and abide by, his marriage vows, whether they were taken because he was wrongfully accused of misconduct and threatened with personal violence or whether because he feared the penalties of the laws which he had violated.

Preas' sole ground for divorce is based on the allegations which we have quoted. We summarize and state his testimony tending most strongly to support these. It is to the effect that he told Louise that he did not have enough money, and did not see how they could get by on what he had and was making; that a few days after they moved to Mrs. Crockett's boarding house he saw his wife on the street one day with her mother; that he asked her later why she was with her mother, and she denied that she had been with her mother or that he had seen her; that several days later the mother came to the house and stayed with his wife most of the day; that the next day she came over again, and did so for three days while his wife stayed in bed complaining that she was sick and of having pains in her stomach, being nauseated and not able to be up; that at night, after they had retired, she would pinch and hit him so as to keep him awake, and that this caused him to get nervous and run down; that one night he told her that he was going to his father's home to get some sleep, and he did go, and was informed that on that night his wife began to call about 11:00 o'clock over the telephone, and called about every fifteen or twenty minutes, saying she was sick and couldn't sleep and wanted some one to see her or for a doctor to come; that his brother, Dr. William Preas, went over and gave her some medicine; that she would frequently come to his office and argue with him as to where he had been and would come back again within an hour or so "and start fussing again"; that she came in about three or four times in one day, and that night she kept him awake by hitting, biting and smacking him; that when he would get to sleep she would hit and pinch him, or do something else, and that she did this all the time they were at Mrs. Crockett's.

Witness said, "I got to where I was almost afraid of her. At times she would threaten to kill herself, and she had left me with the impression that when she did kill herself she would probably kill me, and I was afraid she would kill both of us. I had no peace of mind or body during the entire time I lived with her."

In corroboration of this testimony, Preas offered the depositions of Mr. and Mrs. Crockett and of a Miss Willie May White, his bookkeeper and office assistant, and Dr. Wm. Preas. Mrs. Crockett stated that Dr. Preas had paid board for himself and wife; that he did not take his meals regularly at her place; that "Dotty" (the name Preas was known by) was nervous and pale, and that he and his wife were indifferent toward each other, but they went out together some; that Dr. Preas spent some week-ends at her house with his wife and some he spent away; that she didn't really know whether most of his week-ends were spent with his wife or away from her; that, while Dr. and Mrs. Preas boarded at her house, Mrs. Preas was nervous and hysterical at times and cried a great deal; that witness called Dr. Preas several times for his wife when she was sick, and that her mother came over to see her when she was sick. On cross-examination, in speaking of seeing Mrs. Preas crying often, witness said: "We all cry sometimes, especially if our wives or husbands would leave us."

Mr. Crockett made about the same statement, but ventured the opinion that Dotty seemed to be a nice fellow, but that something was on his mind, and that he never saw the two kiss each other.

Miss White, Dr. Preas' office assistant, testified that, after his marriage, he seemed nervous, worried, pale and not able to attend to his patients at times; that he was not this way before his marriage; that the doctor's wife came to the office frequently and also called frequently over the telephone.

Dr. William Preas, testifying as to matters coming under his observation after the marriage, stated that his brother looked worried; that Louise would call for him at the Preas home four or five times, and one night he

was called four or five times to come to see her; that she was having nervous convulsions, and, when he reached her, he found her nervous and hysterical. "On some of these occasions, my brother would be there, and at other times not." In speaking of his brother's physical condition, he stated that it was bad, that he was nervous, restless, had lost weight and that he would come sometimes to their home in the afternoon and sleep.

Other witnesses for the appellee testified as to his general reputation, and that it was good.

It will be observed that the appellee's testimony is corroborated only as to the telephone calls and visits to his office, and that the personal indignities which he says he endured at the hands of his wife find no corroboration in the testimony of any witness. In order to justify a decree for divorce, it is a familiar rule that a decree will not be given on the uncorroborated testimony of a complainant.

It is the contention of the appellee that we must conclusively presume that his testimony is sufficiently corroborated to sustain the decree because it shows that a witness, one D. W. Parker, gave oral testimony in open court, and, in support of this contention, cites our rule stated in *Hardie* v. *Bissell,* 80 Ark. 74, 94 S. W. 611; *St. L., I. M. & S. R. Co.* v. *Bright,* 109 Ark. 4, 159 S. W. 33; *Harmon* v. *Harmon,* 152 Ark. 131, 237 S. W. 1096; *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374, and in numerous cases, that, where some of the testimony before the chancellor has not been brought into the record, this court must presume that such testimony was sufficient to sustain the decree.

We adhere to this rule, which was early announced and has been consistently followed, but it has no application to the facts in the case at bar. It might have been, and, as we shrewdly suspect, that the evidence of Parker related only to the residence of the appellee in Hot Springs, but, if it went to the merit of the case, given its greatest value and strongest probative force in favor of the appellee, it could only go to corroborate his testimony as to the alleged indignities he suffered. By no stretch of the imagination could this witness be presumed to

know more about what occurred in the privacy of the room of these married persons than the husband himself. Therefore, taking the testimony of Preas as literally true and fully corroborated by the testimony of Parker, it still does not sustain the allegations of his complaint, or make out a case for divorce under the 5th clause of § 3500 of Crawford & Moses' Digest, which reads as follows: "Where either party shall be addicted to habitual drunkenness for the space of one year, or shall be guilty of such cruel and barbarous treatment as to endanger the life of the other, or shall offer such indignities to the person of the other as shall render his or her condition intolerable."

In the early case of *Rose* v. *Rose,* 9 Ark. 507, the rule was laid down that, before this statute could apply, the conduct of the offending spouse must have been of such nature as to connote settled hate and a plain manifestation of alienation and estrangement, and must have been conducted habitually and continued through a period of time sufficient to show that conduct arose through settled malevolence and exerted to an extent as to render it impossible to discharge the duties of married life, resulting in such anguish of spirit as to make one's condition in life intolerable. The statute was an extension of the law as it then existed, and the court reluctantly recognized that extension.

In the case of *Kurtz* v. *Kurtz,* 38 Ark. 119, the court, adverting to the case of *Rose* v. *Rose, supra,* and discussing its interpretation of the statute, said: "It must be confessed that this position goes to the very verge of safety, and should be pressed no further. In applying it, the chancellors should act with great caution to avoid the gradual approach, by imperceptible steps, to the practice of holding all matrimonial bickerings by which parties may render each other unhappy, to be valid grounds of divorce. Where there are no fixed and well-defined barriers of principle, it is difficult to limit the encroachment of precedents, setting in one direction. Each so nearly supports the next that, before one is aware, the bounds of reason are passed."

In numerous cases following we have adhered to the limitations of the rule as suggested in *Kurtz* v. *Kurtz, supra.* In *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1, the following language is used: "So it may be said that the remedy of absolute divorce contemplated by this clause of our statute is for evils which are unavoidable and unendurable, and which cannot be relieved by any exertions of the party seeking the aid of the courts."

In *Pryor* v. *Pryor,* 151 Ark. 150, 235 S. W. 419, one of the grounds for divorce was the same as in the instant case, and the court, in passing on the sufficiency of the evidence to support it, concluded that, if the testimony of the complainant as to this ground was undisputed, it does not establish that there was any settled hate or any condition of enduring alienation and estrangement. We have many cases which follow and approve the rule announced. Among these are *Arnold* v. *Arnold,* 115 Ark. 302, 170 S. W. 486; *Poe* v. *Poe,* 149 Ark. 62, 231 S. W. 198; *Scales* v. *Scales,* 167 Ark. 298, 268 S. W. 9. The reason for the rule that the indignities must be so grave and so long continued as to go beyond the reach of mutual forbearance or forgiveness is that, not only the parties themselves, but society, has an interest in the maintenance of the marriage tie and the evils to be anticipated from granting divorces, except for the gravest reasons, should compel the persons to conciliate each other and suffer long before an attempt to sever the bonds of matrimony. In *Pryor* v. *Pryor, supra,* it is said: "Marriage vows are solemnly assumed, and should be sacredly kept. The interests of society demand that the bonds of wedlock should not be severed except upon clear proof of one or more of the grounds prescribed by our statute."

In the case at bar, there is nothing in the testimony of Preas tending to show that the acts of his wife complained of arose from any fixed malevolence or settled hate, but the proper inference is that her conduct was occasioned by a physical and mental condition caused largely by his own acts. From the very nature of things, there could not have been a course of conduct continued for a period of time sufficient to warrant an invocation of the statute. It will be noted that only 67 days elapsed

from the date of the marriage until the appellee's clandestine departure from his home and State for the purpose of bringing this suit. During that time it is not disputed that he spent a part of his week-ends away from his wife and practically all of his time during the day. Certainly, the interests of society demand that during a space of time so brief some duty would rest upon the husband to comfort an ailing wife, at least not to assume the right, because of her petulance through so short a period, to renounce the most sacred of all contracts.

Appellee's own testimony fails to bring his case within the rule we have cited, and, if it did, the evidence is clear that the appellee himself is not without fault. His neglect was sufficient, even in the mind of his landlady, to justify the tears of his young wife, and she had reason to expect some consideration. But she appears to have been ostracized by her husband's family with the sole exception of his brother, Dr. William Preas. It is undisputed that during this time she was sick, and every principle of honor and fair-dealing should have impelled the appellee to make some effort to soothe and comfort her. Where parties are equally at fault, the right of divorce should be denied. *Strickland* v. *Strickland,* 80 Ark. 451, 97 S. W. 659; *Healy* v. *Healy,* 77 Ark. 94, 90 S. W. 845; *Malone* v. *Malone,* 76 Ark. 28, 88 S. W. 840; *Arnold* v. *Arnold, supra.*

In determining, in any given case, whether the facts relied upon bring it within the statute, regard must be had to the peculiar circumstances of the case and the mental and physical condition of the party against whom complaint is made. This is recognized in the case of *Meffert* v. *Meffert, supra,* and, as we have seen, the condition of the wife, both as to her mental and physical state, was such as not to call for the coolness and neglect manifested by the appellee toward her, but rather for tenderness and forbearance.

We might add that the courts of Tennessee were open to this young man for redress of any grievance, and his surreptitious conduct and secret removal to this State to invoke the aid of our courts implies that he desired to gain an advantage over his wife, and manifests to us that

he had little real confidence in the righteousness of his cause.

The decree of the trial court is reversed, and the case dismissed.

ÆTNA LIFE INSURANCE COMPANY *v.* PERSON.

4-3361

Opinion delivered February 12, 1934.

Owens & Ehrman, for appellant.

Shaver, Shaver & Williams, for appellee.

BUTLER, J. L. K. Person brought this suit to recover damages for total and permanent disabilities under the terms of an insurance contract issued by the Ætna Life Insurance Company. In the trial court he was awarded by a jury the sum demanded, and, from a judgment based thereon, comes this appeal.

There is no dispute as to the existence of a valid insurance policy. It contained a clause providing for the payment of a monthly benefit in the event the insured should become totally and permanently disabled so as to prevent him from performing any work or conducting any

business for compensation or profit. On this clause the suit is based, and the sole question for our determination is as to whether or not the condition of the insured brings him within the terms of this clause.

The policy was issued in 1924, and between that time and January 1, 1927, on a date not disclosed, it was discovered that the insured had contracted active tuberculosis. On the last-named date he notified the company of this, made claim for the disability benefits, and was paid the same from month to month until August 15, 1928, when the last monthly benefit payment was made, including the month ending September 15th, following. On August 15, 1928, the insured wrote the insurer to the effect that he was going back to work, and stated that when he wrote this letter he knew that on its receipt by the company no other monthly benefit payment would be made. Under the contract, the premiums were waived during the continuance of the disability of the insured, but after the 15th of August, 1928, he resumed the payment of the premiums so that the policy was in full force and effect on May 13, 1932. On that date he wrote a letter to the company telling of his having attended court and of hearing the trial of a certain lawsuit involving a claim for benefits for total and permanent disability under a contract similar to the one he had. He also referred to some cases which had been decided by the Supreme Court, and stated that he had reached the conclusion that he was then totally and permanently disabled, and had been so at all times since August 15, 1928, and was entitled to monthly disability payments from that time. The company disagreed with his contention, and he brought this suit.

At the close of the testimony, the defendant insurance company requested the court to direct the jury to return a verdict in its favor. The court denied this request. The refusal to instruct the jury as requested is the principal ground for reversal urged, and, in view of the conclusion we have reached, it is the only question necessary for us to determine. We must view the evidence in the light most favorable to the appellee, and give to it its strongest probative value, and, if there is any evi-

dence of a substantial nature to sustain the allegation of appellee's complaint, the judgment must be affirmed.

It is admitted that, since August 15, 1928, appellee has been, and is now, able to do and perform many of the duties appertaining to the vocation in which, by training and experience he has been, and is now, engaged. But it is his contention that, notwithstanding this, he is totally and permanently disabled within the meaning of our cases. Those cited are: *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. (2d) 407; *Mo. State Life Ins. Co.* v. *Holt,* 186 Ark. 672, 55 S. W. (2d) 788; *Ætna Life Ins. Co.* v. *Spencer,* 182 Ark. 496, 32 S. W. (2d) 310; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335. In these cases, and many others, we are committed to the doctrine that the clause in insurance policies relating to total and permanent disabilities which prevent the insured from engaging in any business for compensation or profit is not susceptible to the strict and literal construction for which the insurers have contended, but rather should have a liberal and rational interpretation so as to render effectual the purpose for which the insured entered into the contract, namely, to insure him against those conditions which, under ordinary circumstances, would so disable the usual person as to prevent him from successfully engaging in an occupation for which he is fitted. To be thus totally and permanently disabled, the inability to perform any necessary act of the work is not required; the contingency contemplated is that, where the condition renders the insured unable to perform all of the essential acts of any calling, for which otherwise he might be fitted, in the usual and customary manner, then he is totally and permanently disabled within the meaning of the insurance contract.

The foregoing is the essence of the rule enunciated in the cases cited *supra,* by the appellee, and in *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457; *Missouri State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 585; *Mutual Benefit, etc., Ass'n* v. *Bird, Id.* 445, 47 S. W. (2d) 812; *Travelers' Protective Ass'n* v. *Stevens,* 185 Ark. 660, 49 S. W. (2d) 364; *Mutual Life Ins. Co.* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433.

A comparison of the activities of the appellee prior to the time he contracted tuberculosis and those in which he has been engaged since August 15, 1928, shows no substantial difference, and is helpful in disposing of the question before us. The evidence is undisputed in all of its essential particulars, and, as related to the matters we are now considering, is derived from the testimony of the appellee himself, and of the witnesses introduced in his behalf. It shows that in 1914 he became the manager of an estate belonging to his mother, his two sisters and himself. This estate consisted of three farms, two situated above Garland City, and one below. The three farms contained a large acreage in cultivation. The appellee lived at Garland City, where, in addition to managing the estate, he conducted a mercantile, gin and cotton seed business. He had an assistant manager residing on one of the farms above Garland City and another manager living on the farm below. Appellee maintained general supervision of the three farms, and would sometimes ride horseback as much as forty or fifty miles a day. These activities were continued down to 1927, at which time he went to Texas for treatment for his disease and took "the rest cure" for about two years.

On or about August 16, 1928, appellee became the owner of a hardware business in Garland City, which he conducted. This business proved unprofitable, and within a few months he closed it out. In the first part of 1929 the Person estate was divided, appellee receiving for his part about 650 or 700 acres of lands in cultivation. It was some distance from Garland City to this farm, and for that reason he built a home upon it and moved therein, and established a commissary there. About the time he took charge of the farm he derived from the division of the estate he purchased another farm, containing about 500 acres in cultivation. This farm, when purchased, was already rented out for the year 1929, and the tenants furnished themselves and attended to the selling of the cotton, sending to the appellee checks for the rent. During this year he went to this farm occasionally—he calls it the "upper place"—and farmed his lower place himself. On this place the commissary was built in the center of the field,

He used an automobile, which he drove himself, in overseeing the making of the crop and during the picking season. He testified that he did not remember how often he went over the farm. In 1929, on his lower place, he raised over 400 bales of cotton. No mention is made of other crops that he raised. In 1930, on the upper place, he rented out approximately 175 or 200 acres and operated and furnished the remainder himself, comprising about 250 acres. He also attended to the farming operations on his lower place during that year. He estimates that the entire acreage he operated was about 800 acres. In 1931 he went ahead, cultivating about the same acreage himself as in 1930. In that year he purchased two tractors to be used on his farms, which enabled him to reduce the number of tenants. In addition to his farming activities, and in connection therewith, he furnished his tenants and farm laborers from his commissary. He bought the merchandise, kept the books, knew how much each tenant owed, and decided how much he would furnish each one. He speaks of a Mr. West, who apparently worked for him, but whose duties are not definitely stated further than that "a good deal of the management was left up to West," upon whom appellee depended partly to keep check on picking, gathering and ginning of the cotton, and upon whose judgment he would sometime depend on letting tenants have supplies. Appellee kept close track, however, of everything that was done.

In addition to the activities mentioned, appellee in 1930 and 1931, acted as a receiver for the Mid-South Cotton Association, which handled about five or six hundred bales in 1930 and a little less the next year. During these years, down to, and including, the cotton season of 1931-1932, appellee also classed and bought cotton. He began the study of law during his illness, and in January, 1933, was licensed to practice. At the time of testifying he had attended to a number of cases in the justice court, and had some cases pending in the circuit court of the county. At that time he had not opened an office at Texarkana, but intended to do so within a short time. Appellee is an educated man, having had seven years of college training.

Regarding his health during the time we have been discussing, appellee stated that he had an arrested case of tuberculosis; that the last time he had a temperature due to his tubercular condition was either in 1928 or 1929, but that he had not had a check-up by doctors since that time, and that, although he himself has technical knowledge, he has not made, since the time mentioned, any definite check-up on himself; that during the interval between the cessation of payment of disability benefits and his present demand he had been ill two or three times, probably with "flu" or some other minor illness, and had probably had Dr. Cook or Dr. Youmans come to see him; that he would occasionally, when he met doctors in a social way, get advice from them, but, as he had attended lectures on the subject of tuberculosis, he knew how to take care of himself. He stated that he had not ridden a horse in the management of his farms since 1928, but that he could still ride, and has no physical disability which keeps him from doing so; that at times he would run a small degree of temperature, but not sufficient "to knock him out"; that during the fall of 1932 he was knocked out on several occasions. He stated that in 1930 and 1931 he raised a considerable less amount of cotton than in 1929; that the crop of 1932 was practically a failure because of a hail storm, but that during all these years he raised other crops than cotton, such as corn, hay, etc.

Several witnesses, neighbors, friends and kinsmen of the appellee, who were familiar with his activities during the years 1929-1931, inclusive, stated that, in their opinion, he could not do his work as he had before. One witness said he did not seem to be able to ride a horse or to superintend personally the operation of his farm. Several of these witnesses stated that they had seen from time to time physicians at the home of the appellee, but it appears they were not advised who these physicians were attending, whether the appellee or some member of his family, or from what ailment the patient was suffering.

Several physicians testified on behalf of the appellee, all of whom stated that he had an arrested case of tuberculosis. This, as defined by one of them, is a condition

where one who has had active tuberculosis becomes "free of all symptoms and evidence of the disease." Dr. Decker Smith, called by the appellee, stated that a week or ten days before testifying he had examined the appellee and found the condition of arrested tuberculosis; that there were no symptoms of active tuberculosis at all, and that his temperature and pulse were normal; that appellee had told him that he had been pronounced well by doctors in the summer of 1928, and that, in witness' opinion, appellee could go ahead in the general supervision of his farms, operate the commissary, look after his tenants and do that kind of work without harm to him. The other physician called by the appellee was Dr. Kosminsky, who stated that he had, within the year before testifying, examined the appellee and found that he had an arrested case of tuberculosis, and it would be questionable whether one who had led an active life managing a large plantation, riding 25 to 30 miles a day, would be able, after an active tubercular case had become arrested, to do that work again and follow it as he had done before. Witness stated that he had examined appellee on June 16, 1928, and had found no active tuberculosis present; that he had given a statement at that time containing the following: "I see no reason why he could not supervise and attend to ordinary business that requires no manual labor." He stated further that, when he last examined the appellee, he found approximately the same condition as five years before, that is to say, he had an arrested case of tuberculosis. One other physician testified regarding appellee's condition. He was called at the request of the appellant, and his statement as to appellee's condition was practically the same as that of the other physicians whose evidence has been referred to.

The only claim made by the appellee as a reason for his contention that he is totally and permanently disabled was merely that he had at one time had active tuberculosis and that he now has an arrested case. But nowhere in the testimony is there any substantial evidence to the effect that appellee's physical condition has prevented him from doing all the acts of his vocation in the usual and customary manner. It is true, the evidence indi-

cates that he has occasionally been ill since August 15, 1928, but it is evident that these were only temporary indispositions and not connected with the disease from which he had suffered and which for a time had disabled him, and, notwithstanding the opinion of some of his neighbors and friends, the evidence is convincing that he has in fact managed his business with the same ability as before he was stricken with active tuberculosis. His vocation did not require any manual labor or extraordinary exertion. Whether or not he was able to ride horseback 25 or 30 miles a day is unimportant, since the evidence shows that he was able to, and did, supervise his plantations without having to ride a horse. It is a matter of common knowledge that, while about 1914 a good saddle horse was a necessary adjunct to the management of any well-regulated plantation, the cheap automobile has made the use of a horse in the supervision of farms obsolete, and plantation managers now supervise the work in light cars more efficiently than it was possible to do by the use of a horse. The evidence is undisputed that, not only was appellee able to manage the farms in the usual and customary manner, but was able to, and did, engage in other lines of business without hurt to his physical condition.

The general object of contracts similar to that involved in this case is to give to the insured indemnity for the loss of time because of a disability which prevents the prosecution of his business, and the evident purpose is to provide a means of living during the time the insured is unable to engage in any gainful occupation. As we have stated, disability exists within the meaning of the contract when the insured is able to accomplish only some of the duties essential to the prosecution of his business, and where he is able to perform only occasional acts. If he is unable to do any substantial portion of the work connected with his vocation, this is sufficient to establish total disability; or where the work he is engaged in is of such character that common care and prudence require him to refrain from its performance because of any ailment he may have. Total disability, however, as we have frequently held, is of necessity a relative matter, and must depend on the peculiar circumstances of every case as it

arises. It depends largely upon the occupation and the capabilities of the person under disability, all of which should be considered; for one, because of his limitation, might be totally disabled from an ailment which would be but a slight hindrance to another in the performance of his vocation.

In the case at bar, the appellee is a man of education, who has never engaged in manual labor, nor does his business require it, or indeed any great physical exertion, or necessary exposure to inclement weather, or any other act which might reasonably be expected to bring about a recurrence of his tubercular condition. It is clear that the undisputed evidence in this case fails to bring it within the rule of total and permanent disability enunciated in the cases cited by the appellee or those to which we have referred. It follows therefore that the trial court should have complied with the request of the appellant and directed a verdict in its favor. For this error, the judgment is reversed, and, as it appears that the case has been fully developed, the same is here dismissed.

KIRBY, J., dissents.

BLACK *v.* WADDELL.

4-3372

Opinion delivered February 19, 1934.

Isaac McClellan and *Woodrow H. McClellan,* for appellant.

S. J. Reid and *D. E. Waddell,* for appellee.

JOHNSON, C. J. The State of Arkansas, on relation of its Attorney General, procured to be entered in the Grant County Chancery Court on September 17, 1932, a decretal

order and judgment, quieting and confirming its tax title to the northeast quarter of the northeast quarter of section 33, township 5 south, range 13 west, lying and being in Grant County. This proceeding was authorized by act 296 of 1929, and the proceedings had and done thereunder were in full compliance therewith.

On January 14, 1933, appellant intervened in said cause, and filed therein his verified motion, setting forth that he was the true and lawful owner of said tract of land, and had no knowledge of the pendency of said confirmation suit until subsequent to the decree; he further alleged, as a meritorious defense thereto, that the forfeiture and sale sought to be confirmed by the State was void or voidable for a number of reasons, and that said decree should be vacated, and he be permitted to redeem. On hearing of appellant's motion, it was stipulated, or tacitly admitted, that appellant was the true owner of the tract of land on the date of the forfeiture and sale to the State, and that the forfeiture and sale to the State was voidable for a number of reasons. Therefore it is not necessary to here set out these reasons in detail.

One J. E. Waddell responded to appellant's motion as follows: "That on September 29, 1932, respondent had donated the tract of land from the State and had received a deed thereto, which deed was exhibited with his response; respondent denied that appellant had no knowledge of the pendency of the confirmation suit prior to the rendition of the decree, and therefore prayed that his title be quieted and confirmed as against appellant." On hearing, the chancellor quieted and confirmed appellee's title as against appellant as follows:

"The court finds that the said O. E. Black had knowledge of the pendency of the suit to confirm the northeast quarter, northeast quarter, section 33, township 5 south, range 13 west, and he is not entitled to recover on this tract, and his petition and complaint are hereby dismissed for want of equity, and the donation certificate of J. E. Waddell is upheld by the court and a writ of assistance is hereby ordered to dispossess the said O. E. Black and place the said J. E. Waddell in possession, to which de-

cree and ruling of the court the said O. E. Black prayed an appeal to the Supreme Court, which is granted."

Thus it definitely appears that appellant's motion to redeem and vacate was denied by the chancellor because appellant, in fact, had knowledge of the pendency of the confirmation proceedings prior to the rendition of the decree. Section 9 of act 296 of 1929 provides: "The owner of any lands embraced in the decree may, within one year from its rendition, have the same set aside, in so far as it relates to the land of the petitioner, by filing a verified motion that such person had no knowledge of the pendency of the suit, and set up a meritorious defense, etc."

Appellant's verified motion strictly complied with and conformed to, the letter and spirit of § 9 of act 296, and, whatever doubts which might arise in reference to his right to vacate the decree and redeem, are made to appear from appellee's response.

We think the clear intent and meaning of § 9 of act 296 is to grant to the true owner, one year from the date of the confirmation decree, in which to assert any defenses which might have been available to him prior to the decree, and that this right is conditioned only upon his ability to show that the tax sale or forfeiture to the State was void or voidable. Since § 9 of act 296 is construed to be an extension of one year of grace to the landowner, conditioned only upon his ability to show that the tax forfeiture or sale was void or voidable, it necessarily follows that it is immaterial whether or not he had actual or constructive notice of the pendency of such suit.

It follows, from what we have said, that appellant has the right under § 9 of act 296 of 1929 to redeem his lands upon paying the accrued taxes thereon.

To that end the case is reversed, and the cause remanded to the Grant County Chancery Court, with directions to enter a decree allowing appellant to redeem.

NORPHLET SCHOOL DISTRICT NO. 50 *v.* EL DORADO SPECIAL SCHOOL DISTRICT NO. 15.

4-3352

Opinion delivered February 19, 1934.

Coulter & Coulter, for appellant.

Coleman & Riddick, for appellee.

JOHNSON, C. J. Invoking equity jurisdiction, this suit was instituted by appellant against appellees, El Dorado Special School District No. 15, and the county treasurer of Union County, Arkansas, seeking an injunction restraining said treasurer from paying over to appellee district $8,685.16, to the end that said sum may be finally determined the property of appellant.

The material allegations of the complaint and amendment thereto were as follows: "Second: That, under a certain order and decree of the Garland Chancery Court made and entered on August 6, 1929, there was recovered from the Lion Oil Refining Company, as overdue taxes, the sum of $25,000, $8,685.16 of which was due the plaintiff herein as its distributive share of said fund; that on August 16, 1929, the said sum of $8,685.16 (together with other sums not here involved) was paid to T. L. Burnside as treasurer of Union County, Arkansas; that said sum, as above stated, was the property of plaintiff herein; that it was paid on properties located in said plaintiff district, and not on property any part of which was located in said defendant district; that said sum was arbitrarily credited to defendant, El Dorado Special School District

No. 15, and that said defendant district still holds and retains said fund to the damage of the plaintiff in said amount.

"Plaintiff states that the question of the distribution of the fund involved in said suit was not an issue raised in the pleadings (in the Garland Chancery Court); that neither it nor the defendants were parties to the cause of action in which said decree and order were entered; that it knew nothing of said decree and order until long after the period of appealing therefrom had expired; that the order allotting any portion of the fund involved to defendant school district was solely under an *ex parte* proceeding, without notice to plaintiff, and without any foundation in fact to support it, and without validity or effect, and wholly inoperative to adjudicate the rights of the parties hereto; and that the parties to this action all reside in Union County, and that the fund in controversy is on deposit with the treasurer of this county."

To the complaint, as thus amended, appellees interposed a general demurrer, which was sustained by the trial court, and this appeal is prosecuted to reverse the decree dismissing appellant's complaint for want of equity.

It will be noted from the allegations of the complaint that the sums sought to be recovered accrued by reason of a certain suit prosecuted in the Garland County Chancery Court, wherein the State of Arkansas was plaintiff and the Lion Oil Refining Company was defendant.

It was determined in that case: "It is therefore by the court considered and ordered that the said special counsel do pay over to the respective treasurers of the several funds the appropriate amounts due thereunder, according to the tax rate applicable for the year 1928, to which the court doth find each entitled, the following sums of money, to-wit: * * *

"To Thad L. Burnside, county treasurer of Union County, for county and school purposes, $12,545.23, to be credited as follows:

"12.	County Gen. Fund	@ 5 M.	$ 2,412.55
"13.	Road Fund	3 M.	1,447.52
"14.	City of El Dorado	18 M.	8,685.15
"15.	Total to County Treasurer		$12,545.23"

The suit referred to in the Garland Chancery Court was an overdue tax proceeding, which was authorized by §§ 10,204 to 10,214, Crawford & Moses' Digest of the laws of Arkansas.

In conformity with § 10,208 of Crawford & Moses' Digest, the Garland Chancery Court decreed the amount due the State, county, school districts and municipalities, and directed payment thereof accordingly.

Appellant's first insistence is that § 10,208 was impliedly repealed by § 5 of act 157 of 1923, which provides: "All moneys collected under the provisions of this act, less the compensation of special counsel fixed under section two (2) hereof, shall be paid over promptly to the State Treasurer, who shall issue his receipt therefor."

To determine the significance of § 5, it is necessary to determine the scope of the whole of act 157 of 1923.

Section 1 of said act provides: "That when there shall be past due and unpaid any special license fee, franchise tax, privilege tax or other moneys due the State, by individuals, officers, companies, firms or corporations, etc."

Section 2 of said act provides for compensation for special counsel employed in the prosecution of suits under said act.

Section 3 provides the venue of suits prosecuted thereunder.

Section 4 gives to the Attorney General discretion in effecting compromises in cases brought under provisions of said act.

Section 6 provides: "All laws and parts of laws in conflict herewith are hereby repealed, except that this act shall not be so construed as to repeal §§ 10,204 and 10,214, both inclusive, of Crawford & Moses' Digest, nor act 194, approved March 20, 1915."

Section 7 is the emergency clause.

From the synopsis given, it is seen that act 157 of 1923 deals with an entirely different subject to that dealt with under §§ 10,204 to 10,214 of Crawford & Moses' Digest. The sections of Crawford & Moses' Digest referred to deal exclusively with general taxes due the State, county, school districts and municipalities because of under valuations in assessments. On the other hand, act 157 of 1923 deals exclusively with special license fees, franchise taxes, privilege taxes or other moneys due the State, etc. Thus it appears that act 157 of 1923 does not impliedly repeal the sections of Crawford & Moses' Digest heretofore referred to.

Repeals by implication are not favored. *Crittenden* v. *Johnson,* 11 Ark. 103; *Eason* v. *State,* 11 Ark. 496; *Carpenter* v. *Little Rock,* 101 Ark. 238, 142 S. W. 162; *Jones* v. *Oldham,* 109 Ark. 24, 158 S. W. 1075; *Eubanks* v. *Futrell,* 112 Ark. 437, 166 S. W. 172.

Moreover, § 6 of act 157 of 1923 specifically exempts §§ 10,204 to 10,214, both inclusive, of Crawford & Moses' Digest, from the operation of said act, thereby evincing a legislative determination not to repeal said sections, but to leave them in full force and effect.

Since §§ 10,204 to 10,214 of Crawford & Moses' Digest were not repealed by act 157 of 1923, it necessarily follows that the Garland County Chancery Court had jurisdiction of the parties and subject-matter in the case there pending, and had full power and authority to designate and determine to what subdivisions of the State said funds belonged. This was a question of fact to be determined from the testimony then and there introduced, and its determination and decree cannot be attacked collaterally. *Hall* v. *Morris,* 94 Ark. 519, 127 S. W. 718; *Campbell* v. *Jones,* 52 Ark. 493, 12 S. W. 1016; *Crittenden Lumber Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836.

It follows from what we have said that the decree must be affirmed.

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

4-3443

Opinion delivered February 19, 1934.

R. V. Wheeler, for appellant.

Hal L. Norwood, Attorney General, and *Edward Bennett,* for appellee.

SMITH, J. The only question involved on this appeal is: "What fees were the sheriffs of the State entitled to for collecting the 1932 automobile license taxes?"

The statute then in force, which imposed the duty of making the collection upon the respective sheriffs of the State, was act 65 of the Acts of 1929, page 264. We must therefore look to this act for the answer to the question stated, as it is conceded, of course, that only those fees may be charged which are authorized by law.

Section 24 of act 65 fixes the fee for the registration and licensing of all motor vehicles subject to the tax. Section 28 of the same act provides that these fees "shall be for each calendar year, beginning January 1, 1929," with the provision that, "if such registrations and licenses are issued after June 30 and prior to September 30, the charge shall be one-half of that for the calendar year. If such registrations and licenses are issued after September 30, the charge shall be one-fourth of that for the calendar year."

By § 29 of this act it is made the duty of the State Highway Commission to furnish, on or before January 1 of each year, to the sheriffs of the various counties of the State application blanks for the registration of motor vehicles, the blanks to be prepared in such form as may appear to the Commission to be necessary to properly carry out the provisions of the act, and that said blanks

shall bear serial numbers. These blanks were to be charged to the sheriffs in the same manner that poll tax receipts are charged to the collectors by the State Auditor. These blanks were to be accounted for by the sheriffs, who were to be charged for those issued or not returned. It was provided that: "There shall be printed upon such application blank a receipt to be filled in and signed by the sheriff of the county," upon issuance.

By § 30 of the act it was provided that the applicant shall deliver the application and receipt therefor to the State Highway Commission, and, "* * * if said Commission finds that said application is in proper form, * * * and the proper fees paid therefor, it shall be its duty to issue such applicant a registration card and a registration plate or set of registration plates, as the Commission may require, bearing the number that has been assigned such motor vehicle." A penalty was imposed upon owners of cars who failed to pay the proper fee within the time limited for payment, one-third of which was to be retained by the sheriff making the collection thereof. It is provided that "the sheriff of each county shall retain for his services, in addition to his salary as such sheriff, thirty-five cents out of each license collected by him."

Section 31 of the act required each sheriff "to pay into the State Treasury, to the credit of the State Highway Fund, all moneys received by him under the provisions of this act, less the amount authorized to be retained by him, not later than the second Monday of the following month."

At the beginning of the year 1932 the State Highway Commission, with the approval of the Attorney General of the State of that action, as being authorized by law, adopted a policy of permitting the license fees to be paid by the owners in quarterly installments, instead of requiring the entire fee to be paid in advance. In the biennial report of the Attorney General for the years 1931-1932 there is published an official opinion by the Attorney General to one of the sheriffs of the State, advising that these fees might be collected in quarterly installments, but advising also that the entire fee for the completed collection would be only thirty-five cents.

Various sheriffs and, among others, the sheriff of Jackson County, proceeded to make quarterly collections of this annual license fee, such collections being made in the first, second and third quarters of the year, and in his annual settlement the sheriff sought to take credit in the sum of thirty-five cents for each of these installments, and he has appealed from a judgment sustaining a demurrer to the answer filed by him, alleging his right to such credit in a suit brought against him by the Attorney General. The purpose of this suit was to require settlements by the sheriff after taking credit for only thirty-five cents on account of the collection made from each owner. The sheriff had made full settlement and payment of his collections, except for this fee, and, as has already been said, this contention presents the only question in the case.

In our opinion, the demurrer to the answer was properly sustained. Although payment was permitted in installments made prior to the last quarter of the year, only one license was collected from the owner paying the tax, and for such service as was rendered by the sheriff in this connection he was allowed the sum of thirty-five cents, and that only. There is involved here no question about penalties collected from owners who had failed to pay, or the fees for collecting such penalties.

If it be conceded that the Highway Commission had the authority to permit installment payments made prior to the last quarter of the year of the automobile license fees, the fact remains that only one fee was collected, and only one charge for the collection was authorized by the statute. It is the statute which authorized and fixed the fees of the sheriff, and no action of the Highway Commission could enlarge the statute in this respect. If, under § 28 of the act, the owner was liable for only a half-year's tax, or for a quarter year's tax, the sheriff would have the right to charge thirty-five cents for such collection, this being true because this was the whole amount of the tax due when the collection was made. But, in whatever quarter of the year the collection may have been made, and whether in installments or in the full amount of the fee in a single collection, only one fee can be charged,

because only one fee is authorized by the statute for the entire service which the sheriff is required to render.

The demurrer to the answer was therefore properly sustained, and the judgment must therefore be affirmed, and it is so ordered.

STANDARD OIL COMPANY OF LOUISIANA *v.* RICHERSON.

4-3307

Opinion delivered January 29, 1934.

T. M. Milling and *Gaughan, Sifford, Godwin & Gaughan*, for appellant.

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

SMITH, J. This appeal has been prosecuted to reverse a judgment recovered by appellee upon the following testimony. Appellee and other employees of appellant, a corporation, were engaged in setting up a boiler. In raising the boiler from the ground they were furnished a block of wood about 10 by 12 inches and 2 feet long, which block of wood was used as a fulcrum, upon which there was placed a joint of 4-inch pipe about 20 feet long and weighing about 200 pounds. The earth was sandy where the block was placed, and it was pressed to some

extent into the earth. After the pipe, which was referred to by the witnesses as a pry or "mope" pole, had been placed on the block, and one end of the pipe under the boiler, fellow employees of appellee placed their weight at the other end of the pipe and pulled down to lift the boiler. It was the duty of Bill Williams, another employee, to place the block of wood securely under the pry pole to keep it from slipping. There was testimony to the effect that Williams negligently failed to perform this duty by releasing the block and permitting it to slip, thus throwing the pole and the weight which it supported upon appellee's foot, thereby inflicting a painful, serious and permanent injury.

Under the facts stated, a case was made for submission to the jury, and, as the instructions given have not been set out, it will be conclusively presumed that the issues of fact were submitted under correct declarations of law.

In its answer, the defendant pleaded a contract with the plaintiff, whereby he agreed that, if he should ever receive an injury while employed by defendant, he would accept in full settlement of any claim for damages the amount provided for a similar injury under the Workmen's Compensation Law of the State of Louisiana. The court refused to permit the introduction of this contract in evidence, and that ruling is assigned as error. Of this contract, counsel for appellant say: "The question of the validity of this contract in the courts of Arkansas has been submitted for decision in this court in the case of *Standard Pipe Line Company, Inc.*, v. *W. M. Burnett*, No. 3245, which case, at the time of the writing of this brief, has not yet been decided. We respectfully refer the court to the argument and authorities cited in the brief of the Standard Pipe Line Company, Inc., in the Burnett case."

The brief referred to was prepared by counsel here appearing, and, since that brief was written, the Burnett case to which reference was made has been decided, and it was held that the contract was not enforceable in the courts of this State. For the reasons inducing that hold-

ing, reference is made to the opinion delivered December 18, 1933, in the case of *Standard Pipe Line Co.* v. *Burnett, ante* p. 491.

There is a conflict as to the extent of appellee's injury, but, according to the testimony on his behalf, the injury is as great or even greater than the complete loss of the foot would have been. The defendant's doctor who treated appellee admitted that: "He has a tenderness there, and always will. He has a broken arch, and any time he steps it will stretch the ligaments and give him pain." The testimony on appellee's behalf is to the effect that he is unable to stand on the injured foot for any considerable time, and he is therefore unable to perform any manual labor, the performance of which requires him to do so. Indeed, we do not understand that it is seriously contended that the verdict is excessive. The insistence is that there is no liability for the injury, and that a full and final settlement of the cause of action was made, which was evidenced by a written contract.

This release appears to have been executed upon a form prepared for that purpose. It was prepared in the defendant's office in Shreveport, and sent by one of its representatives to Smackover, where it was signed by appellee. This release, after reciting the time, place and nature of appellee's injury, contains the following statement:

"The full intent and meaning of this receipt is that I hereby acknowledge to have received from the Standard Oil Company of Louisiana full settlement and compensation for any and all claims for damages which I have or may have against the Standard Oil Company of Louisiana, under the laws of the State of Arkansas, resulting from, or that may result from, said above-described accident, and I further declare and acknowledge that the settlement which I have this day made with the said Standard Oil Company of Louisiana for injuries resulting or that may result from said accident, is a compromise and adjustment of any claim for damages which I have or may have, and that the amount received by me is full and just compensation for the injuries suffered.

"This settlement is accepted and receipt executed by me solely on my own judgment, and I am not acting on any statement made to me by the Standard Oil Company of Louisiana, its officers, agents or employees, or on any statement or representation of any physician or surgeon employed by the said Standard Oil Company of Louisiana."

Appellee had been paid $211.43 by defendant, and this payment was credited by the jury on the verdict for $3,000 which was returned in appellee's favor. Appellee testified that he had been discharged by the defendant's surgeon, who assured him that his foot would be entirely well in the course of a week or so, and that he was induced by this representation to accept the sum paid him in settlement of his cause of action.

It is earnestly insisted that the admission of this testimony was erroneous, as it permits a valid written instrument to be contradicted by parol testimony. This question was thoroughly considered in the case of *St. Louis, Iron Mountain & So. Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S. W. 803, and a decision was rendered which is adverse to this contention. In that case a release was executed in which it was recited that, in the judgment of the injured party, his injuries were of a permanent character, and written thereon in his own handwriting was the statement: "I understand this release." The execution of the release was admitted by the injured party, who testified that he had been assured by the defendant company's surgeon who had treated him that his injuries were not serious, and that he would soon be able to resume his usual employment, whereas his injuries were serious, and he had not been able to return to work, as the doctor had assured him he would be.

In holding that this testimony was competent, notwithstanding the recitals of the release to the contrary, it was said: "The rule of evidence forbidding the addition, alteration or contradiction of a written instrument by parol testimony of antecedent and contemporaneous negotiations does not apply where there is an issue of fraud in the procurement of the writing."

The authorities were again reviewed in the case of *F. Kiech Mfg. Co.* v. *James,* 164 Ark. 137, 261 S. W. 24. The release in that case recited that the injured party "was acting wholly upon his own judgment as to the nature and extent of his injury, and that no representations had been made in regard thereto upon which he relied." The injured party was permitted, however, to testify that such representations had been made to him, upon which he had relied and had acted in executing the release. It was there held, in effect, that, where a release was procured upon representations which proved to be false made to the servant by the attending physician, who was employed by the master and who attended the servant, that the injuries were slight and temporary, if relied and acted upon, constituted fraud in the procurement of the release and justified its avoidance, and parol testimony was admissible to contradict its recitals.

This holding has been consistently adhered to by this court, and was reaffirmed in the case of *Ozan-Graysonia Lbr. Co.* v. *Ward, ante* p. 557.

The release here in question was prepared before appellee saw it, and, when presented to him, required only his signature, which he affixed to the writing, relying, as he did, upon the assurance of the defendant's doctor, who had treated him, that he would soon be well and able to return to work. It may be said that the company's doctor testified in this case with a frankness quite unusual. He admitted telling appellee that his injury was slight, and that he would soon be well, and he admitted with equal frankness that he was mistaken in this opinion.

No error was committed in the admission of this testimony, as it tended to show fraud in the procurement of the execution of the release, although no fraud was intended, the effect of the mistaken opinion of the doctor being to accomplish what would be a fraud if the result induced by this opinion was conclusive and not open to inquiry.

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

ILLINOIS BANKERS' LIFE ASSOCIATION *v.* HAMILTON.

4-3344

Opinion delivered February 5, 1934.

W. P. Strait, for appellant.

H. A. Tucker and *Dean, Moore & Brazil,* for appellee.

BUTLER, J. On or about the 6th day of November, 1926, the Illinois Bankers' Life Association issued a joint policy of life insurance on the lives of Guy Patrick Hamilton and Maggie Hamilton, husband and wife, the survivor being named as beneficiary, in the sum of $1,000 for the consideration of $25.33, annual premium. This policy was taken over and its liability assumed by the Illinois Bankers' Life Assurance Company.

Maggie Hamilton died on February 6, 1933, and proof of death was furnished the last-named corporation. The policy was not paid, and this suit was insti-

tuted, which resulted in a verdict and judgment for Guy P. Hamilton, the survivor.

This appeal challenges the correctness of the judgment on two grounds which were interposed as a defense in the lower court. The first, and the principal, defense made is that there was a lapse in the policy for the nonpayment of premiums, which policy was reinstated on the application of the insured. In this application the insured acknowledged the forfeiture of all claims under the original policy by reason of the lapse of same, and that, as an inducement to the company to reinstate, it was represented that the statements and answers contained in the original application were true when made and were true on the date of the application for reinstatement, and agreed that the same should be based exclusively upon the representations contained in that application and the original application for the policy, and under the condition that, if the statements, or any of them, should be untrue, the company should be under no liability by reason of the attempted reinstatement of the policy except for a return of the premiums paid since the date of the reinstatement; that the answers to the questions regarding the health of the insured and her consultation of a physician since the date of the original application were false, and, because of such false statements, there was no liability except for a return of the premiums which had been tendered.

The next defense interposed was that when the annual premium matured on November 6, 1932, its payment being necessary to carry the policy over another year, the same was not paid, and that the insured and the company entered into an extension agreement extending the time of payment to May 6, 1933, by which extension agreement it was provided that, if the premium as extended was not paid at maturity, the policy should become null and void, and that, because Guy P. Hamilton, the appellee, jointly executed the same and did not pay, or offer to pay, the premium on the date of maturity, the policy became void.

The facts as shown by the evidence are that the policy lapsed for the nonpayment of premium due No-

vember 6, 1929, and thereafter, on June 11, 1930, the parties insured made application for reinstatement, which application contained the stipulations hereinbefore set out, and that, in answer to the question propounded to the insured, Maggie Hamilton, in said application for reinstatement, "Have you been ill or injured or consulted a physician since the date of the application for this policy," she answered, "No"; and in response to the question, "Are you now in good health and of sound constitution," she answered, "Yes," when in fact in 1927 she had suffered a paralytic stroke for which she had been treated by a physician. This physician testified that he did not know whether she had recovered or not.

It was also shown by another physician that Maggie Hamilton became ill about Christmas, 1932, suffering what appeared to be a light stroke of paralysis, from which she did not recover, and at that time she also had what is commonly known as leakage of the heart; that she died about the 7th day of February, 1933, from the heart disease and paralysis, but that the heart trouble was the preponderating cause of her death. This physician stated that he had known Maggie Hamilton for about three years, during which time she walked from her home to visit the sick and waited on them, and that the only indication he saw of any infirmity was that when she would step on something sharp, she would give in her foot; that during this time he would have passed her as an insurable risk.

The evidence relating to the stroke she suffered in 1927 was to the effect that this was a light attack which temporarily affected her left ankle, knee and wrist; that she apparently recovered except for a slight lameness in one of her ankles and one of her wrists troubled her some in lifting and in doing hard work; that at the time of this stroke she was in bed for ten days.

It is the contention of the appellant that this state of facts rendered the policy void because, as it says, the right of reinstatement of the insured was not absolute, but depended upon the condition of the health of the applicant, and that, since they had agreed in the applica-

tion for reinstatement that any false answers made respecting the condition of health would invalidate the policy, they are bound thereby.

To sustain this contention, the appellant relies on the case of *Ward* v. *New York Life Ins. Co.*, a South Carolina case, reported in 129 S. C. 121, 123 S. E. 820. It also cites as authority for the point raised, *Childress* v. *Fraternal Union of America*, a Tennessee case, reported in 113 Tenn. 252, 82 S. W. 832, and *Woodmen, etc.*, v. *Jackson*, 80 Ark. 419, 97 S. W. 673. In the first-named case the statement of facts does not disclose the date of the issuance of the policy. It lapsed for a failure to pay the premium on October 3, 1921, and was reinstated by the insurer, after the days of grace had expired, on an application which admittedly contained false statements material to the risk. The insured died prior to February 27, 1922, since the proof of death was made on that date. The beneficiary brought suit to recover, relying on a statute of the State of South Carolina, the applicable portion of which is as follows: "All life insurance companies that shall receive the premium on any policy for the space of two years shall be deemed and taken to have waived any right they may have had to dispute the truth of the application for insurance; that the assured person had made false representations, and the said application shall be deemed and taken to be true." The original contract of insurance is not set out, but the court sustained the defense interposed by the insurer that the policy was invalid because of the false statements and, in overruling the contention of the beneficiary, held that the statute relied on referred only to the application made for the issuance of the policy, and had no reference to applications made for reinstatement of policies where the same had lapsed for failure to pay the premiums. The policy appears to have contained an "incontestable clause," and in disposing of this, the court said: "The incontestable clause in the policy is not in the case, and we can base no binding judgment thereon."

In the case at bar it is the contention of the appellee that the defense of falsity of statements in the applica-

tion for reinstatement cannot avail the insurer because of a clause in the original policy which provides as follows: "After this policy shall have been in force two full years during the lifetime of the insured, it shall be incontestable except for nonpayment of premiums." The appellee takes the position that this provision inures to his benefit, although the policy was revived by reinstatement, the application for which contained untrue statements; first, because to avoid the policy for these would be to attach a condition to the right of reinstatement not provided in the original contract; second, that, even if this condition had been authorized, more than two years had elapsed between the date of reinstatement and the death of the insured which would make the incontestable clause effective; and, third, that the false statements were not material to the risk.

Whether or not a clause in insurance policies renders the contract incontestable from the date of the issuance of the policy is a question of sharp conflict of authority on the subject. Some respectable courts hold that such contract is invalid on the theory that, if it was procured by fraud, it is no contract, and can never become such if the misrepresentations were of a material nature calculated to deceive and made with that intent. Other courts of equal repute hold to the contrary, basing their conclusions on the ground that the clause was written by the insurer in its own terms for the purpose of inducing the public to enter into contracts with it upon the assurance that, after the insurer had accepted the risk, the validity of the contract will not be questioned. The insurer had all the time it desired to investigate the risk before accepting it and should, and likely does, anticipate that deceit might be practiced by applicants for insurance, and, through its own processes, has means to discover if such deceit has been practiced, and, having announced its satisfaction to bind itself, no subsequently discovered circumstance should avoid the policy except the nonpayment of premiums.

In *National Annuity Ass'n* v. *Carter,* 96 Ark. 495, 132 S. W. 633, this court has adopted the rule that the incontestable clause is valid, even where it takes effect

immediately upon the issuance of the policy. But where, as in the instant case, the agreement not to contest the validity of the policy is postponed for a reasonable and definite period within which time the insurer has the opportunity to ascertain the truth of the representations made, it seems that the provision relating to incontestability is universally held to be valid. Here, more than two years had elapsed between the date of the issuance of the policy and its lapse for the nonpayment of premiums; also, more than two years had elapsed from the date of the reinstatement to the date of the death of the insured. From this the question is presented, does the application for reinstatement which contains false statements annul the provision in the policy against incontestability? We hold it does not.

In the insurance contract, as one of the inducements to the insured to enter into it, there is the following clause: "This policy, after default in payment of any premium, may be reinstated upon both of the insured furnishing to the home office satisfactory and acceptable evidence of insurability and paying all past-due premiums with compound interest thereon at the rate of six per cent. per annum." Therefore, as is held in *National Annuity Ass'n* v. *Carter, supra; 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; and *Equitable Life Ins. Co.* v. *King,* 178 Ark. 293, 10 S. W. (2d) 891, "the reinstatement was not granted as a gratuity on the part of the company, but as a part of the contract expressed in the policy itself to the effect that a reinstatement could be obtained as a matter of right, * * * upon presentation at the home office of evidence of insurability satisfactory to the company."

It will be noted that the provision for reinstatement contained in the policy in the case at bar places no burden or restriction upon the right of reinstatement save the furnishing of satisfactory and acceptable evidence of insurability and the payment of all past-due premiums with compound interest thereon at the rate of six per cent. per annum, the latter provision being ample consideration moving to the company. As is held in the

Arkansas cases cited, the company had no right to enlarge the terms upon which reinstatement could be obtained. It had the right to defer its action on the application for reinstatement for a reasonable time in which it might investigate the insurability of the applicant, and there was no requirement in the original contract that the answers to the questions in the application for reinstatement should be true, and a condition precedent to the reinstatement of the policy and to its validity when so reinstated. In this particular the contract differs from that in the case of *Woodmen, etc.,* v. *Jackson, supra,* cited and relied upon by the appellant. In that case the insurer was a fraternal order insuring its members. Its bylaws were made a part of the original contract of insurance, one section of which provided for reinstatement of a suspended member upon satisfactory answers being given by him in his application relative to his use of intoxicants, narcotics, and his health at the time of application. It provided, in effect, that, if any of the statements made by the applicant were untrue, reinstatement should be unavailing and he was required to furnish the statements "as a condition precedent to reinstatement and waiving all rights thereto if the said written statements shall be found to be untrue."

In our cases cited *supra,* the doctrine is laid down that, since the reinstatement is not a gratuity, the insurer had no right to enlarge the terms upon which reinstatement could be obtained. In the Leeper case, *supra,* it was the contention that by reason of lapse, the original policy was void and the reinstatement created a new contract. In the original policy there was a provision that where the insured committed suicide the policy should be void, but another clause provided that the policy should be incontestable after two years from the date of its issuance. The policy lapsed after two years had expired and was reinstated, and in the application for reinstatement there was a stipulation that, in the event of self-destruction within one year from the date of approval of the application for reinstatement, the amount payable as a death benefit should be equal only to two annual premiums on said policy, and no more.

The court, under the rule announced in the Adams case, *supra,* held that this stipulation was an enlargement of the original contract of the terms upon which reinstatement could be obtained, that there was no new contract created by the reinstatement, but a revival and continuance of the original, and that, although it appeared that Leeper had committed suicide within one year from the date of the reinstatement, the incontestable clause in the original policy was applicable, and the fact that he was a suicide was no defense.

So, in the instant case the reinstatement created no new contract, but revived the original to the same extent as if there had been no lapse. This rendered the incontestable clause available and certainly, since more than two years has elapsed between the date of the reinstatement and the death of the insured, this clause is effectual to waive all defenses except the one reserved in the contract—namely, the nonpayment of premiums. Our cases cited have been approved, and their doctrine reaffirmed in the recent case of *Life & Casualty Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S. W. (2d) 199, and are in accordance with the weight of authority. *Mutual Life Ins. Co. of N. Y.* v. *Lovejoy,* 201 Ala. 337, 78 So. 209; *Becker* v. *Ill. Life Ins. Co.,* 227 Mich. 388, 198 N. W. 884; *Mutual Life Ins. Co., etc.,* v. *Hurni Co.,* 263 U. S. 167, 44 S. Ct. 90; *Wambolt* v. *Reserve, etc., Co.,* 191 N. C. 32, 131 S. E. 395, and cases therein cited.

There is no contrary rule announced in *Childress* v. *Fraternal Union of America, supra,* relied on by the appellant, for in that case the insured was a suicide, and the contract provided that in the event of suicide the indemnity to be paid to the beneficiary should be one-third of the amount otherwise due under the policy. The incontestable clause in that contract provided only that the validity of the policy could not be questioned after two years from its date except upon the ground of certain false answers made and upon this ground it might be questioned at any time. But the suicide clause was not one which entered into the validity of the original contract, and the incontestable clause had no reference to

the suicide clause, which latter clause was in no wise affected by the former.

The second ground presented for reversal in our opinion is without merit. The extension agreement extended the time of the payment of the annual premium due November 6, 1932, to May 6, 1933, and by reason of this the policy was in full force and effect at the time of the death of the insured. Since, under the original contract of insurance as reinstated, the company was liable to the survivor for the face of the policy, this was effective to work a payment of the premium extended, and it would have been a useless course of procedure for the survivor to have paid the premium, as it would have resulted only in its being returned to him by the insurer. The survivor brought suit for the balance on the policy less the amount due the company for the annual premium, payment of which had been extended. This was the correct amount due, and, having recovered that sum, the court properly awarded the penalty and attorney's fees.

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

WASSON *v.* BEEKMAN.

4-3373

Opinion delivered February 19, 1934.

E. K. Edwards, for appellant.

Abe Collins, for appellee.

SMITH, J. On June 27, 1925, Annie R. and H. H. Beekman became indebted to the Bank of DeQueen, of DeQueen, Arkansas, in the sum of $5,000, and, to secure its payment, executed a mortgage to that bank covering blocks 8, 9, 10, 11 and 12 of the Garrison Addition to the city of DeQueen. The mortgage secured the debt then due, which was evidenced by a note payable six months after date, and also any renewals thereof. The note was not paid, and was renewed from time to time, the last renewal being on March 22, 1929, the note then executed in renewal being payable six months after date.

The mortgage was duly recorded, but there had been made no marginal indorsement on the record thereof showing any payment of principal or interest, or other renewal, as required by § 7382, Crawford & Moses' Digest, to preserve the lien thereof against third parties. The bank became insolvent, and was taken over by the State Bank Commissioner for liquidation, and suit was filed in his name on February 17, 1933, for judgment on the note and to foreclose the mortgage securing it, and, at the same time, a *lis pendens* notice was filed conforming to chapter 112, Crawford & Moses' Digest, on that subject. This notice gave the date of the original note, and recited its renewal, the last being the note sued on. The execution of the mortgage securing the note was alleged, and the book and page of its record was stated.

An intervention was filed by W. O. Wright, in which he alleged his ownership of the mortgaged lands under a

deed from the mortgagor executed on April 6, 1933, and duly recorded April 17, 1933. The intervener prayed that the mortgage sought to be foreclosed be declared barred by the five years' statute of limitations as to him, for the reason that there had been no indorsement of payment, or other renewal, on the margin of the record as required by § 7382, Crawford & Moses' Digest.

Testimony was offered to the effect that the Deputy Bank Commissioner engaged in liquidating the bank had taken charge of the mortgaged property, there being three houses thereon. Two of these had been damaged by a storm, and the Commissioner caused them to be repaired. The third house was rented to a tenant, and the Commissioner collected the rents thereon. The intervener lived in an adjoining house, and made no denial of this possession.

Judgment was rendered against the makers of the note for the amount thereof, but it was decreed that the intervener had acquired title free of the mortgage lien, for the reason that the marginal indorsement required by § 7382, Crawford & Moses' Digest, had not been made, and this appeal is from that decree.

Section 7382, Crawford & Moses' Digest, requires the owner of an indebtedness secured by any of the liens there mentioned to make indorsements in writing on the margin of the record where such instrument is recorded, which indorsements shall be attested and dated by the clerk, to preserve the lien as against third parties.

It is true that no indorsement was made of the interest payments which had evidently been made at each renewal of the note, as the face of the note remained unchanged, nor was there any notation upon the record showing these renewals. Lacking these or other marginal indorsements showing that the debt had been kept in force, so that the bar of the statute of limitations had not fallen, the lien was apparently barred as to third parties so far as a mere inspection of the mortgage record disclosed to the contrary. But it is to be remembered that the mortgagee's representative was in possession of the mortgaged property, and such possession had been

taken before the intervener received his deed. *Temple* v. *Tobias,* 186 Ark. 851, 56 S. W. (2d) 585; *Garner* v. *Wright,* 52 Ark. 385, 12 S. W. 785; *Applewhite* v. *Harrell,* 49 Ark. 279, 5 S. W. 292; *Little* v. *National Bank of Mena,* 97 Ark. 57, 133 S. W. 166; *McClendon* v. *First Nat. Bank,* 112 Ark. 189, 165 S. W. 952; § 202 of the chapter on Mortgages, 19 R. C. L., page 421; *Garbutt* v. *Mayo,* 13 L. R. A. (N. S.) 120.

Moreover, the lien subsisted and was in full force and effect as between the mortgagors and the mortgagee when the suit to foreclose was filed and the *lis pendens* notice given as required by statute. The intervener's rights having been subsequently acquired, he was not an innocent purchaser or a third party within the meaning of the statute.

A headnote to the case of *Reaves* v. *Coffman,* 87 Ark. 60, 112 S. W. 194, reads as follows: "When notice of a pending suit to establish a lien on land was filed as required by Kirby's Digest, § 5149 [which now appears as a part of chapter 112, Crawford & Moses' Digest], subsequent purchasers of the land are not entitled to protection as innocent purchasers."

In the case of *Less* v. *English,* 75 Ark. 288, 85 S. W. 447, appears a headnote as follows: "One who purchases the title of a mortgagor in the mortgaged premises during the pendency of a suit to foreclose the mortgage takes subject thereto." See also *Oil Fields Corporation* v. *Dashko,* 173 Ark. 546, 294 S. W. 25; *Teal* v. *Thompson,* 180 Ark. 63, 20 S. W. (2d) 307.

The mortgage here sued on as between the parties was not barred, and the mortgagee had the right, as against the mortgagors, to foreclose that instrument, and the effect of the *lis pendens* notice was to warn all persons dealing with the mortgaged lands of that fact, and it therefore follows that the intervener took title subject to the mortgage.

It is insisted that the effect of act 374 of the Acts of 1917, page 1805, of which § 7382, Crawford & Moses' Digest, is a part, is to repeal act 65 of the Acts of 1903, page 118, appearing as chapter 112, Crawford & Moses'

Digest, in so far as the earlier act relates to mortgage foreclosure. The insistence is that this result is accomplished because of the conflict in the two acts in this respect. There was no express repeal of the earlier act by the later one, nor was the earlier act repealed by necessary implication. Both acts may stand and each accomplish the purpose of its enactment. The *lis pendens* notice does not operate to revive a lien which the statute of limitations has extinguished. The mortgage lien was in full force and effect as between the parties, and, suit having been brought to foreclose it, the *lis pendens* notice gave warning of that fact. The mortgage record was no longer the sole evidence of the lien of the mortgage of which a prospective purchaser from the mortgagor was required to take notice. All persons know that the lien may be kept in force between the parties thereto, although § 7382, Crawford & Moses' Digest, had not been complied with, and, if the statutory notice has been given, as was done in the instant case, that a suit was pending to foreclose the lien, one deals with the subject-matter of the litigation at his peril, and, if he purchased the mortgaged property under the circumstances stated, he takes title subject to the rights of the parties litigant.

The decree of the court below must therefore be reversed, and the cause will be remanded with directions to foreclose the mortgage as prayed for, according to the intervener the right, if he elects to assert it, of redeeming the mortgaged lands by paying the debt secured by the mortgage.

RADER *v.* PAYNE.

4-3353

Opinion delivered February 19, 1934.

Oscar E. Williams, for appellant.

John Nance and *C. D. Atkinson*, for appellee.

HUMPHREYS, J. The question involved on this appeal is whether appellant is estopped to deny the validity of the orders and judgments of the probate court of Washington County appointing appellee, Ida May Payne, guardian of the person and estate of her mother, Lillian R. Sager, and in appointing appellee, Elmer Johnson, guardian in succession to Ida May Payne of said estate.

Appellant appealed from the orders and judgments of the probate court, and also filed a petition for writ of certiorari seeking to reverse and quash them on the ground that they were void for the alleged reason that the court had no jurisdiction to make and enter them.

The jurisdiction of the probate court was assailed because the order and judgment appointing appellee, Ida May Payne, was an approval of letters of guardianship issued to her by the probate clerk in vacation, for the further reason that nonresidents only signed the guardian's bond, and for the further reason that Lillian R. Sager was not present in court and examined as to the condition of her mind before said order and judgment was rendered; and the appointment of Elmer Johnson in succession was assailed because the appointment of the original guardian was void.

The cause was submitted to the court without the intervention of a jury, upon the pleadings and testimony, at the conclusion of which appellant requested the court to find the facts and declare the law separately which the court declined to do, but made a general finding of both the law and the fact in favor of appellees, from which is this appeal.

The following facts, briefly stated, are disclosed by the record; the original judgment rendered and entered by the probate court did not contain a finding that Mrs.

Sager was present and examined, and the original judgment appointing Elmer Johnson as guardian in succession did not state the judgment was rendered and entered with the consent of appellant, but there is a *nunc pro tunc* order made and entered at a subsequent term by the probate court reciting that these findings had been made and omitted from the judgments which were entered theretofore. Mrs. Rader and Mrs. Payne are sisters, and the only daughters and heirs of Mrs. Sager. In July and August, 1931, the daughters resided in Minneapolis, Minnesota, and Mrs. Sager, who was old and feeble, resided in Springdale, Arkansas. Mrs. Sager owned a home and about $8,000 in money. By agreement of the daughters, and on a formal application of Mrs. Payne, she was appointed guardian of the person and estate of Mrs. Sager by the clerk of the probate court of Washington County in vacation, and executed a guardian's bond in the sum of $10,000, which both appellant and appellee signed; whereupon Mrs. Payne took charge of her mother's property, as well as her person. At the succeeding term of court, and after an examination of Mrs. Sager in open court concerning the condition of her mind, the vacation appointment was confirmed, and the bond was approved by the court. At a subsequent term of court, Mrs. Rader filed a petition or motion to remove Mrs. Payne as guardian; whereupon Mrs. Payne filed a final report and tendered her resignation. The report was approved and her resignation was accepted. By agreement of the attorneys representing appellant and appellee, her sister, Elmer Johnson was appointed guardian in succession, and continued to act in that capacity until after the death of Mrs. Sager, at which time he was appointed administrator of her estate. By consent of the parties, the appeals and petition for certiorari were consolidated and tried by the court with the result stated above.

Appellant contends for a reversal of the judgment because the trial court refused to state his conclusions of facts separately from his conclusions of law in compliance with § 1309 of Crawford & Moses' Digest, which is as follows:

"Upon trials of questions of fact by the court, it shall state in writing the conclusions of fact found separately from the conclusions of law."

Although the trial court refused to adopt the conclusions of law and conclusions of fact submitted to him in writing by appellant, he did make the following written finding: "The court having heard the evidence and the argument of counsel, and being well advised in the premises, finds the facts and the law in favor of the appellees."

This was a sufficient compliance with the statute. *State ex rel. Attorney General* v. *Knights of Pythias,* 157 Ark. 266, 247 S. W. 1068.

Appellant also contends for a reversal of the judgment on the ground that the probate court was without jurisdiction to appoint a guardian for the person and estate of Mrs. Sager, or to appoint Elmer Johnson guardian in succession of her estate, assigning as reasons that she was not in court and examined as to her mental condition when the original appointment was made or approved; that the guardian's bond was executed by nonresidents of the State, and that, as the original appointment was void, the appointment of Elmer Johnson in succession was also void.

The record reflects that the jurisdiction of the probate court was invoked by appellant, and that she signed the guardian's bond; also that, when she became dissatisfied with the actions of her sister as guardian, she sought by petition to have her removed, but, before the hearing on the petition, one of her attorneys agreed in open court to the appointment of Elmer Johnson as guardian in succession. These acts on her part clearly estopped her from questioning the jurisdiction of the probate court to make the appointments. 28 C. J., p. 1296.

No error appearing, the judgment is affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* STEWART.

4-3345

Opinion delivered February 19, 1934.

Moore, Gray, Burrow & Chowning, for appellant.
W. G. Dinning, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of Phillips County to recover double indemnity under a life insurance policy issued by appellant to her husband on December 28, 1925, in which she (appellee) was the sole beneficiary. The contract provided for double indemnity in case of the accidental death of the insured during the life of the policy.

On August 9, 1931, the insured was shot and killed in Kilgore, Texas, without fault on his part.

Appellant filed an answer, denying liability under the double indemnity clause of the policy, on the ground that the insured failed to pay the monthly premiums of $4.48 accruing on and after January 28, 1931, until his death. It was alleged in the answer that the insured defaulted in the payment of the premiums and failed to designate either one of three nonforfeiture options in paragraph 9 of the policy, thereby automatically converting the policy, carrying a double indemnity of $4,000, into a non-participating, paid-up, endowment insurance policy of $293, for which amount appellant offered to confess judgment. Paragraph 9 provided for three options on the part of the insured after default in the payment of any monthly premium, which he might exercise in three months after default, provided he had theretofore paid all the premiums for two full years. The options were to take the cash surrender value, or a paid-up, non-participating, endowment insurance policy, or a non-participating, paid-up, term insurance policy. The paragraph containing the options was set out in full in the answer. The following clause in the policy was also set out in the answer:

"In the event of default in the payment of any premium, after premiums for two full years shall have been paid on this policy, if the owner or the assignee of record, if any, shall not avail himself of one of the foregoing options, in the manner hereinbefore provided, within three months after the due date of the premium in default, this policy will be continued by the company, for a reduced amount of non-participating paid-up endowment insurance, as provided under option (b) above."

The cause was submitted upon the pleadings and testimony adduced, resulting in a verdict and consequent judgment for $3,000, from which is this appeal. When the evidence was concluded, appellant requested the court to instruct a verdict for it on the theory that, as the undisputed evidence showed that the insured made default in the payment of premiums for more than three months before he was killed, and that, under the terms of the option clause contained therein, the policy was automatically converted into a non-participating, paid-up, endowment insurance policy, amounting to $293 instead of $4,000, provided for in the indemnity policy. This request for a peremptory instruction overlooks or omits to take into account the provisions of the policy relative to annual distributions of divisible surplus. The policy contains the following paragraph:

"This policy is a participating contract while in force as a premium-paying policy, and the company will annually, as of the 31st day of December of each year, ascertain and apportion any divisible surplus accruing thereon. Such divisible surplus will be payable on the next anniversary of this policy following the next succeeding thirteenth day of April, etc."

The undisputed testimony reflects that the premiums had been paid for full five years and one month, and that one year only of the divisible surplus or profits provided for in the policy had been allocated to the insured, or, at least, no notice of the balance due him out of the divisible surplus or profits had been sent to him. These paragraphs must necessarily be read together in connection with the option paragraphs in order to properly construe them, and, when read together, mean that, before the policy would be converted automatically from a profit-participating into a nonparticipating, paid-up, endowment insurance policy for a nominal sum on account of the failure to pay premiums for three months, appellant should ascertain the amount due the insured out of the divisible surplus, so that it might be applied to the payment of the monthly premiums, and thereby prevent a lapse of the policy. These provisions in the policy must be construed

as a harmonious whole and, in the light of the rule consistently announced by this court to the effect that insurance companies must not allow policies to lapse for the nonpayment of premiums when they have sufficient funds in their hands to pay the premiums. *Security Life Insurance Company* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865, and cases cited therein. The same rule was announced in the recent case of *Illinois Bankers' Insurance Company* v. *Wilken,* 187 Ark. 337, 59 S. W. (2d) 1046. The proper construction of the various paragraphs in the policy quoted above is that appellant cannot put the insured to an election of options upon failure to pay premiums for three months after default in the payment of any premium until it first ascertains the profits or dividends due the insured which might be used to pay premiums, and after notification to him of the amount. The burden was upon appellant to show that the divisible surplus in its hands was insufficient to pay the monthly premiums to keep the policy alive during the lifetime of the insured. It not only failed to do this and to notify the insured of the amount thereof, but, when asked on the trial of the cause to reveal the amount, it failed to do so. Under these circumstances, and under the interpretations placed upon the clauses when read together, the trial court would have been warranted in presuming that the profits due the insured were sufficient to pay all the premiums until he was shot or killed, and in instructing a verdict for appellee. The court did not therefore err in refusing to instruct a verdict for appellant.

Appellant also contends for a reversal of the judgment because the court submitted the case on erroneous instructions which were conflicting. Appellee was entitled to an instructed verdict on the undisputed evidence in the case; hence no prejudice resulted to appellant on account of the instructions, although they might have been erroneous and conflicting. *Beene Motor Co.* v. *Dison,* 180 Ark. 1064, 23 S. W. (2d) 971; *Hunt* v. *Hurst,* 170 Ark. 644, 280 S. W. 652.

Appellant also contends for a reversal of the judgment because the court admitted testimony relative to a different policy issued by appellant to appellee's insured,

to the effect that said policy was not converted into a non-participating endowment policy. This testimony was introduced for the purpose of contradicting the testimony introduced by appellant to the effect that all policies of this kind issued by appellant were converted into paid-up insurance policies at the expiration of three months from default in the payment of a premium. The court did not err in admitting the testimony for this purpose.

No error appearing, the judgment is affirmed.

SMITH, J., dissents; MCHANEY, J., concurs.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* MARTIN.

4-3365

Opinion delivered February 19, 1934.

Allen May, J. R. Burcham, Charles D. Frierson and *Charles Frierson, Jr.*, for appellant.

J. Ford Smith and *W. J. Dungan,* for appellee.

KIRBY, J., (after stating the facts). There is but one question involved in this appeal, *viz.,* whether the death of the insured under the circumstances herein resulted from an accident covered by the double indemnity provision of the policy which excepts bodily injuries received

"from participation in aviation or submarine operations."

Aviation is defined in Funk & Wagnall's Dictionary as follows: "Aviation—is the art of flying, especially the management of aeroplanes."

"Participation" is defined in Webster's Dictionary as follows: 1. The state of sharing in common with others. 2. The act or state of receiving or having a part of something. 3. Distribution or division into shares.

It has been held that it was not necessary for one to have mechanical control over a plane in order to participate in its operation, but, when one imposes and enforces his judgment in the venture or about an undertaking solely for his purpose, he is effectively participating in the operation of the plane. *First Nat. Bank of Chattanooga* v. *Phoenix Mut. Life Ins. Co.*, 62 Fed. (2d) 681.

It appears here, however, that there was no contractual relation between the pilot of the plane and the insured, and no expectation of a fare to be paid and collected for the trip, the insured being an invited guest only, and not a passenger, and it cannot be said that insured received the injuries from which he died "from participation in aviation operations," within the meaning of the terms of the policy, and is thereby excluded from its coverage.

The contract of insurance was ambiguous and susceptible to more than one reasonable construction, and the one most favorable to the insured should be adopted. *Travelers' Protective Ass'n* v. *Stephens,* 185 Ark. 660, 49 S. W. (2d) 364; *National Life Ins. Co.* v. *Whitfield,* 186 Ark. 198; *Gits* v. *N. Y. Life Ins. Co.,* 32 Fed. (2d) 7; *Charette* v. *Prudential Ins. Co.,* 202 Wis. 470, 232 N. W. 848.

No error was committed in allowing attorney's fee and the statutory penalty, since the entire sum contracted to be paid under the rider in the policy was recovered herein, and the appellee was therefore entitled to a judgment for the penalty and a reasonable attorney's fee, "and the fact that the company believes it has a meritorious defense, and in good faith defends the case does not

excuse it from the application of the statute." *Life & Casualty Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S. W. (2d) 199.

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

BUTLER, J., (supplemental opinion on rehearing). To sustain the contention that the death of the insured resulted from an accident within exemption from liability within the meaning of the terms of the policy, counsel for appellant refer us to the following cases: *Bew* v. *Travelers' Ins. Co.,* 95 N. J. Law 533, 112 Atl. 859, 14 A. L. R. 983; *Travelers' Ins. Co.* v. *Peek,* 82 Fla. 128, 89 So. 418 (1921); *Meredith* v. *Bus. Men's Acc. Co.,* (Mo.) 252 S. W. 976 (1923); *Pittman* v. *Lamar Life Ins. Co.,* 17 F. (2d) 370 (1927); *Tierney* v. *Occ. Life Ins. Co.,* 89 Cal. App. 779, 265 Pac. 400 (1928); *Wendorff* v. *Mo. St. Life Ins. Co.,* 318 Mo. 363, 1 S. W. (2d) 99 (1927); *Gits* v. *N. Y. Life Ins. Co.,* 32 Fed. (2d) 7 (1929); *Peters* v. *Prudential Ins. Co.,* 133 Misc. 780, 233 N. Y. S. 500 (1929); *Price* v. *Prudential Ins. Co.,* 98 Fla. 1044, 124 So. 817 (1929); *Head* v. *N. Y. Life,* 43 F. (2d) 517, 520 (1930); *First Natl. Bk.* v. *Phoenix Co.,* (C. C. A.) 62 Fed. (2d) 681. We are also referred to the notes assembled in 14 A. L. R. 986; 61 A. L. R. 846; 69 A. L. R. 331; 83 A. L. R. 384, and to the case of *Benefit Ass'n* v. *Hayden,* 175 Ark. 565, 299 S. W. 995. In their brief for rehearing, the following additional authorities are cited in support of their contention: *Irwin* v. *Prudential Ins. Co.,* 5 Fed. Supp. 382, February 19, 1934; *Goldsmith* v. *New York Life,* 69 Fed. (2d) 273; 6 Couch's Enc. Ins. Law, p. 1252; 6 Cooley's Briefs on Ins., (2d ed.) p. 5309.

Counsel for the appellant admit that where the words "engaged in aviation" are used in the exempting clause of a policy, the exemption from liability will not apply to the case of a mere passenger, but they contend, on the authorities cited, that the words "participate in aviation" are to be distinguished from "engaged in aviation" and are sufficiently broad in their meaning to include any one riding in an aeroplane whether as a pilot or a passenger only. Upon an examination of the cases cited, we find those most nearly sustaining the contention

are *Bew* v. *Travelers' Ins. Co.; Travelers' Ins. Co.* v. *Peek,* and *Meredith* v. *Bus. Men's Acc. Co., supra.* In the first mentioned case the applicable clause is as follows: "The insurance hereunder shall not cover * * * injuries, fatal or non-fatal, sustained by the insured while participating in, or in consequence of having participated in, aeronautics." The insured was killed while a passenger in an airplane. After quoting the definition of the word "aeronautics" given by the Ency. Britt, "aeronautics is the art or practice of sailing in, or navigating, the air," the court held that there was nothing in the definition to confine it to those active in piloting air vessels and to exclude those who are inactive users thereof. The court also quoted from the Standard Dictionary the definition of the word "participate" as meaning, "to receive or have a part or share of; to partake of; experience in common with others; to have or enjoy a part or share in common with others; partake; as to participate in a discussion; to take a part in; as to participate in joys or sorrows." From these definitions it was the conclusion of the court that one who is a passenger in an aeroplane partakes of the pleasure and benefits of the art or practice of sailing in the air and thereby participates in aeronautics. In reaching this conclusion, the court, however, appears to have given no effect to one of the definitions, *supra, viz,* "to take part in."

In *Travelers' Ins. Co.* v. *Peek, supra,* the court had before it a contract similar to that in the Bew case and based its decision solely on the authority of the latter case. In *Meredith* v. *Bus. Men's Acc. Co., supra,* the court followed the views expressed in the Bew and Peek cases without any further elucidation.

A number of cases discussing the meaning of the words "engaged in aeronautics" used in the policies under consideration profess to find a distinction between the meaning of that term and "*participating* in aeronautics," but give no particular reason for the discovery of the difference. Thus, in *Price* v. *Prudential Ins. Co., supra,* the court merely says, "Being engaged in aviation operations means taking part in the operations

of an airplane in some direct way other than merely participating in aeronautics by being in an airplane while it is in the air"; and, in *Flanders* v. *Benefit Ass'n,* 226 Mo. App. 143, 42 S. W. (2d) 973, the court found that "engaged" involved the idea of continuity of action and contented itself with stating the difference between "engaged in" and "participating in" in the following way: "It means that one must take part in the operation of the airplane in some way other than merely participating in flying." So also, in *Head* v. *New York Life Ins. Co., supra,* a distinction is stated without giving the reason why.

The distinction thought by the courts to exist between "engage in aeronautics" and "participation in aviation" may be apparent to, and approved by, those learned in the niceties of the language and accustomed to its precise use, but it is to be doubted whether these hair-splitting and subtle distinctions would occur to, or be understood by, the majority of the thousands of persons who seek insurance against the many hazards to life and limb which are likely to occur to the most prudent and fortunate. Words and phrases used in insurance policies should be construed by their meaning as used in the ordinary speech of the people and not as understood by scholars.

It might well be imagined that if the average tradesman, artisan or farmer, although he had many times taken passage on a railroad train and intended again soon to do so, if asked if he had participated, or intended to participate, in railroading, would at once answer, "No"; and, if then asked if he had engaged in, or intended to engage in, railroading, would reply, "I have just told you, 'No'." It might well be assumed that to his mind the word "participate" in the connection used in the question would imply some action, some "taking part in" the movement of the trains, the upkeep of the property, or management of its business. He likely would not think that by the question was meant to learn if he had, or intended merely "to have, enjoy, or share in common with others" the privilege of being transported as a passenger on the lines of railway companies.

It is interesting, however, to note that in these cases and others which discover a distinction between "engaged in" and "participate in," the courts, when they abandon the role of the "precisian" and discuss the case in the language of the ordinary person, they sometimes use the words "engaged" and "participate" or "participation" as conveying a similar idea. In the case of *Peters* v. *Prudential Ins. Co., supra,* in discussing the word "engaged" the court said: "It gives the impression of participation as an occupation." In *Benefit Ass'n* v. *Hayden, supra,* the court found for the beneficiary, saying: "The proper construction of those words (engaged in) is that actual employment or participation was contemplated and not merely riding as a passenger." This case followed the case of *Benham* v. *Insurance Co.,* 140 Ark. 612, 217 S. W. 462, where the court defined the word "engaged" as denoting action, thus: "It means to take part in." This is precisely one of the meanings of the word "participate" which is apparent from the etymology of the word: "Participate—a word coming from the Latin words 'pars,' a part, and 'capio,' to take," therefore meaning to take part in. 6 Words & Phrases, p. 5185.

As defined by the leading lexicographers, "aviation" is a more exact and specific term than "aeronautics" and means "the art or science of locomotion by means of aeroplanes." Webster. It might appear that if aviation is the science of locomotion by aeroplane and the word "participate" means "to take part in," the phrase "participate in aviation" would connote an active share in its management; as, where a person of *First Nat. Bank* v. *Phoenix, supra,* where he owned the plane and had authority to, and did, direct the pilot as to when he should make the flight. It would seem that this interpretation of the phrase "participate in aviation" is not wholly unjustified. We pass this question, however, without deciding it because it is unnecessary to do so under the language of the exemption clause in the contract before us which is dissimilar to that of any of the cases denying the right to recover relied on by learned counsel.

As noted in the Bew, Peek and Meredith cases, the phrase in the exemption clause was "*participating* in aeronautics." In *Benefit Ass'n* v. *Hayden,* and *Flanders* v. *Benefit Ass'n, supra,* the phrase was "*engaged* in aeronautics." In *Peters* v. *Prudential Ins. Co., supra,* it was "engaged in aviation." In *Wendorff* v. *Mo. State Life Ins. Co., supra,* the applicable exemption phrase is "while on or in any mechanical device for aerial navigation." In *Gits* v. *N. Y. Life, supra,* the phrase was, "engaged in submarine or aeronautic operations," and in *First Nat. Bank* v. *Phoenix, supra,* it was "participation in aeronautic operations."

In the cases cited, the phrase quoted above from the last case named is the one most similar to the phrase used in the contract involved in the instant case, but in that case the insured, when killed, was not a mere passenger. The court thus found his relationship to the flight: "Though the insured was not personally piloting the plane, the venture was his, initiated and undertaken solely for his purposes. He owned the plane, employed a pilot to operate it, determined whether weather conditions would permit of the flight and when it should be made. We agree with the lower court that one who interposes and enforces his judgment in matters so vital as these to the flight of an aeroplane is participating in aeronautic operations."

We have examined the additional authorities cited by counsel in their brief on rehearing, except that of *Goldsmith* v. *New York Life Ins. Co., supra,* to which we do not have access. In *Irwin* v. *Prudential Ins. Co., supra,* the exempting phrase is, "from having been engaged in military or naval service, or in aviation, or submarine operations." The facts were that the insured was killed by the crash of a glider, a device for aerial transport, while he was riding as a pilot and the sole occupant. While the operation of gliders was not his regular business, it was an avocation in which he frequently indulged. He was killed on October 23, 1931, and had flown a glider during the two preceding years approximately 203 times. Under these facts, the court

held that he was engaged in aviation within the meaning of the policy and denied recovery.

In the page of Couch's Cyc. Ins. Law, cited *supra,* there is this statement: "A passenger in an aeroplane flying in the air, whether he takes part in the operation of the plane or not, is participating in aeronautics within the intent and meaning of a provision in an insurance policy specifically excepting such a risk." For authority for this statement the author cites one Arkansas case—that of *Sov. Camp W. O. W.* v. *Compton,* 140 Ark. 313, 215 S. W. 672. This case does not support the text. The question there was whether an exemption of liability, where the insured "engaged in aviation," was applicable, if the insured were killed while flying as an army aviator. It was the holding of the court that the exemption clause referred to private occupation and not to those of the same character performed while in military service.

The doctrine announced in Cooley's Brief, *supra,* was that under a policy exempting from liability while "engaged in aviation" excluded recovery where the insured was killed while flying in the air, whether piloting or riding as a passenger, and for authority for this the author cites *Masonic Acc. Ins. Co.* v. *Jackson,* a case from one of the Indiana courts of appeal, reported in 147 N. E. at page 156. This case is against the weight of authority and also is not authority in Indiana, as it was superseded in the same case by a decision of the Supreme Court of Indiana, reported in 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840.

The double indemnity clause in the instant case excepts the insurance company from liability for "bodily injuries received while engaged in military or naval service in time of war, or for participation in aviation or submarine operations." It is the word "operations" which distinguishes this exemption from those relied upon by counsel for the appellant and which creates the ambiguity referred to in the original opinion. Counsel for appellant erroneously contend that because the language relied upon does not create a forfeiture of the policy, but simply states a risk which was never assumed,

the rule that the language of the phrase involved should be strictly construed—and, where ambiguous, against the insurance company—has no application. The rule of strict construction applies to exemption from liability as well as to forfeitures. *Irwin* v. *Prudential Ins. Co.; Wendorff* v. *Mo. State Life Ins. Co., supra; Wilson* v. *Trav. Ins. Co.,* 183 Calif. 183, 190 Pac. 366; *National Life Ins. Co.* v. *Whitfield,* 186 Ark. 198, 53 S. W. (2d) 10.

It may be, as argued by counsel, that if the word "aviation" is intended to qualify the word "operations," the phrase is not in accord with grammatical rules, and, to be correct under those rules, some adjective form of the word aviation should have been used. The word "aviation" is of comparatively recent origin, and we know of no adjective term for it yet formulated. It is used indiscriminately as a noun and as an adjective, just as the word "submarine." The use of the word "either" after "or" is frequently implied (see Webster's Dict.) and it is not an unreasonable construction to say that "operations" is limited by both aviation and submarine participation. At least, this is an interpretation which the ordinary person, not skilled in the niceties of grammatical construction, might give to it. It will be noticed that no comma is used after the word "aviation," and this is an additional reason for concluding that it as well as submarine was intended to refer to and limit the word operations.

In *Peters* v. *Prudential Ins. Co., supra,* the phrase, "from having been engaged in aviation or submarine operations or military or naval service in time of war" was held to be ambiguous, and that it might not include death resulting to a passenger in an airplane in time of peace. It was the contention of the plaintiff that the exception intended to apply only to an accidental death occurring while engaged in aviation in time of war. The court found this construction a reasonable one when the punctuation employed was considered. It pointed out that the use of a comma after the word "aviation" and one after the word "operations" would clearly show that the insurer intended to limit the expression "in time of war" to the last antecedent, but, having omitted it, it

might be inferred that the danger from aviation excepted from the risk was only that occurring in time of war, and, as the phrase was ambiguous, the construction most favorable to the insured should be placed upon it, since the insurer chose the language and was responsible for its ambiguity.

The ambiguity and doubt as to the exact meaning of the phrase involved in the instant case is emphasized by the ease with which the insurer could have made its meaning clear, as was done in the contracts under consideration in *Head* v. *New York Life Ins. Co.; Pittman* v. *Lamar Life Ins. Co.,* and *Tierney* v. *Occ. Life Ins. Co., supra.* In these cases the limitation was for injury while "participating as a passenger or otherwise in aviation or aeronautics." It would not have been difficult for the insurer to have clearly informed the insured that it would not be liable for his death while riding or being in a plane either as a passenger or otherwise; but, having elected to use general expressions which might mean one thing or another, the ambiguity thus created must be resolved against it.

The effect of the word "operations" in connection with the phrase "participation in aviation" necessarily limits the scope of the meaning of the word "participation," and, though the word "participate," standing alone, might denote activities not included in the narrow compass of "engaged in," when the effect of the word "operations" is considered, (which can only mean the management and control of the airplane) it becomes more apparent that "participation" is to be considered in its active sense and viewed as the equivalent of "engaged in."

The question of penalty and attorney's fees is ruled by the recent case of *Life & Casualty Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S. W. (2d) 199, the holding of which was affirmed by the Supreme Court of the United States on the 5th day of March, 1934. We reaffirm the conclusion reached in the original opinion and overrule the petition for rehearing.

SMITH, J., (dissenting). The original opinion states that the facts in this case are undisputed. And so they

are. The insured, who paid no fare, was invited by an amateur aviator to fly with him from Augusta, Arkansas, to St. Louis, Missouri. They did not reach their destination, as the plane "crashed and struck the ground," killing the insured. The insured had no control over the plane, but it occurs to me that neither this fact nor the failure to pay fare affected the hazard of the journey.

The original opinion cited only one case to support the conclusion announced that the insured was not participating in aviation at the time of his death, this being the case of *First National Bank* v. *Phoenix Mutual Life Ins. Co.*, 62 Fed. (2d) 681. The headnote in that case reads as follows: "Insurer *held* not liable under double indemnity provision excepting death from 'participation in aeronautics operations,' where insured was killed while passenger in aeroplane." It requires no argument to show that this case affords no support for the conclusion announced.

The labored supplemental opinion on rehearing is equally unconvincing to me, and I therefore respectfully dissent. Quotations appearing in this opinion from a number of cases there cited show clearly that they do not support the conclusions which the majority have reached. These cases are brushed aside with the observation that they are hair-splitting and appeal only to the grammarian and the precisian.

It is a wise and just rule of construction, and one of universal application, that all doubt, or any ambiguity, as to the meaning of an insurance policy is resolved against the insurer, for the reason, often stated, that the language expressing or limiting the liability insured against is carefully chosen by the insurer. But the rule is equally as well established, and is equally as wise and as just, that courts may not create ambiguities by strained constructions which would not otherwise be found to exist. Insurance policies are to be construed like other contracts, where their meaning plainly appears, and it has never been questioned that insurers may assume and insure against some risks and exempt themselves from liability for others.

The courts—all of them—are reluctant to permit insurance companies to forfeit their policies, upon which premiums have been paid, especially upon purely technical grounds, but there is no question of forfeiture in this case. The question is rather whether we shall search for an ambiguity whereby, when it has been found, the insurer may be held liable for a risk from which, in my opinion, it has expressly exempted itself.

Insurance companies first undertook to exempt themselves from liability to persons "engaged in aviation or aeronautics," but when some of the courts followed our opinion in the case of *Benefit Ass'n* v. *Hayden*, 175 Ark. 565, 299 S. W. 995, 57 A. L. R. 622, and held that a passenger having no control over the machine in which he flew was not "engaged in aviation or aeronautics," the companies writing insurance of this character attempted to clarify their exemption by providing that they should not be liable to persons "participating in aviation." The distinction appears to be invisible to the majority, but it is one which has been recognized by a line of decisions previously unbroken.

The exemption existing in the policy here sued on is not merely against the aviator flying the machine, but it is against all persons participating in aviation. Can it be true that the aviator is in any more danger than his passenger? Is not the hazard as great in the one case as in the other? Now, the majority say that a different result would have been reached had the exemption from liability read "while participating as a passenger or otherwise in aviation or aeronautics." Why so? This is not broader than the language employed. The insurer attempted to exempt itself from liability to the insured from injuries received "from participation in aviation or submarine operations," not merely as a passenger, but at all. There is no qualification as to the extent of the participation. If the tradesman, artisan or farmer, to whom the majority refer, had promised his wife, before leaving home, that he would not participate in aviation while gone, he would probably have had trouble convincing her, upon his return, that he had kept his word, if he admitted that a part or all of his

journey had been made in a flying machine. But the cases uniformly distinguish between engaging in aviation and participating in aviation. In pointing out this distinction the Supreme Court of Indiana, in the case of *Masonic Accident Insurance Co.* v. *Jackson,* 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840, said: "To say that one is 'engaged' in an occupation signifies much more than the doing of one act in the line of such occupation." (Citing cases.) Further reference will be made to this case, as it appears to have afforded the majority some support for their conclusion.

I might defer to the majority if the text writers on insurance had not construed the numerous cases on the question here under consideration just as I do.

For instance, at § 1252 of Couch's Cyclopedia of Insurance Law, vol. 6, the author says: "Section 1252. Death or injury while participating or engaging in aeronautics, aviation, etc. A passenger in an aeroplane flying in the air, whether he takes part in the operation of the plane or not, is 'participating in aeronautics,' within the intent and meaning of a provision of an insurance policy specifically excepting such a risk."

The majority inadvertently say that *Sovereign Camp W. O. W.* v. *Compton,* 140 Ark. 313, 215 S. W. 672, is the only case cited, and that it does not support the text. On the contrary, the annotated cases reported in 14 A. L. R. 986; 40 A. L. R. 1176; 57 A. L. R. 625; and 61 A. L. R. 846, are cited in note 1 to the paragraph above quoted, and these annotated cases collect innumerable cases on the subject. Note 2 to this paragraph cites cases from California, Florida, Missouri and New Jersey in addition to the Arkansas case.

The majority quote from Cooley's Briefs on Insurance, but treat the quotation as being without authority because it was based upon the decision of an inferior court of Indiana, which has been superseded by a later decision of the Supreme Court of that State. This statement is as unfortunate as was the reference to Couch's Cyclopedia of Insurance Law, *supra.* I give the exact statement from Cooley's Briefs on Insurance, (vol. 6, 2d ed., page 5309). It reads as follows: "Where in-

sured died from injuries received while riding as passenger in aeroplane, there could be no recovery on a policy which excepted death or disability while 'engaged in aviation,' that phrase meaning the act of flying in the air in machine heavier than air, whether piloting or riding as passenger (*Masonic Acc. Ins. Co.* v. *Jackson,* (Ind. App.) 147 N. E. 156). A passenger in an airplane was 'participating' in 'aeronautics' within the meaning of a provision in an insurance policy providing that it should not cover any person or injuries, fatal or nonfatal, sustained by insured while participating in aeronautics (*Bew* v. *Travelers' Ins. Co.,* 95 N. J. Law 533, 112 A. 859, 14 A. L. R. 983)." Numerous cases are cited in the note to this text which fully support it.

This Indiana case was first decided by "Appellate Court of Indiana," and is reported in 147 N. E. 156. The headnote—and the only one—to that case reads as follows: "Where insured died from injuries received while riding as passenger in aeroplane, beneficiary *held* not entitled to recover on policy which excepted death or disability while 'engaged in aviation,' that phrase meaning the act of flying in the air in machine heavier than air, whether piloting or riding as passenger." It will be observed that the exemption contained in the policy there construed was from death or disability while "engaged in aviation." This case reached the Supreme Court of Indiana and is the case to which I have previously referred to as being reported in 61 A. L. R. 840. The Supreme Court of Indiana quoted at length from our case of *Benefit Ass'n R. R. Employees* v. *Hayden,* 175 Ark. 565, 299 S. W. 995, 57 A. L. R. 622, and appears to have adopted its reasoning, but, as appears from the language already quoted from that opinion, the Supreme Court of Indiana recognized the distinction between being engaged in aviation and participating in aviation. The annotator, in his note to this case, says: "These cases make a distinction between 'engaged' in aviation and 'participating' in aviation or aeronautics, and proceed upon theory that to be 'engaged' in aviation imports something more than (as expressed in the latter case) 'occasional participation'."

In the late work of Richards on the Law of Insurance (4th ed.), at page 660, it is said: "A construction urged upon the courts, but consistently refused is, that one participates only when he is physically active in the management and control of an instrument or agency and that the word 'aeronautics' is necessarily descriptive of an occupation. Such a construction would give too narrow a meaning to both words. The Standard Dictionary defines 'participate' as meaning 'to receive or have a part or share of; to partake of; experience in common with others; to have or enjoy a part or share in common with others; partake; as to participate in a discussion.' Nothing in the definition, or in the common use of the word confines it to those who are active in navigating balloons or aeroplanes and to exclude those who are inactive occupants of such vessels."

In Vance on Insurance, (2d ed.), page 901, § 269, it is said: "If the policy excepts the risk of the insured 'while participating in aeronautics,' his injury or death on account of riding as a passenger in an aeroplane is generally held to be within the exception, but not so if the language of the exception is 'while engaged in aviation'."

In the case of *Pittman* v. *Lamar Life Ins. Co.*, 17 Fed. (2d) 370, the Circuit Court of Appeals for the Fifth Circuit held (to quote the syllabus in that case) that: "Assured, killed when struck by airplane propeller blade as he was leaving ship after completing flight, *held* to have met his death while participating in an 'aeronautic activity,' within the meaning of provision of policy limiting insurer's liability to premiums paid." A petition for a writ of certiorari in this case was denied by the Supreme Court of the United States. 274 U. S. 750, 47 S. Ct. 764. It is apparent that this case goes much farther than I am now contending in the instant case, as the insured had not operated the airplane which killed him, after he had gotten out of it.

Inasmuch as the text writers on the subject of insurance construe the adjudged cases as I do, I am constrained to register my dissent.

COFFIELD & MOORE MANUFACTURING COMPANY *v.* EL DORADO LAUNDRY & DRY CLEANING COMPANY.

4-3366

Opinion delivered February 19, 1934.

Silas W. Rogers, for appellant.

Harry Steinberg and *McNalley & Sellers*, for appellee.

MEHAFFY, J. This suit was begun by the appellant against the appellee for $957.48. It alleged that the appellee was indebted to it in said sum for machinery and merchandise sold to appellee; that the amount was past due and represented the balance due on the purchase made by appellee. An itemized statement was attached to the complaint and made part thereof.

Appellee filed an answer and cross-complaint in which it denied the material allegations in the complaint; denied being indebted to appellant in any sum. In the cross-complaint appellee alleged that the machinery bought was unfit for the purpose for which it was purchased, and that appellee had been damaged in the sum of $700, and asked judgment against the appellant.

There was a trial by jury, and a verdict and judgment for appellee on its cross-complaint for $100. The case is here on appeal.

Appellant first contends that the damages awarded appellee were in excess of the amount claimed in cross-complaint. It is argued that, according to the undisputed

testimony, the total amount due appellant at the date of trial was $968.95; of this amount $133.48 is interest. If, as the jury must have found, the machinery sold was unfit for the purpose for which it was purchased, appellant would not be entitled to interest. The evidence as to the damages is not very satisfactory, but we think it was sufficient to show that the damages were equal to the amount due appellant.

The cross-complaint alleged that appellee entered into a contract with appellant for the purchase of a new and complete boiler return system to be used in appellee's laundry and cleaning plant, and that appellant warranted to appellee that such system, when installed by it, would operate in an efficient and satisfactory manner, and that, when the steam pressure in the boiler reached a certain point, the safety signal valve would blow a warning of such excess pressure, and said valve would automatically cut off or reduce the flow of fuel gas in such manner as to furnish proper steam pressure for the efficient operation of the system and protect the boiler against excessive pressure. It was also alleged in the cross-complaint that the appellant breached this contract by installing a used, second-hand and inferior system, instead of a complete new system; that the system installed by appellant is not the system purchased by appellee; that the agent of appellant informed appellee that the safety signal valve installed was second-hand, but that appellant would replace it with a new safety signal valve, but that the old valve would adequately operate and take care of the operation of the system.

Appellee was not acquainted with the character of equipment purchased, and did not know that a second-hand system had been installed, until some time after the installation. It then requested appellant to comply with its contract. It also alleged that its agents and servants were not familiar with the system, and had to rely on appellant; that, as a result of the breach of contract of purchase as above mentioned, the system failed to operate efficiently, and, because of the defects in it, the system was damaged by steam pressure in the sum of $500. Appellant agreed to install a new safety signal valve, and ap-

pellee thereupon paid $200; that the promises made by appellant were all violated, and the equipment is worthless and of no value. Appellee prayed for judgment for $700 damages.

The evidence also showed that the automatic gas control was second-hand, and was sold to appellee for $37.50, and that a new one was worth $125.

Thomas Conley, a boiler-maker, testified that he was familiar with the value of second-hand boilers, and that a reasonable market value of the boiler in question would be $1,500, and that the damage depreciated it 50 per cent. This evidence seems to have been admitted without objection.

O. Brewster testified that he was solicitor for the laundry when the boiler flues burned, and this caused confusion and dissatisfaction and loss of two customers, and that, from these two customers, the laundry was getting $30 a week, $15 from each. There is no evidence as to whether this loss would probably continue, and no evidence showing the loss of other customers, and it is impossible to tell how much the jury found for these items.

Whatever amount of damages was given for loss of customers was speculative and uncertain. We think, however, this error can be cured by disallowing the judgment of $100 in favor of appellee, because there seems to be ample evidence to sustain a finding for appellee; that is, a finding that the damages are equal to the balance due appellant.

It is next contended that the court erred in not permitting the appellant to introduce testimony that the Kisco Return System was a well-known, well-advertised and generally used article of merchandise. There was no error committed by the court in refusing to permit this testimony. The evidence shows that the appellee did not make the purchase because of any advertising or general use of the merchandise, and knew nothing about it itself.

It is next contended that the court erred in refusing to instruct the jury to find for the appellant in the sum proved to be due. The court, at the request of the appellant, instructed the jury in effect that there was no implied warranty that second-hand parts will perform effi-

ciently, but that the defendant must assume the risk that the second-hand part will do the work as well as a new part, and that the failure of the second-hand part to perform efficiently does not invalidate the contract. The court also instructed the jury that the burden of proving the counterclaim was upon the appellee. The following instruction was given at the request of the appellant: "Where property sold is not reasonably fit for the purpose intended, the purchaser has two remedies: first, he may rescind the contract, surrender the property and recover his money, or, second, he may retain the property and recoup his damages for the deficiency when sued for the purchase price. In this case the defendant, El Dorado Laundry & Dry Cleaning Company, has elected to retain the property, and under the evidence it will be your duty to find for the plaintiff in the amount sued for, and, if you further find that the defendant is entitled to damages on its counterclaim, you will find for the defendant in whatever sum you find from the evidence it is entitled to."

Instruction No. 8 was also given at the request of appellant. It reads as follows: "Before the defendant can recover damages on its counterclaim, it must prove by a preponderance of the evidence that there were substantial defects, not mere minor defects or adjustments, that would make the Kisco Boiler Return System unfit for use, and, if you find from a preponderance of the evidence that the defendant was damaged in any sum, you will arrive at the amount of the damages by determining the difference between the value of the property sold in good condition as represented and the value in its present deficient condition, if it was deficient, and render a judgment against El Dorado Laundry & Dry Cleaning plant for the difference, if any is shown."

The case seems to have been submitted to the jury on correct instructions, and as to whether the property purchased was fit for the use for which it was purchased, and also its value, were questions for the jury. The amount of damages to which appellee was entitled was also a question for the jury. We have already said that the evidence as to loss of customers was uncertain and speculative, and it is impossible to say what amount the

jury gave for these items. However, the amount given for loss of customers would not exceed $100, and, as there appears to be sufficient evidence, without the evidence as to these items, to sustain the jury's verdict in finding for the appellee, this error can be cured by disallowing the $100 in favor of appellee, reversing the judgment as to that, and entering judgment here for the appellee, which is accordingly done.

ROARK TRANSPORTATION, INC. *v.* SNEED.

4-3376

Opinion delivered February 19, 1934.

Festus O. Butt, for appellant.

C. A. Fuller, A. J. Russell, Jr., and *J. W. Trimble*, for appellee.

MEHAFFY, J. On November 15, 1932, W. L. Sneed, who lived at Berryville, Arkansas, was on his way to Eureka Springs, driving a Ford car, which collided with a bus belonging to appellant, which was being driven in the opposite direction. W. L. Sneed died a few hours after the collision from injuries received when his car and the bus collided. Suit was brought by the administratrix, Grace Sneed, for damages for the injury and death of her husband.

The complaint alleged that the appellant is a corporation and was operating the bus at the time of the collision as a common carrier of passengers from Fayetteville through Eureka Springs to Berryville; that, at the time of the collision and injury, the bus of appellant was being driven at an unusual and dangerous rate of speed, and without due care and caution for the safety of deceased and other persons upon the highway; that the driver of said bus negligently and carelessly propelled and drove the said bus against the car in which the deceased was riding, and, as a result of the negligence of the driver of said bus, the said deceased received the injuries which caused his death; that at the time deceased was in the exercise of due care and caution for his own safety, and that the injury received by him was caused solely by the negligent failure of appellant through its agents, servants and employees to operate said bus with care and caution, and with due regard for the safety of

the deceased; that said automobile bus was traveling along and upon the highway at an unusual, reckless and dangerous rate of speed, and, immediately prior to the meeting with the deceased, the driver of said bus negligently and carelessly lost control of said bus, and thereby propelled the same against the automobile occupied by deceased, resulting in the injuries and death of deceased; that the deceased, W. L. Sneed, left surviving him his widow, Mrs. Grace Sneed, a daughter 17 years of age, a son 20 years of age, and another son 12 years of age, as the next of kin and heirs at law; that prior to the injury said Sneed was a strong, healthy, able-bodied and industrious man, and was contributing all his earnings, except a small amount necessary for his own maintenance, to the support, care and comfort of his wife and children.

There was a trial by jury, and a verdict and judgment for the appellee, Mrs. Sneed, in the sum of $3,000, and a verdict and judgment in favor of the estate in the sum of $2,000. The case is here on appeal.

It is earnestly insisted by the appellant that there is no evidence to support the verdict, and no evidence showing negligence on the part of the bus driver. A map, or diagram, was introduced in evidence, and the evidence shows that the collision occurred at a curve. The deceased, Sneed, was traveling from Berryville to Eureka Springs, and, according to the evidence, the accident occurred just after Sneed had entered into the curve. The road at that place curved to Sneed's right, and Sneed should have been on the right-hand side of the road, next to the mountain or bluff. The bus driver who was going in the opposite direction, if he was on the right side of the road, as he should have been, would have been at the outside part of the curve, and, according to the diagram and evidence, there was ample room for the cars to pass. It was snowing and sleeting; the bus driver was coming downhill, and Sneed was going uphill.

Mitchell, the bus driver, testified that there is a double curve where the accident occurred, and, before he got around, he saw the other car coming facing him, not yet around the curve, and still below him. He testified

that he was on his side of the road, and did not start to slow down, but thought the driver of the other car would honk as he came around closer. He then applied his brakes and sounded his horn, and Sneed came right on and hit him, and that was on the right side of the road. He testified that the grade was a steep one; that, when he first saw the approaching car, before he got to the second curve, and making the left turn, the other car was at a point designated as "B" on the diagram, which is some distance on the road toward Berryville; that, when he saw the other car coming straight against him, he applied his brakes and sounded his horn. He also testifies that the cars hit, and for the time being there was a stop; then the bus gradually pushed the car diagonally across the road downhill. He said that he approached the place of the accident driving at from 20 to 30 miles an hour. He had hydraulic brakes, and first applied them, and then used his emergency brakes. It caused the bus to skid some, and cut the speed, and at the moment of impact he said he was going about 10 miles an hour. The hydraulic brakes applied to all four wheels, and would not cause a skid. The bus had dual or double wheels in the rear. Witness said that coming down the grade on his left or the north side of the road was a mountainside, and on his right a sharp drop. He then describes the damage to the cars, and says that the bus pushed the other car down the road to the embankment. This witness testified that he left Eureka Springs driving at 20 to 30 miles an hour; that he did not have a schedule under which he drove 50 to 60 miles an hour, but the buses are governed at 40 miles an hour. Witness supposed the bus weighs about 7,000 pounds, and he was going 25 or 30 miles an hour. The natural tendency of the bus was to lean toward the bank. When he first saw the Ford coming, he did not slow up because he thought it was going to turn away, but as he came nearer he applied his brakes. Witness was asked the question: "If you had applied your brakes you could have avoided the collision at that time?" and he answered, "I could have stopped, maybe; I don't know." He testified that it was easier to

stop a car with hydraulic four-wheel brakes than where it had only two brakes.

Witness Denny testified that he paid little attention to the size of the bus, but that it was eight or ten times larger than the Ford, and would weigh six or seven times as much. Witness found the car against the bank, and thought the collision occurred about 50 feet diagonally up the road from where the car was; saw glass about two or two and a half feet on the north or right-hand center of the road going toward Eureka Springs. This witness also said, from where the glass was, the big car came kind of diagonally off until it took the little car against the bank. Witness traced the tracks to the middle of the road. The hind wheels were two feet south of the middle, and the front wheels were two feet north of the middle. Witness said the bus coming down the grade at 25 or 30 miles an hour could have been stopped in 75 feet. He testified that the Ford would weigh about 2,300.

Other witnesses testified about the condition at the place of the accident, and about the tracks of the bus coming diagonally across from the right side to the left side of the road.

All of the evidence shows that, when the cars had stopped, the Ford car was against the bluff. This bluff was on the right side of the road, the way Sneed was going. Several of the witnesses testified that the bus went diagonally across the road from the driver's right to the left side, and pushed the Ford against the bluff. The evidence shows that it was snowing and sleeting, and the road was slick.

There was considerable evidence in addition to what we have set out tending to show the condition of the road, the situation of the cars after the collision, and the tracks made by the bus. We think, however, that, from the evidence above set out the jury could have found that the driver of the bus was going down grade on a slippery road at the rate of speed of 30 or 35 miles an hour; that he was not on the right side of the road, and that he made no effort to stop immediately upon discovering Sneed coming from the other direction. In other

words, we think the evidence as to the negligence of the bus driver was sufficient to submit this question to the jury, and the jury's finding on conflicting evidence is conclusive here, although we might think it was against the preponderance of the evidence. It would serve no useful purpose to set out the evidence in detail, for the reason that the finding of the jury on conflicting evidence is conclusive here. The burden of proof was, of course, upon the appellee to show that appellant was guilty of negligence.

Appellant contends that the court erred in asking witness Denny the following question, and permitting him to answer it. "Assuming that the bus has an emergency brake, and from the size of the car you observed and the direction you gave the jury, and it weighing 6 or 7 times as much as the small car, and the character of the road you observed, state whether or not, if that car had been running at a reasonable rate, 20 to 30 miles an hour, down hill, that it could have been stopped within a reasonable distance with the application of the emergency brake." The witness answered: "Within a distance of 75 feet." The evidence shows that Denny is a mechanic in a Ford garage at Berryville, and has operated cars 20 or 25 years. We do not think there was any error in permitting the question and answer. He certainly qualified himself to testify about emergency brakes and hydraulic brakes, and the effect that their application would have on a car.

Appellant, in this connection, calls attention to the case of *Malvern & O. R. Rd. Co.* v. *Smith,* 181 Ark. 626, 26 S. W. (2d) 1107. In that case it was urged that the court committed error in permitting witnesses to express an opinion as to what the damages were without stating the facts upon which the opinion was based, and the court said: "We think no error was committed in permitting the witnesses to express their opinion where it was shown that they had some knowledge of the facts about which they testified." The court also said in this connection: "Whether a witness has such knowledge of the facts as to make his opinion of any value is a question largely

within the discretion of the trial judge, and the value of such testimony may be tested by cross-examination of the witnesses as to the facts upon which the opinion is based."

In the instant case the witness testified about his experience and qualification, and especially with reference to the effect of emergency and hydraulic brakes, and, even if he had never seen them tested on a large bus, still he could give his opinion as to what the effect would be, if he had experience in the use of such brakes on other cars.

In the other case referred to by appellant, *Newport Mfg. Co.* v. *Alton,* 130 Ark. 542, 198 S. W. 120, the court announced the rule that where experience and observation in the special calling of the witness gives him knowledge of the subject beyond that of persons of common knowledge, his evidence is admissible. Certainly the witness, Denny, had had experience and observation that gave him knowledge beyond that of a person of common knowledge. See also *Dardanelle Pontoon & Bridge Turnpike Co.* v. *Croom,* 95 Ark. 284, 129 S. W. 280.

"Whether or not the qualification of a witness with respect to knowledge or special experience is sufficiently established is a matter resting largely in the discretion of the trial court, whose determination is usually final and will not be disturbed by an appellate court except in extreme cases where it is manifest that the trial court has fallen into error or has abused its discretion, and that prejudice to the complaining party has resulted, even though the appellate court might have decided differently if the question had been presented to it in the first instance." 22 C. J. 526.

Appellant next contends that the court erred in excluding the testimony of McCall, who testified that he arrived at the scene of the accident about 15 or 20 minutes after it happened, and talked to Sneed. Sneed asked him whose fault it was, and witness said: "They all say it was your fault; you were on the wrong side of the road." He testified that Sneed made no reply. This testimony, appellant insists, was a part of the *res gestae.* Sneed's question may have been, but certainly the state-

ment of the witness was no part of the *res gestae,* and was inadmissible. That statement of the witness was purely hearsay and was inadmissible. 10 R. C. L. 980.

Appellant next contends that instruction No. 7 is erroneous and should not have been given. Instruction No. 7 authorized the jury to find for the plaintiff if the defendant negligently operated the bus, and by reason of said carelessness and negligence, struck the Ford car driven by Sneed and fatally injured Sneed. This instruction also told the jury: "If you fail to so find, you should find for the defendant."

But in instruction 12 given by the court, after having defined "ordinary care" and "negligence," the court said that if Sneed, at the time of the injury was also guilty of negligence which caused or contributed to the injuries complained of, the verdict should be for the defendant.

Instruction No. 7, standing alone, would be erroneous, and the court said to the jury at the close of the instructions: "Gentlemen, I have been asked to state to you that no one of these instructions is the law, but all the instructions taken together constitute the law in this case."

Appellant urges that instruction No. 8 on the measure of damages assumes as a fact without regard to the testimony or what a jury might think about it, that some injuries had been inflicted. We do not think the instruction is subject to this objection, but if it were it would not be erroneous.

Dr. J. F. John testified that he attended Sneed about three or four o'clock on the day of the accident, examined and treated him; that both arms and both legs were broken and crushed, and various injuries on head and body; that he died about 6 P. M.; suffered conscious pain and anguish as much as any man witness ever saw. There was no dispute about his injuries, and, where a person has both legs and both arms crushed and other injuries inflicted, it would not be erroneous even if the court assumed that some injuries had been inflicted. The court, however, did not assume that in said instruction.

Appellant also objected to the court's instructing the jury as to the form of the verdict, but we find no error in this instruction. Appellant next contends that instruction No. 13, given by the court, is erroneous. We do not think the instruction as given by the court is open to the objection made by appellant. The instruction is as follows: "Ordinary care requires of every man who drives a motor vehicle upon a public highway to keep a lookout for vehicles or persons who may be upon the highway and to keep his motor vehicle under such control as to be able to check the speed or stop it if necessary, to avoid injury to others when danger is apparent; and, if in this case you should find that the driver of defendant's automobile bus discovered the peril of deceased Sneed, and, by the exercise of ordinary caution and care, could have avoided a collision, and failed to do so, then, in that event, he would be guilty of negligence."

This court said in the case of *Madding* v. *State,* 118 Ark. 506, 177 S. W. 410: "Neither did the court err in telling the jury that it was the duty of the defendant to keep his machine under such control as to check the speed or stop it absolutely if necessary to avoid injury to others where danger could reasonably be expected or was apparent."

The instruction in the instant case stated to the jury that it was the duty of a person driving an automobile on the highway to keep his vehicle under such control as to be able to check the speed or stop it if necessary to avoid injury to others when danger is apparent.

In the case of *Smith Ark. Traveler Co.* v. *Simmons,* 181 Ark. 1024, 28 S. W. (2d) 1052, objection was made to the instruction given in that case. The instruction there given and approved was as follows: "Ordinary care requires of every man who drives a motor vehicle upon a public street to keep a lookout for vehicles or persons who may be upon the street, and to keep his motor vehicle under such control as to be able to check the speed or stop it absolutely if necessary to avoid injury to others when danger may be expected or is apparent." The court did not err in giving instruction No. 13.

Appellant objects to some other instructions, particularly to appellant's requested instruction "B." This instruction was modified by the court by striking out the word "partly." The instruction as requested stated that, if the collision that occurred was due solely or partly to the fault of Sneed, the verdict should be for the defendant. The court modified said instruction by striking out "partly." It then read, "if the collision that occurred was due solely to the fault of Sneed." The instruction as requested should have been given, but, for the fact that the jury had already been told in the instruction immediately preceding this that, if Sneed was guilty of negligence which caused or contributed to the injury, plaintiff could not recover. There was no occasion to tell them in another instruction the same thing, and the instruction as given, No. 15, was, of course, correct. Sneed could not recover if his negligence was the sole cause.

After a careful examination of all the instructions requested, given and refused, we are of opinion that the court did not err either in giving or refusing to give instructions. The questions involved were submitted to the jury on correct instructions, and it was therefore a question of fact to be determined by the jury as to whether appellant was guilty of negligence, and as to whether Sneed was guilty of contributory negligence, and the jury's verdict on these questions is conclusive here.

We find no error, and the judgment is affirmed.

McMillan *v.* Marathon Oil Company.

4-3369

Opinion delivered February 19, 1934.

D. D. Glover, for appellant.

Henry E. Spitzberg, for appellee.

McHaney, J. Appellant, Mrs. Cora A. McMillan, is the owner of a certain filling station property in the city of Malvern. Prior to October 11, 1932, said property was under lease to the Texas Oil Company at a rental of 1 cent per gallon of gasoline sold in said station per month. Through negotiations between her agent and the agents of appellee, which were initiated by the latter's agents, on October 11, 1932, she executed a lease agreement to the appellee, for a period of twelve months, beginning November 1, 1932, at $90 per month. The lease agreement was prepared by counsel for appellee, who, upon examination of the abstract of title to the property, found that it was mortgaged to the Commonwealth Building & Loan Association of Little Rock in the sum of $7,500. The latter agreed to subordinate its rights to that of appellee, provided the monthly rentals were paid to it, and Mrs. McMillan, on the same day, October 11, executed a written assignment of the rentals to accrue under said lease to said association. Under date of October 14, 1932, she executed a lease upon the same premises for the remainder of the month of October to L. J. Nix, an agent of appellee, at 1 cent per gallon of gas sold during the remainder of the month. This lease agreement, as also the rental assignment aforesaid, made specific reference to the lease agreement with appellee above mentioned. When the Texas company moved its underground tanks and other equipment from the prem-

ises, it left the openings in the ground unfilled at Nix's request, and he immediately moved tanks and other equipment in, the property of appellee, and replaced the concrete which had been removed when the Texas company took its tanks out. All this was done by Nix, as he says, although he had a lease for only sixteen days. The station was, from October 14 on, operated in appellee's name, displaying its name and brand of products. Appellee never did sign the lease agreement, nor did it pay appellant any rent as agreed or otherwise. On December 17, Nix gave Mrs. McMillan a check for $19.40 for rent for November, the October rent having been paid. She took this check to the Building & Loan Association, and, upon its advice, refused to accept it, and turned it back to Nix. She thereafter brought this action against appellee to recover the rent as stipulated in the lease agreement. At the conclusion of the evidence on behalf of appellant, the court, upon appellee's motion, found the facts and law against her, dismissed the complaint for want of equity, and this appeal followed.

We think the court erred in so deciding. To sustain the action of the trial court, appellee insists that there is no proof that either Mr. Springer, its general manager of sales in this State, or Mr. Sheets, who actively solicited this lease and negotiated with appellant for it, and who was its field agent, had any express authority to represent appellee in this particular matter. There is no showing to the contrary. The undisputed proof is that Sheets solicited this lease, and, when the terms had been agreed upon, he requested Mrs. McMillan's agent to go to see Mr. Springer, general agent for Arkansas, which he did, and he and Springer agreed upon the contract, which was reduced to writing by appellee's attorney. Springer either sent it or caused it to be sent to Mrs. McMillan for her signature. She signed it and at the same time signed the rent assignment heretofore mentioned and Sheets signed as a witness thereto. This rent assignment was sent to the Commonwealth Building & Loan Association and was approved and accepted by it. No further subordination agreement was necessary, but, if so, the association agreed to subordinate its lien to the lease and

offered to sign a proper writing to this effect. Springer, Sheets and Nix were all employees of appellee. They assumed to act for it in the premises, and we think were acting within the apparent scope of their authority. Springer, being the general manager for sales in this State, the others, acting under him, had the apparent authority of transacting any business for his principal that would further or tend to further the business of his principal of which he is the general manager. It is well known that oil companies market their products through filling stations or service stations, either owned by them in fee, or operated by them under a lease, or through dealers handling their brands of merchandise. Such being the case, Springer no doubt had the express authority to negotiate for leases on property for filling station purposes, and bind his principal by contracts of this nature. At least, he had the apparent authority so to do. Moreover, both Sheets and Springer were admitted agents, and we have many times held that one dealing with an admitted agent had the right to presume, in the absence of notice to the contrary, that he is a general agent, clothed with authority coextensive with its apparent scope. *Hal H. Peel Co.* v. *Hawkins,* 175 Ark. 806, 300 S. W. 420, and cases there cited. Also it is true that Springer is the general agent, and we have many time further held that generally the principal is bound by all acts of a general agent which are within the apparent scope of his authority, whether they have been authorized or not. *Oil City Iron Works* v. *Bradley,* 171 Ark. 45, 283 S. W. 362; *A. J. Chestnut Co.* v. *Hargrave,* 177 Ark. 683, 7 S. W. (2d) 800.

Appellee's agents caused appellant to terminate a lease agreement between her and the Texas company, made a contract with her for the lease of the property, entered into possession of the property and have had it in their possession ever since. It cannot escape liability now on the supposed lack of authority in such agents to bind it, or in its failure to have its proper officials execute the lease agreement. The term having now expired, it is liable for the full amount of the rental, $1,080, with interest thereon at 6 per cent. for one-half the term, to November 1, 1933, this sum to bear interest

thereafter until paid at 6 per cent. Judgment will be entered here for said amount, and all costs here and below.

Reversed.

ROARK TRANSPORTATION, INC. *v.* WEST.

4-3377

Opinion delivered February 19, 1934.

Festus O. Butt, for appellant.

C. A. Fuller, A. J. Russell, Jr., and *J. W. Trimble*, for appellee.

McHANEY, J. This case is controlled in nearly all respects by the decision of this date in the case, *Roark Transportation, Inc.*, v. *Sneed, ante* p. 928. Appellee's intestate and Mr. Sneed were riding in the same car at the time of the collision between it and appellant's bus, Sneed being the driver and Mrs. West an invited guest, and both received injuries from which they died. Trial resulted in a verdict and judgment against appellant for $3,000.

For a reversal, a number of errors are assigned and argued, which are the same as in the Sneed case, and we will not repeat them here. Only such assignments as are not covered in the Sneed case will be discussed in this.

In the panel of 24, qualified as prospective jurors, from which to select by lot 18 for a drawn jury, appeared two persons who were related to Mr. Sneed, driver of the Ford car, within the prohibited degree, and they were challenged on this ground. The court held them competent; and they were stricken from the list by appellant. This was not reversible error for two reasons: (1) that they were not related to Mrs. West or the plaintiff, and (2) appellant was not required to accept them on the trial jury. It exercised its right so to do and struck them off. It is not contended that any of the twelve jurors selected to try the case were disqualified in any way, or that they were not fair and impartial, nor is it shown that any challenge was made to any juror selected. The relationship prohibited by § 6334, Crawford & Moses' Digest, is to either party to the suit. Sneed was not a party to this suit.

Objection was made to the giving of instruction No. 6 for appellee, on the ground that it "ignores the possible existence of contributory negligence on the part of plaintiff's decedent." Only a general objection was made to the instruction as given, but it is now said that it should have contained the clause, "and without fault on the part of Fannie Clark West." No such request was made to the trial court. Contributory negligence is an affirmative defense, and the burden is on him alleging it to establish it by a preponderance of the evidence. There is no proof in this record that Mrs. West was negligent in any particular. The proof is to the contrary. Therefore the court would have been justified in refusing the modification now suggested had the request been made. The same thing is true as to objections made to instructions 10 and 11.

All other errors assigned and argued are covered in the Sneed case.

Affirmed.

HOME BUILDING & SAVINGS ASSOCIATION *v.* CLAY.

4-3262

Opinion delivered February 19, 1934.

Hardin & Barton, for appellant.

Paul M. Lynch and *George W. Dodd*, for appellee.

Wm. H. Clark, Jr., Pettit & Meek, Trieber & Lasley and *Will G. Akers, amici curiae.*

BUTLER, J. The appellee brought suit to recover upon a certificate of stock issued to him by the appellant association. On a trial of the case, upon the pleadings and testimony adduced, the court held that the appellee was entitled to the relief prayed, and rendered judgment in his favor in the sum of $1,000, with interest from the date of the judgment until paid. From that judgment this appeal is prosecuted.

Prior to September 2, 1931, appellee was the owner of an amount of matured stock in the appellant association, and on that day he surrendered the same and received in exchange therefor the certificate upon which the suit was filed, which certificate is as follows:

"Without Banking Privileges

"Number 721 Ten Shares

"Home Building and Savings Association

"Fort Smith—Little Rock—Dallas

"Six Per Cent. Full Paid Stock

"Upon thirty days' written notice, given after one year from date hereof, Home Building and Savings Association will pay to J. F. Clay, of Fort Smith, Arkansas, one thousand and no/100 dollars ($1,000), with all unpaid dividends that have fallen due thereon, at the rate of six per cent. (6%) per annum, falling due semi-annually on January 1st and July 1st each year. In consideration of said dividends being paid in cash, the owner hereof waives all larger participation in the earnings of the association.

"This certificate is subject to the laws of Arkansas and the bylaws of the association. It is especially agreed in no case shall the rate of dividends hereon exceed the rate paid or credited by said association on its instalment and pre-paid stock.

"Witness the corporate seal and the signatures of the president and the general manager of said association at Fort Smith, Arkansas, this 2d day of September, 1931.

"(Signed) W. T. Maxwell, President.

"(Seal) R. W. Ferguson, for General Mgr.

"Transfer of this certificate will be made only upon request of the owner and upon payment therefor of $1 transfer fee.

"Shares $100 Each."

Endorsed on side of certificate: (Div. paid from July 1, 1931. Issued in lieu Cert. No. 1988.)

It is the contention of the appellee, to which the trial court assented, that the relationship created by the foregoing instrument was that of debtor and general creditor. The appellee here argues that the certificate

did not create him a stockholder in the association, but, if so, that at the expiration of thirty days' notice of demand for payment such relationship ceased, and that of debtor and creditor arose. In support of this contention appellee has referred us to a number of cases which seem to sustain the position he has taken. Among these are: *Wise Bros.* v. *Yazoo Building & Loan Ass'n,* 105 Miss. 78, 62 Sou. 1; *Eastern Bldg. & Loan Ass'n* v. *Williamson,* 189 U. S. 122, 23 S. Ct. 527; *Silvers* v. *M. & M. Sav. Fund, etc.,* N. J. Ch. 56 Atl. 294; *State, etc.,* v. *Active Bldg. & Loan Ass'n,* 80 Mo. App. 585. The doctrine of these cases appears to be founded on the case of *U. S. Bldg. & Loan Ass'n* v. *Silverman,* 85 Pa. 394, holding that, in building and loan associations the status of a withdrawing member is changed from that of member to that of general creditor.

It is insisted by the appellee that the form of the certificate is conclusive of the relationship, and that an inspection of it discloses that it is an obligation for the payment of money; that it is not in form a stock certificate, and does not indicate that the appellee was the owner of stock or a member of the association, and, since it is an obligation to pay a certain sum of money, it is not a stock certificate, nor was the appellee a stockholder, and therefore the bylaws of the association would not apply. This position cannot be maintained because the certificate is not an unconditional obligation to pay a sum of money at a time stated or upon the happening of certain contingencies, the promise to pay being limited by the statutes of this State and the bylaws of the association, which are expressly made a part of the contract.

The association is a mutual building and loan association, operating under the provision of act No. 128 of the Acts of 1929 as amended by act No. 236 of the Acts of 1931, digested in Castle's Supplement, § 750 *et seq.* Mutual building and loan associations are permitted by statute to provide by their bylaws the several kinds of classes of shares, stock, or certificates which it may issue and to prescribe the reciprocal rights and powers of the owners of the several classes of stock. Authority is given for the withdrawal of credits on any or all classes

of shares, stock or certificates at such times and under such terms and conditions as the association may prescribe by its bylaws. The statute also provides that the withdrawals shall be paid in the order of filing, and that not more than fifty per cent. of the monthly receipts of the association in any one month may be paid upon such withdrawal applications.

The bylaws of the association provide that all those who become in any way the owner of one or more shares of the capital stock or certificates of the association shall be members of the same; that each member present at any meeting of the association in person, or by proxy, shall be entitled to one vote for each $25 of value of stock or certificates held by him. They provide further for various classes of stock to be paid for in installments or to be fully paid when issued, the fully paid stock to be issued at $100 cash per share with such rate of interest or dividend and for such length of time as may be determined by the board of directors.

Section 12 of the bylaws provides in part that at no time shall more than one-half of the monthly receipts of the association, in any one month, be applicable to the payments of withdrawals for that month, except by the consent of the board of directors; and, further, that applications for withdrawals shall be paid in the order filed as fast as funds are available for that purpose.

Upon the issuance of the certificate, it is clear that the appellee became the owner of ten shares of the value of $100 each of full-paid stock, and, under the bylaws of the association, had a right to participate in its management, and it seems that he executed a written proxy authorizing certain persons to vote his shares of stock at any meeting of the association. It is argued that § 12, relating to withdrawals, does not apply to fully-paid certificates of stock. No class of stock is excepted, but the statute expressly provides for the withdrawal of "all classes of shares, stock or certificates." Appellee says he did not give notice of withdrawal, but of demand for payment. The effect of a demand for payment would be notice to the association of the intention to withdraw membership, and whether it be called "demand for pay-

ment" or "notice of withdrawal" is immaterial, for the result would be the same, and the demand or application could not be paid in any event out of more than one-half of the monthly receipts of the association in any one month, and then only in the order of its filing. The maturity of the stock and the demand for its payment would not serve to change the relationship from stockholder to general creditor as contended. Our conclusion in this respect has the support of the weight of authority, and in Pennsylvania and New Jersey, where the rule was first announced as contended for by the appellee, later decisions seem to have abandoned it. *Fornatoro* v. *Atl. Coast, etc., Ass'n,* 10 N. J. Misc. 1248, 163 Atl. 240, and *Stone* v. *Schiller B. & L. Ass'n,* 302 Pa. 544, 153 Atl. 758. In the last-named case, the early case of *U. S. B. & L. Ass'n* v. *Silverman, supra,* is repudiated. In *Heinbokel* v. *Nat. S. L. & B. Ass'n,* 58 Minn. 340, 59 N. W. 1050, 25 L. R. A. 215, 49 A. S. R. 519, referring to the doctrine that a stockholder ceases to be a member of the association after due notice of withdrawal, and may, upon refusal of payment, sue and recover judgment as any other creditor, it is said: "But it is obvious that a stockholder who withdraws from one of these associations cannot properly be regarded as having the rights of the ordinary creditor, and this was admitted by the same learned court (Pennsylvania) in a later case (*Christian's Appeal,* 102 Pa. St. 189), in which it was frankly stated that there was manifest error in *U. S., etc., Ass'n* v. *Silverman,* 85 Pa. St. 394, in putting withdrawing stockholders in the position of general creditors. The conclusion in the case just mentioned loses potency when we discover that the reasoning is unsound."

As already stated, the later Pennsylvania and New Jersey cases have abandoned the rule laid down in the Silverman case, and have adopted the contrary view, which has the support of our own court in *Fort Smith B. & L. Ass'n* v. *Cohn,* 75 Ark. 497, 87 S. W. 1173. In that case certain stockholders had matured their stock in the association and were entitled to a designated sum under the terms of their certificates. They demanded payment, notice of which matured December 1, 1897. Instead of

paying cash, the association executed its promissory note on February 25, 1899, for the sum demanded, payable February 25, 1900. On the 5th day of March, 1900, the association was declared insolvent by the chancery court, and receivers were appointed to administer its assets under the orders of the court. The holders of the notes intervened and prayed for judgment for the amount due, as shown by the notes, on the theory that they were general creditors, invoking the rule contended for by the appellee in the case at bar. The trial court gave judgment for the note holders, but the Supreme Court reversed that judgment, saying: "The court erred in rendering judgment for appellees as if they were creditors of the association. The proof shows that the association was insolvent at the time the notice of withdrawal was given, and continued so down to the time of the execution of the notes, which are the basis of appellees' claims.

"The proof tends to show that appellees suspected that the association was in a critical financial situation. But, even if it be conceded that they did not know that the association was insolvent, still that would not affect the result here. For the indebtedness of the association to them, evidenced by the notes, grows out of their relation to the association as members. * * *

"While appellees made an honest effort to withdraw, and thought they had withdrawn, and were treated, after expiration of their notice, as if they had withdrawn, so far as the payment of dues, etc., was concerned, yet, as a matter of fact, actual withdrawal had not been consummated. For that could only take place by the payment for their stock."

The doctrine of these cases is that held by a majority of the courts. Among these are the following: *Fornataro* v. *Atl. Coast B. & L. Assn., supra,* where the rule of the eariler New Jersey cases is modified; *Englehart* v. *Fifty Ward, etc., Ass'n,* 148 N. Y. 281, 42 N. E. 710, 35 L. R. A. 289; *Texas Homestead B. & L. Ass'n,* v. *Kerr,* 13 S. W. 1020; *Publicker* v. *Pottash Bros., etc., Ass'n,* a late Pennsylvania case, 104 Pa. Super Ct. 530, 159 Atl. 58; *Andrews* v. *Roanoke Bldg., etc., Co.,* 98 Va. 445, 36 S. E. 531, 49 L. R. A. 659; *Mutual Bldg. & Investment Co.* v. *Fred-*

erick, 43 Ohio App. 270, 183 N. E. 114; *Rabbitt* v. *Wilcoxen,* 103 Iowa 35, 72 N. W. 306, 38 L. R. A. 183, 64 Am. St. Rep. 152.

The appellee calls attention to the fact that nearly all of the cases cited by the appellant arose where the association was insolvent, and that the rule in those cases is not applicable to the instant case for the reason that the appellant association is a solvent and going concern. The fact that a building and loan association is solvent or insolvent cannot convert a withdrawing stockholder who may be in a sense a qualified creditor into a general creditor. It is true that a majority of the cases arose in insolvent associations, but there are a number where the association was a solvent and going concern and the withdrawing member contended for the status of a general creditor and sought to have his demand reduced to judgment. Among these are those last above cited.

In the case of *Miers* v. *Columbia Mutual B. & L. Ass'n,* 157 Fed. 490, the court, in discussing a contention similar to that of the appellee in the case at bar last noted above, had this to say: "The claimant contends that, assuming the insolvency of the association at the time his withdrawal application was accepted, he is entitled to preferential payment; his status from that time being that of a creditor. The contention ignores the qualification of the liability of the association contained in the bylaws that no more than 'one-half the monthly dues received in any month' shall be applied to the payment of withdrawing members." A number of cases are cited, and the court continues: "It is true that in some of the cases cited by the master the involved associations were insolvent, and in others they had ceased to do business and were unable to repay the dues paid by the withdrawing members; but, even assuming that the evidence in this case does not strictly disclose the insolvency of the respondent at the period of the withdrawal notice in suit, the claimant was nevertheless required to prove that available funds were in the possession of the respondent to meet the repayment demanded at the time of the appointment of the receivers."

In a majority of the cases holding that a withdrawing member is a creditor, there is no controversy involving the rights of the general creditors, the contentions being between the different classes of shareholders. The members, who had withdrawn and demanded payment for their certificates, claimed to be preferred and entitled to full payment before the other shareholders were entitled to anything. Those shareholders who had not given notice claimed that all the shareholders should participate equally in the distribution of the assets of the insolvent company. Some of these cases turn on the language of the statutes and bylaws, and it is generally held in those cases that the right of the withdrawing shareholder to receive payment must be limited to the manner prescribed by the bylaws and payable out of the funds made applicable thereto.

In *Rabbitt* v. *Wilcoxen, supra,* the court said: "It seems to us that these authorities, as well as the language of the bylaws of the association in this case, fix a limitation on the rights of withdrawing shareholders as to the funds applicable to the payment of their claims, and that beyond such limit they cannot go. In this case there is, confessedly, no such fund available. * * * Insolvency but adds to the strength of such a position."

In the instant case there is no contention that there is a fund in the treasury of the appellant association available under its bylaws to pay the certificates of the withdrawing members. Indeed, the evidence shows that there are a great number of members holding fully paid certificates who have made application for their money, but have not been paid because there are no funds available, and there is no claim made that the association has diverted any of its funds, but only that it has been paying debts owing to general creditors to the exclusion of the appellee's claim and the claims of others similarly situated. There appears to be 2,280 applications of holders of certificates for withdrawal and payment. Of this number 820 have been paid in the order of the filing of their applications. There remain 1,460 applications unpaid, and 1,057 of these were filed prior to that of the appellee. The association, in acknowledging the demand

made by the appellee, advised him that it was allowed to use not exceeding fifty per cent. of its income in any one month to pay for withdrawals; that, because of the unusual business depression, its monthly income had been reduced, and that his claim would be paid at the earliest possible date, and as soon as reached in the order of its filing.

The question of the solvency or insolvency of the appellant and a number of others are raised by the parties. These we refrain from discussing for the reason that we have reached the conclusion that the appellee's status, in any view of the case, is not that of a general creditor, and that he therefore is not entitled to the relief he seeks, which was granted by the trial court. It follows that the judgment is reversed, and the case dismissed.

AGRICULTURAL FINANCE CORPORATION *v.* BRINKLEY.

4-3370

Opinion delivered February 19, 1934.

Frank C. Douglas, for appellant.

Holland & Barham, for appellee.

BUTLER, J. The Agricultural Finance Corporation of Blytheville was organized under the laws of Arkansas about 1927 for the purpose of making loans to farmers through the Federal Intermediate Credit Bank of St. Louis. Samuel L. Thomas was secretary and treasurer after the first year or two until suit was filed in March, 1933, by certain stockholders to wind up the affairs of said corporation, in the chancery court for the Osceola District of Mississippi County, and Roy Nelson was ap-

pointed receiver and directed to proceed to collect notes and accounts. As such receiver, he filed this suit on April 28, 1933, and made each of the appellees defendants, as they had each borrowed from said corporation, and each had signed the other's note and mortgage.

It was agreed at the time of the submission of the case that said defendants owed said corporation a joint liability of $640 and interest. Defendants filed an answer and cross-complaint, alleging that, in order to borrow said money, they were required to become stockholders in the Agricultural Finance Corporation of Blytheville to the amount of $900; that they paid in this amount when the loan was made, but never received their stock certificates, and prayed for judgment against the receiver for $900 and interest.

The trial court found for the receiver in the sum of $640, and that the defendants were entitled to recover on their cross-complaint in the sum of $900, a difference of $260 in favor of the defendants, together with six per cent. interest thereon from June 2, 1930, until paid. From that decree is this appeal.

The appellants make two contentions; first, that the evidence does not show that the appellees paid the Finance Corporation $900 for their stock, and, if such payment was made to Samuel L. Thomas, it was made to him as the agent for the appellants, and not in his capacity as an officer of the corporation. We need not discuss the testimony adduced on this branch of the case, since we are of the opinion that it is sufficient to support the finding of fact made by the chancellor.

The next contention of the appellants, and the one we think well-founded, is that, by the payment of the $900 by appellees to Thomas, they became stockholders in the corporation, and cannot therefore offset their stock against the debts due by them. The proof shows that those borrowing from the corporation as a condition precedent for the loan were required to purchase stock in the corporation to the amount of seven and one-half per cent. of the sums borrowed. It seems to be conceded that seven and one-half per cent. of the sums borrowed by the appellees would be $900. When the loan had been

approved by the Intermediate Credit Bank, through which organization the Finance Corporation obtained its money, and when the checks were sent to the office of the local corporation, $900 was paid by the appellees to the secretary, Samuel L. Thomas, for the stock and the remainder of the proceeds of the loan was used by them in their business. Certificates of stock were not to be delivered to the appellees, but were to be retained by the corporation as part of the collateral security for the payment of the loan.

One of the appellees, who handled the transaction for himself and the others, testified that he understood that stock had to be taken in order to get the loan, and that in discussing the question as to the issuance and delivery of the stock with Thomas he was informed that the stock would be issued but would not be delivered until the loan was paid; that the stock would be held as collateral. The records of the corporation contain no entry showing the issuance of the stock and no stock certificates were discovered.

Appellees contend that the dealing between them and the secretary of the corporation amounted only to a contract for the sale and purchase of the stock, and that, as the evidence fails to show that the certificates were issued or delivered to the appellees, they did not become stockholders. They cite the rule announced in 14 C. J. at page 481, §§ 710 and 711, to the effect that, although the issue or tender of certificates of shares is not necessary to render one a stockholder in a corporation, the rule does not apply to contracts for the sale of stock by the corporation as distinguished from subscriptions. They insist that the transaction, to be considered as a sale, must have been completed by the issuance and delivery of the stock, and argue that, if the transaction was completed, the failure to issue the stock would amount to a conversion of it, and they would be entitled to recover its value as of the date the loan was consummated. It is clear that these contentions are untenable. Nothing remained to be done to complete the purchase of the stock after the $900 was paid to the secretary of the corporation, at which time the appellees became the owners of

the number of shares of stock in the corporation as $900 would purchase. It was not the intention of the parties that appellees should receive the certificates of stock until after the loan had been paid and whether or not the certificates were actually issued is immaterial in so far as the relationship existing between the appellees and the corporation is concerned. They acquired all the rights of stockholders and were subjected to all the liabilities as such the moment they paid the $900 for the stock, and were then, and are now, stockholders of the corporation. 14 C. J. 482 § 710; *Biscoe* v. *Tucker,* 11 Ark. 145; *Galbraith* v. *McDonald,* 123 Minn. 208, 143 N. W. 353, L. R. A. 1915A, page 465. The rule is clearly stated in *U. S. Radiator Corporation* v. *State,* 208 N. Y. 144, 101 N. E. 783, 46 L. R. A. (N. S.) 585, as follows: "The certificate of the corporation for the share, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of these facts. It expresses the contract between the shareholder and the corporation and his co-shareholders. But it is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership."

There was no conversion because the appellees were not entitled to the possession of the certificates of stock until after their debt was paid. Under the undisputed facts the appellants were entitled to a judgment for the balance of the debt with interest and the prayer of the cross-complaint should have been denied. The appellees may file their claim with the receiver as stockholders and receive their *pro rata* share of whatever may be due them after the debts of the corporation and the expense of the insolvency proceedings have been paid.

It follows that the decree of the trial court is reversed, and the cause remanded with directions to enter a decree in conformity with this opinion.

SUTHERLAND *v.* SUTHERLAND.

4-3337

Opinion delivered February 26, 1934.

Charles E. Lewis, E. B. Dillon and *S. S. Jefferies,* for appellant.

Sam M. Wassell and *Isaac Riff*, for appellee.

JOHNSON, C. J. The parties to this unfortunate divorce suit were intermarried at Cleveland, Ohio, in 1913, and there resided as husband and wife until 1929. For the sole and only purpose of ridding himself of his marriage vows, so solemnly assumed in 1913, appellee came to this State in May, 1932, and established himself in a Little Rock hotel and thereafter on November 7, 1932, filed this suit in the Pulaski Chancery Court alleging as grounds for divorce:

First, willful desertion, beginning in 1929; secondly, indignities, which rendered his condition in life intolerable.

Appellant filed an answer denying the allegations of appellee's complaint, and also filed a cross-complaint seeking alimony. On June 23, 1933, the cause was determined and appellee was granted an absolute divorce from appellant, and this appeal is prosecuted to reverse this decree.

The decree of divorce in favor of appellee is not warranted under any view of the testimony.

It is the established doctrine in this State that a divorce decree will not be granted upon the uncorroborated testimony of one of the parties. *Darrow* v. *Darrow,* 122 Ark. 346, 183 S. W. 746; *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 896; *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Rie* v. *Rie,* 34 Ark. 37.

On the question of willful desertion but little need be said. The parties flatly contradicted each other as to desertion, and neither is corroborated by other testimony. Appellee insists, however, that the witness Hood corroborates his testimony as follows: "It was also evident that plaintiff was unable to persuade her to again take up residence with him, etc."

Just what evidence this witness referred to is not related by him, and we are unwilling to accept his conclusions as evidence. The law is definitely settled in this State that witnesses should be required to detail facts about which they testify, and the conclusions deducible therefrom are drawn by the courts. This witness testified to no fact corroborating the testimony of appellee as to willful desertion.

The remaining contention is that the divorce decree is supported by sufficient testimony on the ground of indignities. As on the ground for desertion, we find that every charge and accusation made by appellee against appellant is flatly contradicted and denied by appellant in her testimony. Certainly, it can not be contended under these circumstances that either party is entitled to a divorce. The alleged corroboration of appellee's testimony on this ground is predicated solely upon two or three occasions occurring at widely separated intervals. For instance, the first occurrence detailed by the witness Ford occurred in 1925, and is of no importance. Whatever petulance was shown by appellant on this occasion was thrust at Ford and his company and not at appellee. This testimony, instead of showing reproach, contempt or ridicule of or towards appellee, demonstrates appellant's overpowering interest in her husband's welfare.

The incident referred to in 1929 by the witnesses is likewise without merit. On this occasion one witness testified that appellant said to appellee: "I never enjoy anything when I am with you." This testimony falls far short of that required under the repeated decisions of this court to establish indignities.

In the early case of *Rose* v. *Rose,* 9 Ark. 507, this court stated the rule as follows: "Personal indignities, such as rudeness, unmerited reproach, contempt, studied neglect, open insult, etc., and other plain manifestations of settled hate, alienation, and estrangement must be habitual, continuous, and permanent to create that intolerable condition contemplated by the statute."

The doctrine as announced in *Rose* v. *Rose,* has been consistently followed by this court since its pronouncement. *Preas* v. *Preas, ante* p. 854.

It should be distinctly kept in mind that marriage vows are solemnly assumed and should be sacredly kept. The interest of society demands that the bonds of wedlock should not be severed, except upon grounds prescribed by statute and established by testimony. One, two, or three trivial instances of petulance are entirely insufficient to establish indignities as defined by our statute.

The most charitable view of the testimony presented in this record in behalf of appellee is to say, that both parties were somewhat in fault, and that both, by failure to exercise that mutual forgiveness, which the relationship demanded, aggravated, rather than tended to ameliorate, their conjugal state. Had the parties to this unfortunate marriage heeded the admonitions of this court:

> "A little confessed, a little endured,
> A little forgiven, and all is cured."

As announced in *Arnold* v. *Arnold, supra,* this now unhappy couple would be enjoying the associations usually consequent to the marriage status.

A monthly allowance of $50 per month will be continued until reconciliation of the parties or until the circumstances and conditions of the parties warrant a

change, and this should be determined by some court of competent jurisdiction.

The decree of the Pulaski Chancery Court awarding appellee a divorce will be reversed, and the cause of action dismissed.

DODD *v.* GOWER.

4-3445

Opinion delivered February 26, 1934.

J. Paul Ward and *Ben B. Williamson,* for appellant.

W. O. Edmondson and *Coleman & Reeder,* for appellee.

JOHNSON, C. J. This is the second appearance of this case here. The first will be found in 187 Ark. 717, 62 S. W. (2d) 1, and reference is here made thereto for a better understanding of the issues here presented.

The law of the case, as announced in the former opinion, is controlling on this appeal. *Childs* v. *Motor Wheel Corporation,* 164 Ark. 149, 261 S. W. 28.

On the threshold of this case we are met with the contention that the appeal should be dismissed for noncompliance with rule 9. This contention is bottomed upon the theory that the material parts of the pleadings, proceedings, facts and documents presented on the former appeal have not been properly abstracted.

A part of rule 16 provides:

"When a cause has once been before this court and a transcript is again called for, to have error which occurred after its return corrected, the second transcript shall begin where the former ended; that is, with the judgment of this court, which should be entered of record in the circuit court, omitting the opinion of the appellate court—the appeal or supersedeas bond to be the last paper copied."

The abstract presented and filed in this cause substantially complies with rule 16; therefore appellee's motion to dismiss must be denied.

On the former appeal of this case, it was determined, first, "that the certificate of the election commissioners was made up from the tally sheets of the various townships in Stone County and that the tally 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."

From this hypothesis it was therefore said: "The *prima facie* effect of the certificate was overcome by the uncontradicted testimony that it was based upon the tally sheets, the integrity of which had been destroyed."

Secondly, it was furthermore determined on the former appeal, "that the integrity of the ballots in the four townships (Turkey Creek, Richards, Franklin and Washington) had been destroyed." Therefore, from this hypothesis it was determined: "The trial court should have proceeded to ascertain from secondary evidence the number of votes each received from the four townships in question."

On remand, the testimony taken on the previous trial was again introduced by appellant together with some other testimony which is not deemed of sufficient import-

ance to here discuss. Appellee introduced no additional testimony. Upon the record thus made, the trial court found that the *prima facie* showing of the election certificate executed by the election commissioners had not been overcome by the testimony, and pronounced judgment accordingly. Obviously, this was error. The testimony introduced on last trial was identical with that introduced on the former trial, and this court expressly held that the *prima facie* effect of the election commissioner's certificates was overcome thereby.

The effect of the trial court's holding was in the teeth of the former opinion of this court. This practice, of course, can not be sanctioned or approved. Whether this court's former holding was right or wrong, logical or illogical, is beside the question. The former opinion is the law of the case, the evidence being the same, regardless of the individual views of members of this court or the individual views of trial courts. This is true by force of constitutional mandate. Article 7, Arkansas Constitution of 1874.

The secondary testimony referred to in the former opinion, which was uncontradicted then and is uncontradicted now, is to the following effect:

"The election certificate executed by the election commissioners of Stone County on November 15, 1932, shows that appellee was given credit for 741 votes and appellant was given credit for 664 votes. In the tabulation of townships this certificate further shows that in Washington township appellant was given credit for 16 votes and appellee 18 votes; in Turkey Creek township appellant was given credit for 23 votes and appellee 29 votes; in Richards township appellant was given credit for 31 votes and appellee 26 votes; in Franklin township appellant was given credit for 35 votes and appellee 31 votes.

The uncontradicted testimony of the election judges and clerks, who held the election, together with the duplicate tally sheets and certificates retained by them, show that in Washington township appellant actually received 23 votes and appellee 12 votes; in Turkey Creek township appellant actually received 29 votes and ap-

pellee 13 votes; in Richards township appellant actually received 41 votes and appellee 13 votes; in Franklin township appellant actually received 48 votes and appellee 12 votes.

Thus it is a very simple mathematical problem to determine that the official count gave to appellee, in the four townships referred to, 104 votes and to appellant 105 votes. On the other hand, the uncontradicted secondary testimony shows that appellant actually received, in said four townships, 141 votes instead of 105, as credited to him by the election commissioners, and that appellee received only 50 votes in the four townships instead of 104 votes, as credited to him by the election commissioners.

Also it is another very simple mathematical problem to determine that appellant actually received 700 votes for tax assessor at the November, 1932, election instead of 664, as credited to him by the election commissioners, and that appellee actually received only 687 votes instead of 741, credited to him by the election commissioners. From this status of the record, it inevitably follows that appellant was elected tax assessor for Stone County for the term beginning January 1, 1933.

On the former appeal this case was reversed and remanded for the sole and only purpose of giving appellee an opportunity of introducing testimony to overcome the secondary testimony theretofore introduced by appellant, but this invitation was declined and ignored by appellee, therefore no useful purpose would be served by again reversing the case for a new trial. From this state of the record, it becomes our duty to declare the result and enter judgment here accordingly. *Pritchett* v. *Road Improvement Dist. No. 4,* 167 Ark. 555, 268 S. W. 1119.

For the reasons aforesaid, judgment will be here entered declaring appellant duly elected tax assessor for Stone County for the term beginning January 1, 1933, and a mandate issue effecting this result.

E. L. BRUCE COMPANY *v.* CORBETT.

4-3340

Opinion delivered February 26, 1934.

Buzbee, Harrison, Buzbee & Wright, for appellant.

W. F. Denman, Malcolm T. Garner, Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

SMITH, J. This appeal is prosecuted to reverse a judgment for $2,000 which appellee recovered to compensate a personal injury sustained while employed by appellant, a corporation. Testimony tending to support the right to recover was to the following effect: Appellee was employed as a ripsaw operator in the dimension mill of appellant, and had been operating a ripsaw only two weeks, although he had worked for appellant in various capacities about its mill since 1914, off and on. The dimension mill is equipped with different machines for sawing lumber, each being constructed and equipped for use in sawing lumber in a different manner. One of these machines is called a band ripsaw, and is designed for use in

ripping boards or planks in two, and, when so ripped, the board or plank is fed or run into the ripsaw machine sideways.

As a safety device, the ripsaw machine was equipped with two rollers in front of, and also one behind, the saw. These rollers were used to feed and guide the board or plank to and from the saw. The rollers in front of the saw caused the piece of lumber being sawed to be fed to the saw evenly and at regular intervals, while the roller behind the ripsaw was used to carry the lumber away from the saw.

Appellant also operates a flooring mill in connection with its saw and planing mill. In the flooring mill, located on the floor above the dimension mill, is a machine called a re-saw machine, which is used for resawing lumber. Lumber is run into the re-saw machine edgeways when re-sawed. The re-saw machine is equipped with rollers in front of, and also behind, the saw, and served the same purpose as the rollers with which the ripsaw was equipped. These rollers in front of the re-saw are geared up with cogs on each end of the rollers, which serve to pull the lumber being sawed into the saw. It is customary for the re-saw machine to be equipped with the rollers in front of the saw to feed and guide the lumber being re-sawed to the saw. The band ripsaw machine operated by appellee at the time of his injury was not designed for nor intended to be used in re-sawing lumber.

During the morning of the day appellee was injured the foreman of the dimension mill directed appellee to remove the rollers used as safety devices from in front of and also from behind the ripsaw machine, and appellee was ordered to replace the rollers removed from the ripsaw machine with an improvised wooden attachment, which was attached to the ripsaw machine in order to convert it and use it as a re-saw machine. This attachment was not equipped with rollers in front of the saw, nor did it feed the lumber to the saw evenly and at regular intervals. It was therefore necessary for the operator, when the improvised wooden attachment was placed on the machine, to use his hands, arms and the weight of his body in guiding and pushing the lumber to the saw.

The foreman gave appellee specific instructions as to the manner of removing the rollers from the ripsaw, and also as to replacing them with the improvised wooden attachment. After the attachment had been placed on the ripsaw as directed appellee was ordered by his foreman to re-saw an order of table drawer stock, which consisted of glued boards 8 inches wide, 14 inches long, and about 15/16ths of an inch thick.

Due to constant use, the floor around the base of the ripsaw machine was slippery. A cleat had been nailed to the floor so that when the operator was required to feed or push the material to the saw he could brace his feet. Appellee began to re-saw the table drawer stock, and braced his feet against the cleat. He pushed two pieces of drawer stock through the saw. While in this position, and pushing a third piece to the saw, the material was pulled into the saw with unexpected rapidity. Appellee had to hold the board down as he was guiding and feeding it to the saw, because the weave of the saw would cause the board to buck up. When the saw pulled the piece rapidly into the machine, appellee became unbalanced and fell, striking his chest against the bed of the machine. As a result of this fall, appellee's first rib on the right side was fractured and torn loose from the breast bone, and a malignant tumor formed at the place of injury. Drs. McGill and Hoge gave expert testimony to the effect that the injury was the probable cause of appellee's present condition.

In appellee's brief, the facts are summarized as above stated, and the evidence is legally sufficient to support a finding that appellee was injured in the manner stated, and the principal question involved on this appeal is whether these facts support a finding that the injury was the result of appellant's negligent failure to furnish and provide a safe place for appellee to work, and a safe and suitable machine for use in re-sawing the lumber. The questions of contributory negligence and of assumption of risk appear to have been submitted to the jury under correct declarations of law.

The case of *Kemp* v. *Hunter Transfer Co.*, 184 Ark. 13, 41 S. W. (2d) 981, is cited and relied upon for the

reversal of the judgment, together with other similar cases which have declared the law to be that: "It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery, but he must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises." Cases are also cited which declare that: "Where a servant knows the methods that are adopted by the master, the place furnished in which to work and the appliances with which it is done, and continues in the employment without complaint, he assumes the risks which may result from such known methods and appliances."

We accord full recognition to these well-established statements of the law of master and servant, but we are nevertheless of the opinion that a case was made for submission to the jury on the question of appellant's negligence. It may be true that the mere use of a ripsaw machine to do the work for which a re-saw machine was designed was not negligence, and it may also be true that appellee assumed the risk of any increased danger resulting from the use of one machine to do the work for which another was intended where he was apprised of the substitution and appreciated the increased danger, if any, but the testimony tends, in addition, to show an unfit and unsuitable device had been substituted for the rollers which rendered appellee's place even more dangerous, and also that it was not customary to do re-saw work with a ripsaw, although the latter was in proper condition.

We conclude therefore that it was a question for the jury whether the master had used ordinary care to furnish the servant a reasonably safe place in which to work, and that the questions of contributory negligence and of assumption of risk were likewise questions of fact for the jury.

The controlling principles in the instant case are similar to those announced in the case of *Kelly Handle Co.* v. *Shanks,* 146 Ark. 208, 225 S. W. 302, which arose out of facts very similar to those of the instant case. We

conclude therefore that no error was committed in refusing to direct a verdict in appellant's favor.

The giving of instruction numbered 1 at the request of appellee is assigned as error. But this is not true if the testimony is sufficient to support a finding of liability, as the effect of the instruction is to tell the jury that, if the facts were found to be as contended by appellee, the master was negligent.

The refusal to give instruction numbered 7 requested by appellee is also assigned as error. This instruction as copied in appellant's brief reads as follows: "You are further instructed that, if you find from the evidence that the plaintiff had pushed two boards through the saw with safety, but while pushing the third board through the saw it went through with great and unexpected rapidity, without fault on the part of the defendant, and while thus engaged with the board the plaintiff, in order to avoid an injury, threw his body suddenly on to the bed or frame of the saw and was thereby injured, then your verdict will be for the defendant."

The transcript shows, however, that the instruction does not read as above quoted, "without fault on the part of the defendant," but, in fact, reads, "without fault on the part of the plaintiff," which reading changes, of course, the entire meaning of the instruction. It may have been intended to declare the law to be that there was no liability for the injury if it occurred "without fault on the part of the defendant," but the instruction as copied in the transcript apparently tells the jury that, regardless of appellant's negligence, there would be no liability if appellee had pushed two boards through the saw with safety, which is not the law.

It was earnestly insisted at the trial below that appellee's present serious condition was not caused by the injury hereinabove described, but Drs. McGill and Hoge, who testified as experts in the case, gave testimony which supports the finding that appellee's present condition is the probable result of the injury. Dr. McGill did not treat appellee professionally, and only examined him for the purpose of testifying as to the extent and cause of

his present condition, whereas Dr. Hoge did treat appellee for his ailment, and during his cross-examination this question was propounded to him: "I want to ask you directly of what that course of treatment consisted?" Upon objection being made to the question, counsel for appellant said: "Your honor, this witness is testifying as to the condition at the present time. We have a right to know if in his course of treatment he has done anything to aggravate the so-called condition." In overruling the objection to the question the court said: "The court: Gentlemen, you have got a right to ask the witness any question which tends to show the plaintiff has any improvement from his condition, damage he might have sustained, or he has got a right to ask the witness any question the answer to which will show his condition has been aggravated by the treatment, or because of lack of treatment."

We think this ruling permitted as much latitude as appellant was entitled to have. In addition, it may be said that no lack of care was shown by appellee in the selection of the physician who treated him, and, this being true, the damages may not be diminished by showing that more skillful treatment would have produced better results. This subject was considered in the case of *Lane* v. *Southern Railway Co.,* 192 N. C. 287, 134 S. E. 855, 51 A. L. R. 1114, where it was held by the Supreme Court of North Carolina (to quote a headnote): "That treatment of a personal injury is not beneficial does not, if the injured person used due care to have proper treatment, affect the damages which he would otherwise be entitled to recover from the wrongdoer." See also annotator's note to the case of *O'Quinn* v. *Alston,* 213 Ala. 346, 104 So. 653, 39 A. L. R. 1268, and also the annotation to the case of *Purchase* v. *Seelye,* 231 Mass. 434, 121 N. E. 413, 8 A. L. R. 506, and other annotated cases cited in the note to § 19 of the chapter on Damages, 8 R. C. L. 449, and our own case of *Butler* v. *Arkansas Power & Light Co.,* 186 Ark. 611, 54 S. W. (2d) 984.

Upon the whole case we find no error in the record, and the judgment must be affirmed. It is so ordered.

HELENA *v.* RUSSWURM.

Crim. 3875.

Opinion delivered February 26, 1934.

Polk & Orr, for appellant.

Jo. M. Walker, for appellee.

SMITH, J. Ordinance No. 1858 of the city of Helena imposed a tax on various occupations. Section 1 thereof reads as follows: "That it shall be unlawful for any person, firm or corporation or individual in the city of Helena, Arkansas, to engage in, follow, or carry on any of the following businesses, trades or occupations, vocations, callings or professions without first having obtained and paid an annual license therefor from the city collector; the amounts of such license are hereby fixed in this ordinance." Item 56 of the ordinance imposed a tax of $50 on all persons practicing the profession of dentistry, and item 58 imposed a tax of $50 on doctors and surgeons. The ordinance required the tax to be paid in advance on or before October 15 of each year, and by section 10 it was provided that: "Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction shall be fined twice the amount of the license imposed by this ordinance; each day that such violation shall continue shall constitute a separate offense."

Certain doctors and dentists in the city of Helena failed to pay the tax, and were tried in the municipal court of the city for violation of the ordinance, and were fined twice the amount of the taxes provided by the ordi-

nance. An appeal was duly prosecuted to the circuit court, and, pending the appeal, the ordinance was amended on September 7, 1933, by ordinance No. 2118, which reduced the amount of the license to be paid by physicians, surgeons and dentists for the next year by one-half. The amendatory ordinance contained no saving clause, but in the last section thereof it was provided that "This ordinance to take full force and effect from and after its passage, and all ordinances in conflict therewith to be void."

The appeal came on to be heard in the circuit court after the passage of ordinance No. 2118, and a motion was filed in the circuit court to dismiss the case, for the reason that ordinance No. 2118 had repealed ordinance No. 1858, and contained no saving clause. This motion was sustained, and the cases were dismissed, and this appeal has been prosecuted from that order.

It is pointed out that §§ 9758 and 9759, Crawford & Moses' Digest, do not apply to municipal ordinances, but apply only to the statutes of the State. These sections read as follows:

"Section 9758. When any criminal or penal statute shall be repealed, all offenses committed or forfeiture accrued under it while it was in force shall be punished or enforced as if it were in force, notwithstanding such repeal, unless otherwise expressly provided in the repealing statute.

"Section 9759. No action, plea, prosecution or proceeding, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provisions had remained in force."

The case of *Pleasant Grove City* v. *Lindsay,* 41 Utah 154, 125 Pac. 389, is cited as holding that a State law providing that the repeal of a statute will not affect any action or proceeding commenced under or by virtue of the statute repealed has no application to municipal ordinances or any proceedings instituted under them.

We are cited also to § 7500, Crawford & Moses' Digest, which reads as follows: "All laws, ordinances, resolutions or orders heretofore lawfully passed and adopted by the city or town council, not inconsistent with the Constitution or laws of this State, shall be, remain and continue in force until altered or repealed by the city council."

It is argued that ordinance No. 2118 is an "alteration" of ordinance No. 1858, within the meaning of § 7500, Crawford & Moses' Digest, and operates to repeal it, inasmuch as there was no clause in the later ordinance saving prosecutions pending in the earlier ordinance. See *Wichita* v. *Murphy,* 78 Kan. 859, 23 L. R. A. (N. S.) 245.

We are of the opinion, however, that this argument is based upon a misconception of the purpose and effect of ordinance No. 2118. No purpose is apparent in the amendatory ordinance to remit the tax for the fiscal year 1932-1933, nor to reduce the amount thereof. On the contrary, the purpose and effect of the amendatory ordinance is merely to reduce the tax for the ensuing fiscal year of 1933-1934, leaving unchanged the tax for the preceding year. The tax for the year 1932-1933 was due and was alleged to be delinquent when the amendatory ordinance was passed.

There is no repugnancy between these ordinances, as they relate to different years, and there is therefore no implied repeal. In the case of *Sanderson* v. *Williams,* 142 Ark. 91, 218 S. W. 179, it was held that, where there is no express repeal by the last enactment of prior statutes, it is to be presumed that no repeal was intended, and such effect will not be given unless the statutes are in irreconcilable conflict. *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649. This rule of construction applies to municipal ordinances as well as to the statutes of the State. Section 203, McQuillin, Municipal Ordinances.

We conclude therefore that the court was in error in dismissing the cases, and that judgment is reversed, and they are remanded for further proceedings.

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

4-3368

Opinion delivered February 26, 1934.

W. C. Rodgers, for appellant.

J. R. Crocker and *James S. McConnell*, for appellee.

HUMPHREYS, J. Appellee instituted suit on August 9, 1932, against E. H. Copeland and wife and appellant and his wife in the chancery court of Howard County to foreclose a mortgage on the southeast quarter, southwest quarter and fractional west half of the southwest quarter of section 3, township 9 north, range 27 west, in said county, executed by the Copelands to it on January 1, 1927, to secure certain indebtedness. Service was had upon the Copelands and appellant and his wife, and, no answer being filed within the time provided by law, a decree of foreclosure by default was taken and entered at the November, 1932, term of court. In that decree, a commissioner was appointed to sell the land and satisfy the indebtedness, at which sale appellee became the purchaser for $2,600.65 to be credited on said judgment. On January 6, 1933, the commissioner filed his report, and on the same day appellant filed an intervention, alleging that on December 10, 1927, the Copelands, by warranty deed, conveyed a half acre of said land by proper description to appellant, and, believing himself to be the owner thereof in good faith, he erected a cottage of the value of $500 thereon and immediately moved into and occupied the same from that date as his home. It was

further alleged in the intervention that, in order to compromise the matter, he (appellant) had offered to pay appellee $250 for the half acre of land, but that it had refused to accept the offer, and that, in view of the facts, it would be unjust and inequitable to confirm the sale including the half acre without requiring appellee to pay for the improvements he had made thereon in good faith.

A demurrer was filed to the intervention and sustained on May 1, 1933, and, on the same day, the report of sale of the commissioner was confirmed, and his deed to the purchaser was approved. Appellant then filed an amended intervention disclosing that, when the demurrer was sustained to the original answer or intervention, and on the day on which the sale of the lands by the commissioner was confirmed, appellant was insane. It appearing that appellant had been adjudged insane on April 17, 1933, prior to entering the order approving the sale and commissioner's deed, appellee petitioned the court to set aside the sale and deed and appoint a guardian *ad litem* to defend for appellant. The court granted the motion, and, after setting aside the order of confirmation and approval of the sale, the sale, and the deed, he appointed a guardian *ad litem* to defend for appellant, who was permitted to file an answer for him setting out, in substance, that, after the execution and recordation of the mortgage sought to be foreclosed, the Copelands conveyed by warranty deed a half acre of the land described in said mortgage in order that appellant might build a home thereon for himself and wife; that appellant built a cottage thereon at an expense of $500, believing in good faith that he had absolute title to said half acre, and resided therein and paid the taxes thereon for more than five years without knowing that the Copelands had mortgaged the property to appellee and that appellee had recorded same before the Copelands conveyed the half acre to him; that, when appellee instituted the foreclosure suit, he offered it $250 for the half acre of land upon which the house was built in which he resided in order to save his home, which it refused to accept, although the half acre without the house was not worth more than $10.

The cause was submitted upon the pleadings and an agreed statement of facts, from which the court found there was no equity in the claim of appellant, and that he was not entitled directly or indirectly to compensation for his improvements, from which finding and decree an appeal has been duly prosecuted to this court. The agreed statement of facts is as follows:

"It is agreed by and between the plaintiff and R. J. Austin, intervener in this cause as follows:

"That on the 10th day of December, 1927, George H. Copeland and wife, by warranty deed, conveyed to the intervener, R. J. Austin, for a valuable consideration, the following land in Howard County, Arkansas, to-wit: A part of the northwest quarter of the southwest quarter of section 30, township 9 south, range 27 west, beginning 30 yards north of the southwest corner and run north 50 yards, east 50 yards, south 50 yards, west 50 yards to point of beginning, containing one-half acre, more or less.

"That the said R. J. Austin, believing himself to be the owner of said land under color of title and his deed aforesaid, peaceably improved said land to the amount and value of five hundred dollars, by reason of which the value of the same was enhanced in the said sum of five hundred dollars.

"That the mortgage of the plaintiff in controversy herein is based on a valuable consideration, embraces the land claimed by the intervener, R. J. Austin, and was duly recorded in the proper record of Howard County, Arkansas, before the said improvements were placed in said land now claimed by the said R. J. Austin. That the said intervener made said improvements in good faith without any notice of the mortgage to the plaintiff other than the notice the law imposes by reason of the recording of said mortgage.

"That the said deed to said intervener was recorded in the proper record in Howard County in record book 52, at page 618.

"That said intervener was judicially declared *non compos mentis* April 17, 1933."

The undisputed facts in this case call for the application of the well-settled rule that one asking equity

must do equity. Appellee took its mortgage on the land without reference to the cottage which was afterwards built by appellant at an expense of $500 on one-half acre thereof in good faith, under the belief that he was the owner of an indefeasible title thereto unassailable in law or equity. It is true that the statute permitting mortgages to be recorded provides that the filing thereof shall be notice to all persons of the existence of such mortgage, but appellant had no actual knowledge of the existence thereof. Without actually knowing that appellee had a mortgage on it, appellant in good faith made improvements which necessarily enhanced the value of the land. Appellee argues that it is entitled to the benefit of this enhancement in value because neither the common law nor the betterment act protects it. Perhaps not, but equity should mold a remedy if it can be done without injury to appellee. This can be done by permitting appellant to move the cottage off the land within a reasonable time, and we are of the opinion that he should have six months in which to move same. It may inconvenience appellant to do so, but it is common knowledge that houses are now frequently moved from one plot of ground to another even though the plots are separated by quite a distance. This remedy will place appellee *in statu quo* and greatly benefit the appellant. It was within the power of the chancery court, after setting aside the sale and deed on the application of appellee, to refuse to confirm the sale and approve the deed until appellee, who was asking equity, should himself do equity. It was error to deny appellant the privilege of saving his home.

On account of the error indicated, the decree confirming the sale and approving the deed is reversed with directions to the chancery court not to re-enter same until appellant removes the house within the time indicated by the court.

McHaney, J., dissents.

HARRIS *v.* LITTLE RED RIVER LEVEE DISTRICT NO. 2.

4-3374

Opinion delivered February 26, 1934.

Gordon Armitage and *Brundidge & Neelly,* for appellant.

Culbert L. Pearce, for appellee.

HUMPHREYS, J. Appellees brought suit in the chancery court of White County to obtain separate judgments against the southwest quarter of the northwest quarter

and the northwest quarter of the southwest quarter, section 32, township 8 north, range 5 west in said county for taxes due upon betterments assessed against said lands, alleging that the amount due the levee district for the years 1927 to 1932, inclusive, was $347.88, and that the amount due the drainage district was $849.72.

Appellant, who purchased said lands from the State of Arkansas on the 12th day of April, 1932, for $108, filed an answer alleging that the district taxes sought to be recovered against the lands in question were forever barred and extinguished when the State's tax title which he bought was confirmed on April 11, 1932, under the provisions of act 296 of the Acts of 1929. Relative to the confirmation of the tax title to said lands in the State, the answer of appellant contained the following specific allegation:

"On the 2d day of September, 1931, the State of Arkansas under and by virtue of act No. 296 of the General Assembly of the State, filed suit to quiet and confirm its title in and to the said lands. The plaintiffs herein, being the owners of said land, intervened and were made parties to said suit at their own request. Cross-complaint was filed setting up various reasons as to why title should not be confirmed, refusing and neglecting, however, to comply with the provisions of paragraph 8 of said act 296 which afforded them an opportunity to protect their rights. On the 11th day of April, 1932, this court sustained a demurrer to the intervention and cross-complaint of the plaintiffs herein and gave a decree in which title to the lands described in the complaint of the plaintiff were quieted and confirmed in the State of Arkansas."

Appellees filed a demurrer to the answer, which was sustained; whereupon appellee elected to stand upon his answer.

The court then found that the special improvement taxes due appellees prior to April 11, 1932, were extinguished by the confirmation decree, but that the special improvement taxes accruing after the confirmation decree were valid and subsisting liens upon the lands and ordered separate decrees of foreclosure for same in favor of

appellees and ordered the lands sold to satisfy said liens and decreed that deeds be executed by the commissioner who was ordered to make the sale at the expiration of five years, the redemption period fixed in act 43 of the Acts 1915.

Appellant has prosecuted an appeal to this court from that part of the decree fixing the lien upon the lands for improvement taxes accruing after the date of the decree confirming the title to said lands in the State.

Appellees have prosecuted a cross-appeal to this court from that part of the decree barring the collection of the improvement taxes which accrued prior to the date of the decree confirming the title to said lands in the State and in directing the commissioner to execute a certificate instead of a deed to the purchaser.

The pleadings reflect that the lands were forfeited and sold to the State of Arkansas for the nonpayment of the taxes from the year 1928, and that, after two years from the date of the sale, they were certified to the office of the Commissioner of State Lands; and that the title thereto was confirmed in the State on the 11th day of April, 1932, under the provisions of act 296 of the Acts of 1929. The pleadings also reflect that the lands were included in appellees' levee and drainage districts, which were organized in 1914, and were subject to special improvement taxes therein at the time same were forfeited to and the title confirmed in the State.

The pleadings also reflect that appellees were the owners of the lands by purchase for delinquent improvement taxes at the time the State instituted suit to confirm the title thereto and intervened in the suit for the purpose of attacking the forfeiture of the sale of the lands to the State and were denied the right to do so because they refused to tender or pay the taxes due the State. The intervention of appellees was filed in the confirmation suit under authority of § 8 of act 296 of the Acts of 1929. Said paragraph 8 is as follows:

"Any special improvement district claiming that there is owing to it overdue taxes on any land described in the State's petition shall have the right to be made a party defendant to the State's suit for the purpose of

contesting the sale under which the forfeiture to the State was made. And any such improvement district upon the payment of the amount of taxes, penalty and costs for which the land was forfeited and all past-due taxes which would have accrued had the land remained on the tax books at the valuation against it immediately prior to the forfeiture, shall be subrogated to the State's lien for the amount so paid, and such improvement district may include said amount due the district for taxes, and shall have the right to foreclose for such amount as though the same had been assessed against such land in favor of the improvement district."

Appellant contends that appellees were estopped by filing the intervention and failing to tender or pay the taxes due the State from thereafter asserting a lien upon the lands for improvement taxes due them. Section 8 of said act is a privilege extended to improvement districts to pay the State taxes and be subrogated to the State's paramount lien upon the lands for taxes due them. Certainly, it was not the intention of the Legislature to force improvement districts to pay the State's taxes upon lands embraced within said district; otherwise to lose their improvement taxes after confirmation of the tax title in the State.

Appellant also contends that the effect of the confirmation of tax titles by the State under the provisions of act 296 of the Acts of 1929 where special improvement districts fail to take advantage of § 8 of said confirmation act was to extinguish all special improvement taxes levied by the district, both delinquent and immature. This court has ruled that the forfeiture and sale of lands to the State for nonpayment of taxes has the effect of suspending the enforcement of special improvement taxes against the lands during the time the title thereto remains in the State or until the lands return to private ownership. This rule was announced in recognition of the State's paramount right of taxation. The rule was reiterated and stated as follows in the recent case of *Stringer* v. *Conway County Bridge District, ante* p. 481. "The decree of confirmation does not relieve the purchaser from the State of payment of as-

sessments because the sale to the State does not extinguish the lien; it merely suspends the lien while the title is in the State."

Appellant argues that the districts became the owners of the lands in question by virtue of foreclosure proceedings to enforce their liens in the instant case, and that the rule announced in the Stringer case, *supra,* is not applicable. It makes no difference whether the delinquent improvement taxes have merged into a judgment or into the lands by foreclosure proceedings; still it is the duty of the purchaser to pay the districts' special improvement taxes in order to extinguish the liens of the districts for the payment thereof, the enforcement of which has been suspended during the time the tax title remained in the State. The trial court erred in failing to order a sale of the lands to pay all the improvement taxes accruing both before and after the confirmation of the title in the State. Appellees contend the court erred in directing the commissioner to execute a certificate instead of a deed to the purchaser at the sale for the improvement taxes. Appellees argue that under the provisions of §§ 3632 and 6836 of Crawford & Moses' Digest, the purchaser at the sale was entitled to a deed showing an indefeasible title unassailable either in law or equity, and that to deny the purchaser such a deed would impair the obligation of the contract the districts made with the bondholders. It is true that when the districts were created and the bonds issued, §§ 3632 and 6836 were in force, but the executions of the deeds provided for immediately after sale were a part of the foreclosure proceeding, or, more accurately speaking, a part of the remedy for enforcing the lien against the lands for delinquent improvement taxes. By act 359 of the Acts of 1925 the right to redeem the lands within two years after the sale was granted to owners, so the time was extended two years from "immediately" for the purchaser at the sale to obtain a deed. This was not an unreasonable extension, and therefore was not a denial of a right or the impairment of a contract. It was a moratorium that did not materially interfere with or abridge the contract. Authority for this construction of

the act extending the time of redemption will be found in the case of *Sewer Improvement District No. 1 of Wynne, Ark.*, v. *Delinquent Lands, ante*, p. 738.

Appellees also contend that act 129 of the Acts of 1933 repealing a part of act 43 of the Acts of 1915 (Crawford & Moses' Digest, § 5642), to the effect that the purchaser at the sale should have the right to possession of the lands and process therefor, impaired the obligation of the contract and was void. The districts were created and in operation prior to the passage of act 43 of the Acts of 1915, so appellees are in no position to assail the constitutionality of act 129 of the Acts of 1933 repealing that part of act 43 of the Acts of 1915 about which they complain. Act 43 of the Acts of 1915 was not a part of their contract and cannot be read into it.

On account of the errors indicated, the judgment is reversed on direct appeal and reversed in part on cross-appeal with directions to enter judgments against the lands for the entire amount of the improvement taxes prayed for in the complaint, and to order a sale thereof with direction to the commissioner to execute a certificate for a deed thereto at the expiration of two years from the date of sale.

SMITH and MCHANEY, JJ., dissent.

MICHAEL *v.* WOOD.

4-3379

Opinion delivered February 26, 1934.

J. O. Livesay, for appellant.
Jones & Jones, for appellee.
Will Steel, amicus curiae.

KIRBY, J. Appellant, who resides in the State of Wisconsin, acquired title to an 80-acre tract of land in Little River County in 1928, but, through ignorance of our tax collection system, failed to pay the general taxes due thereon for the year 1928, and the land was returned delinquent, and was sold in June, 1929, to the State. The land was not redeemed within two years as required by law, and the forfeiture was duly certified to the State in June, 1931.

Suit was filed on August 24, 1931, pursuant to act 296 of 1929, page 1235, to confirm this forfeiture, and a decree of confirmation was rendered as prayed on May 16, 1932, quieting and confirming the title to the land in the State.

Thereafter, on May 15, 1933, appellant filed his verified petition in said action, in which he set up his ownership of the land and his lack of knowledge or information as to the pendency of the confirmation suit until after the rendition of the decree of confirmation. Various irregularities were alleged in the sale of the land to the State, which, if shown to be true, were sufficient to render the tax sale void, and it was the purpose of the confirmation proceedings to cure these irregularities.

The intervention alleged the nonpayment of the taxes due on the land for the year 1928, but did not allege the date of the sale, nor did the petition in alleging the various duties required of the collector and county clerk to make a valid sale, which under the law should have been performed in the year 1929, recite that year as it should have done. In alleging the omission of duties on the part of these officials, the year was alleged in each instance as "192....." However, an amended intervention was filed which correctly stated the year to be 1929, but this amended intervention was not filed until May 29, 1933, which was more than one year after the date of the

confirmation decree. This amendment did not constitute the filing of a new cause of action, but, as was said of a similar situation in the case of *Sternberg* v. *Strong,* 158 Ark. 429, 250 S. W. 344, "was properly an amendment to a complaint insufficient and defectively stated in the first instance." Moreover, we judicially know that a sale for the 1928 taxes would occur, as the amended intervention alleged, in the year 1929, in which year the official duties of the collector and clerk in returning the land as delinquent and advertising it for sale would have been performed, and it was the improper performance of these duties which the intervention alleged rendered the sale invalid.

Appellee, who donated the land from the State after the rendition of the confirmation decree, intervened in this proceeding, and filed a demurrer to the intervention. The demurrer was sustained to the intervention, and it was dismissed as being without equity, and this appeal is from that decree.

The recent case of *Black* v. *Waddell, ante* p. 872, is decisive of the question presented on this appeal. We there said: "We think the clear intent and meaning of § 9 of act 296 is to grant to the true owner one year from the date of the confirmation decree in which to assert any defenses which might have been available to him prior to the decree, and that this right is conditioned only upon his ability to show that the tax sale or forfeiture to the State was void or voidable. Since § 9 of act 296 is construed to be an extension of one year of grace to the landowner, conditioned only upon his ability to show that the tax forfeiture or sale was void or voidable, it necessarily follows that it is immaterial whether or not he had actual or constructive notice of the pendency of such suit."

The intervention sufficiently alleges the invalidity of the forfeiture to the State and contains the jurisdictional recital that the owner had no knowledge of the pendency of the confirmation suit until after the rendition of the decree of confirmation. Now, while the decree may have cured the irregularities which otherwise would

have rendered the sale void, the confirmation was subject to the rights of the owner within one year to intervene by filing a verified motion asserting that he had no knowledge of the pendency of the suit and setting up a meritorious defense to the complaint upon which the confirmation decree was rendered. The case of *Black* v. *Waddell, supra,* is decisive of the question that a showing that the original forfeiture was void is a meritorious defense within the meaning of § 9 of this act.

We conclude therefore that the court was in error in sustaining the demurrer to the intervention, and the decree is reversed, and the cause will be remanded with directions to overrule the demurrer.

REIMAN *v.* RAWLS.

4-3380

Opinion delivered February 26, 1934.

Lee Miles, for appellant.

Donham & Fulk, for appellee.

MEHAFFY, J. This suit was brought in the Pulaski Chancery Court by appellant to foreclose a mortgage against appellees. The note and mortgage were executed on December 20, 1927. The summons was issued and served on the appellees more than 20 days, and no answer

had been filed, and the appellant filed motion to enter judgment and decree.

The appellees filed a response to said motion, and, among other things, alleged that the answer was not due under § 1 of act 21 of the Acts of the General Assembly of 1933. Section 1 of said act reads as follows: "Answers in suits to foreclose mortgages, deeds of trust or pledges executed prior to January 1, 1933, shall not be due until three months after the service of summons or the publication of the warning order."

Prior to the passage of said act 21, answer in foreclosure suits was due 20 days after the service of summons. The appellees, in their motion, pleaded § 1 of said act, and asked that the motion be denied. Appellant then filed demurrer to appellees' response. The court thereupon overruled the demurrer, and denied the motion to enter judgment and decree, and dismissed said motion for want of equity. The case is here on appeal.

If § 1 of act 21 of 1933 is constitutional, the case must be affirmed. This is the only question involved in this case.

Appellant contends that the act of the Legislature is unconstitutional and void because it is alleged that it is in conflict with § 17 of article 2 of the Constitution of the State of Arkansas. It is contended by appellant that the act impairs the obligation of the contract. It is also alleged that the act is in conflict with § 10 of article 1 of the Constitution of the United States. That section of the United States Constitution provides that no State shall pass any law impairing the obligation of contracts.

Act 21 is an emergency act passed for the relief or benefit of the citizens of Arkansas who are in destitute circumstances because of the public economic emergency. It is a matter of common knowledge that the present is a period of great depression, and that land values have decreased until there is practically no market for such property. A home that was worth $2,500 when mortgaged to secure a debt some years ago would not bring at foreclosure sale more than one-fourth of this amount, and in many cases much less. There is not only no

market for land, but practically all the banks in the country have failed, and it is impossible to borrow money secured by mortgage or pledge of property, to pay debts, and thousands of people in Arkansas who were making a living prior to the depression have lost their jobs, are without work, and without means of support. Governments are created for the purpose of securing the rights of the citizens, and, if a government, during a period of such depression as we now have, could not protect its citizens, there would be no reason for its existence.

The Supreme Court of Minnesota, in the case of *Blaisdell* v. *Home Building & Loan Association,* 189 Minn. 422, 249 N. W. 334, said: "Whether or not a public emergency existed was a question of fact, debated and debatable, which addressed itself primarily to the Legislature. That it existed, promised not to be presently self-curative, and called for action, appeared from public documents and from common knowledge and observation. If the law-making power on such evidence has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon legislative power, so far as the same affect the class of landlords now challenging the statutes, the legislation should be upheld. * * * The proposition is equally fundamental that the 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 is abridged. * * * Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war, earthquake, pestilence, famine, and fire, a combination of men or the force of circumstances may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions."

The court also said in the same case: "In addition to the weight to be given the determination of the Legislature that an economic emergency exists which demands relief, the court must take notice of other considerations.

The members of the Legislature come from every community of the State and from all the walks of life. They are familiar with conditions generally in every calling, occupation, profession and business in the State. Not only they, but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values."

All that was said by the Minnesota court may be said of conditions in Arkansas at this time. The Minnesota case went to the Supreme Court of the United States, and was decided by that court on January 8, 1934. That court upheld the Minnesota law, and affirmed the decision of the Supreme Court of Minnesota.

The Supreme Court of the United States said: "To ascertain the scope of the constitutional prohibition, we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one, and is not to be read with literal exactness like a mathematical formula."

The Supreme Court of the United States also said in the above case: "But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur." * * * "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the pro-

motion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. * * * The reservation of State power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of State power to protect the public interest in the other situations to which we have referred. * * * The reserved power cannot be construed so as to destroy the limitations, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other."

There are many decisions of both State courts and United States courts upholding emergency legislation; but it would serve no useful purpose to review or cite them here. The recent decision of the Supreme Court of the United States above referred to reviews the authorities and settles the law on this question.

However, the decision in this case does not depend upon the existence of an emergency, because § 1 of act 21 affects the remedy only, and does not impair the obligation of a contract. The courts have always held that the Legislature is not prohibited from legislating on the remedy, provided the legislation did not impair the obligation of a contract.

One of the cases cited and relied on by appellant is *Bronson* v. *Kinzie,* 1 How. 311, 11 L. Ed. 143. The court in that case 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 the courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations." * * * "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 harassing

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."

This court said: "The rule is, that whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract." *Vernon* v. *Henson,* 24 Ark. 242.

This court also said: "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." *Robards* v. *Brown,* 40 Ark. 423.

Again this court said: "While it is true that the State may change and alter remedies, extend or limit the time that notice may be given, they might give the defendant to the second term of the suit brought to answer, and do many other things touching the remedy, yet they must not, in acting on the remedy, interfere with any right accruing under the contract." *Oliver* v. *McClure,* 28 Ark. 555.

Courts have uniformly held that changing the time of holding court did not impair the obligation of a contract. If the Legislature should change the law in any district in the State, so that the term of court would begin 60 days later than at the time the law was passed, no one would contend that this impaired the obligations of a contract, although it would postpone the time to answer 60 days. And the Legislature may, without violating any constitutional provision, change the time to file answer, as provided in § 1 above referred to. There is nothing in this section violating any provision of the Constitution.

The decree of the chancery court is affirmed.

SMITH, J., (concurring). In my opinion § 2 of act 21 is unconstitutional as imposing a condition not previously existing, which, in many cases arising out of mortgages and deeds of trust executed before the passage of the act, will postpone and greatly delay foreclosure proceedings. While it was no doubt contemplated that foreclosure suits must be prepared for submission before the term of court convened, it must also have been contemplated that a hearing would be had before foreclosure decrees are rendered. It is easily conceivable that, even though the first three days of the term were wholly devoted to hearing such cases—and the act does not require that this be done—all such cases, although ready for submission, might not be reached within the time limited. Not much ingenuity would be required to protract the hearing of a few cases to an extent that many other similar cases could not be heard at all, with the consequent result of a delay which might prove to be indefinite.

However, act 21 and much similar legislation passed at the same session of the General Assembly manifests the purpose to accord the debtor the greatest indulgence which may be granted, and it is, therefore, reasonably certain that the legislation would have been enacted even though § 2 were eliminated. It is well settled that the unconstitutional portion of a statute may be stricken out without impairing the effect of the remainder where the provisions are wholly independent and it can be seen that the lawmakers would have enacted the remaining part of the statute, even though the act does not contain an express declaration of the intention to enact so much of the legislation as may prove to be constitutional. *Heinemann* v. *Sweatt,* 130 Ark. 74, 196 S. W. 931; *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77; *McClendon* v. *Board of Health,* 141 Ark. 114, 216 S. W. 289; *Brooks* v. *Wilson,* 165 Ark. 477, 265 S. W. 53; *County Board of Health* v. *Austin,* 169 Ark. 436, 276 S. W. 2. There are many other cases to the same effect.

Section 1 of the act only is here directly involved, and, as it appears to be a reasonable amendment to the practice in foreclosure cases, I see no constitutional ob-

jection to its enforcement, and it may be enforced even though § 2 is unconstitutional, as I believe it to be. I therefore concur.

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

Felts *v.* Cherry Hill School District No. 10.

4-3381

Opinion delivered February 26, 1934.

Pipkin & DeLongy, for appellant.

Duke Frederick, for appellee.

McHaney, J. On June 14, 1930, the county board of education of Polk County, on petition of a majority of the electors therein, abolished certain school districts and formed the territory in such districts into a new district known as Cherry Hill Consolidated School District No. 10. Thereafter on petition, the county board called an election for July 19 in said new district for the purpose of the electors therein voting on the proposal to borrow money from the revolving loan fund and to levy a tax of 7 mills on the assessed valuation of the real and personal property of the district. The election was held and the proposals carried. Bonds were issued and delivered to the State Board of Education in the sum of $9,800, being 7 per cent. of the assessed valuation. The district under the advice of the State Board entered upon a large building program. Instead of erecting and equipping such buildings as the bond issue would pay for, it entered into contracts for three large stone build-

ings, two of which cost $3,075 each, and one, at Cherry Hill, cost $9,750, or a total of $15,900 for buildings alone. The building contracts with the contractor provided that they should be paid for "by warrants on revolving and equalizing funds." And it appears from the evidence that the State Department of Education agreed to furnish the money to cover the cost of the buildings in excess of the bond issue and to pay the cost of all equipment, including three buses, out of the State "equalizing fund." About $6,000 was expended for furniture, equipment and buses. The contractor and equipment furnishers were given warrants of the district drawn on the "equalizing fund" for the excess cost above the bond issue. In May, 1932, the then holders of said warrants, appellants, except Felts, induced the district's directors to re-issue said warrants, including interest to date, without designating the fund on which they were drawn and apparently making them the direct obligations of the district, payable out of its general revenues. This suit was thereafter brought to enjoin the county treasurer from paying them out of the district's general revenues and to have them declared void as to said district and its school funds. The re-issued warrants total $11,886.67. Trial resulted in a decree granting the relief prayed, and this appeal followed.

We think the trial court correctly so held. Appellants argue that this is a consolidated district, and that there is a distinction between the powers of the board of directors in such a district and in a rural special school district. We think it unnecessary to discuss or decide this question. The undisputed evidence shows that it was never contemplated by any of the parties that said district should pay any part of the excess cost of the buildings and equipment, that is, excess over the bond issue, out of the general revenues of the district. It was understood and agreed that the State Board would furnish such excess from the "equalizing fund." The electors voted a tax on themselves of 7 mills to secure the payment of a bond issue of $9,800, which is 7 per cent. of the total assessed valuation of the property in the dis-

trict. The directors had the authority to borrow so much money and no more, and the contractor and equipment vendors elected to take warrants drawn on the "equalizing fund" for the excess. They have no right to demand or receive warrants drawn on the general school revenues of the district, and the directors had no power to bind the district thereto without a vote of the electors of the district. Act 252 of 1925, p. 742.

These warrants will be payable out of the "equalizing fund," if, and when, there is anything in such fund to pay them.

Affirmed.

[redacted]

JOHNSON *v.* JOHNSON.

4-3384

Opinion delivered February 26, 1934.

[redacted]

McElhannon & Callaway, for appellant.

O. A. Featherston and *McMillan & McMillan,* for appellee.

BUTLER, J. On February 26, 1927, J. R. Johnson, being then the owner of $4,000 worth of the capital stock of the Johnson Orchard Company, a corporation, sold the same on credit to W. S. Johnson, who on that day executed and delivered to J. R. Johnson his three promissory notes for the sum of $1,333.33, due respectively, one, two and three years after date with 8 per cent. interest until paid. Each note recited that it was in part payment of the purchase money of the capital stock "according to the terms of the contract made and entered into on this date, in which contract these notes are referred to." That part of the contract involved, after reciting the execution of the notes, provided in effect that the purchaser of the stock agreed to resell the same at its par value to the seller, J. R. Johnson, upon a return of the notes, or, if any or all of them should have been paid, to make repayment in cash for any or all of such notes as had been paid. It was also provided that the resale "shall be consummated when the debt due the Pike City Orchard Company from the Johnson Orchard Company shall have been fully paid," and that no additional stock of the Johnson Orchard Company should be issued as would in any way impair the value of the stock involved without the consent of J. R. Johnson.

J. R. Johnson died in 1930, and appellee, his widow and administratrix, brought this suit to enforce the payment of the notes. On issue joined testimony was adduced, and the trial court found the notes to be valid and unpaid; that defendant was entitled to an offset, and rendered judgment for the balance. The defendant has appealed and rests his case on the sole ground that the notes and contract are void for want of mutuality. In support of this contention, he argues that, although he was obligated to pay the notes and to resell the stock to J. R. Johnson for the same sums at which he purchased the stock, it was left optional with J. R. Johnson whether he would repurchase the same. Appellant points out the fact that the stock was not delivered to him but retained by the seller, and from this contends there was really no sale of the stock but a colorable transaction only made for the purpose of enabling J. R. Johnson to

borrow money, the result of which would be solely beneficial to J. R. Johnson and without any corresponding benefit to him.

At this point it may be said that the testimony of several witnesses was taken for the purpose of showing the reasons for which the sale was made and the contract entered into, but which we do not consider because the contract is unambiguous, and we therefore look only to it to discover its terms and the intent of the parties.

In support of the contention of want of mutuality, we are cited to a number of decisions of our court which have held that the contracts considered in those cases were void for the reason contended in the case at bar, and especially to the rule as formulated in the case of *Grayling Lumber Co.* v. *Hemingway,* 124 Ark. 354, 187 S. W. 327, as follows: "It is a general principle in the law of contracts that an agreement entered into between the parties to a contract in order to be binding must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality."

An examination of those cases discloses that the doctrine stated was applied because the want of mutuality would leave one party without a valid or available consideration for his promise. Such is not the case in the contract before us. The consideration for appellant's promise to pay was his purchase of the stock with whatever advantage which might result to him thereby, whether great or small, and is sufficient to support the obligation on his part to resell to his vendor upon the happening of the contingency named in the contract, namely, the payment to the Pike City Orchard Company of the debt due it by the Johnson Orchard Company. *Peterson* v. *Chase,* 115 Wis. 239, 91 N. W. 687; *Pyskoty* v. *Sobusiak,* 109 Conn. 593, 145 Atl. 58. The last named case was one where the seller of the stock agreed that if the purchaser should become dissatisfied he would rebuy it. It was held that the official and financial interest of

the seller in the corporation was such as to afford a sufficient consideration for his agreement to repurchase the stock.

The fact that the stock was retained by J. R. Johnson and never delivered to the appellant is immaterial. The contract is that the stock was to be held by J. R. Johnson only as collateral security for the payment of the notes evidencing its purchase price. As between the parties, delivery was not necessary to vest title in the buyer, and title to the stock passed, although it was not delivered to the appellant but remained in the possession of the seller. *Costar* v. *Davies,* 8 Ark. 213, 46 Am. Dec. 311; *Danley* v. *Rector,* 10 Ark. 211, 50 Am. Dec. 242.

In the instant case the appellant received the benefit resulting from the ownership of the stock and was entitled to the possession of the certificates of shares upon the payment of the notes. The defense of want of mutuality has no application except where the party alleging it has never received the benefit of the contract on his part and never had the right to enforce it. *Coldcleugh* v. *Johnson,* 34 Ark. 312.

In 6 R. C. L., p 689, the rule is thus stated: "A contract does not lack mutuality merely because every obligation of the one party is not met by an equivalent counter obligation of the other party." And on page 686 the author says: "Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise. The doctrine of mutuality of obligation appears therefore to be merely one aspect of the rule that mutual promises constitute considerations for each other. Where there is no other consideration for a contract, the mutual promises must be binding on both parties. But where there is any other consideration for the contract, mutuality of obligation is not essential."

These principles were referred to with approval by this court in the case of *Philpot Const. Co.* v. *Danaher,* 180 Ark. 926-37, 23 S. W. (2d) 632, and their application to the contract involved in the instant case renders the plea of want of mutuality unavailable, and the trial

court was correct in so holding. Let the decree be affirmed.

WATSON *v.* HARPER.

4-3391

Opinion delivered March 5, 1934.

Lee Miles, for appellant.

Pat L. Robinson, for appellee.

JOHNSON, C. J. To restrain Fred Watson, State Revenue Commissioner, from collecting an alleged excessive license tax fee under act No. 7, passed and approved at the 1933 special session of the Arkansas Legislature, this proceeding was instituted by appellee in the Pulaski Chancery Court.

By stipulation of counsel, the facts were agreed upon as follows: "That act No. 7 is an act passed by the special session of the General Assembly of the State of Arkansas for the year 1933, for the purpose of permitting and regulating the sale of beer and wine under certain regulations, as provided by said act, in the State of Arkansas. That the plaintiff has paid to the defendant, Commissioner of Revenue, the sum of two hundred fifty dollars ($250) for permit to engage in the wholesale beer distributing business.

"That plaintiff maintains warehouses in the cities of Little Rock, Hot Springs, El Dorado and Pine Bluff

among seventeen counties; that each of said distributing points, towit: Little Rock, Hot Springs, El Dorado and Pine Bluff, distribute beer to retail dealers in other counties than those in which the distributing point is located. That the defendant is attempting to collect an additional fee of two hundred fifty dollars ($250) for each warehouse, or fifty dollars ($50) per county for each distributing point, and $50 for each county served from said warehouses.

"It is agreed between the parties that this stipulation may be filed and considered by the court as evidence in this action, each party reserving the right to introduce additional evidence, if it wishes to do so."

Upon trial, the chancellor determined the issues in favor of appellee, and directed issuance of a permanent injunction enjoining and restraining the State Revenue Commissioner from collecting or endeavoring to collect from appellee additional license fees during the fiscal year ending July 1, 1934. This appeal brings in question the decree thus entered.

The chancellor construed act No. 7 to mean that, when any one broker, distributor or wholesale dealer paid to the State a license fee of $250, such broker, distributor or wholesale dealer was thereby authorized, privileged and licensed to establish and maintain wholesale warehouses or separate and distinct distributing points in any or all the seventy-five counties of the State.

Section 4 of act No. 7 of the special session of 1933, in part, provides:

"For the privilege of doing business respectively as herein below indicated there shall each fiscal year, beginning July 1st, be assessed, levied and collected:

"(A) For each wholesale dealer or broker, or distributor in light wine and/or beer a special tax of fifty (50) dollars for each county in which said broker, distributor or wholesale dealer operates, provided, that in no event shall said tax exceed two hundred and fifty ($250) dollars for any one broker, distributor or wholesale dealer."

Paragraphs B and C of § 4 deal with manufacturers' and retailers' license fees (which are not relevant to any issue here presented). Then follows this provision: "The tax shall be due and payable at each place where the business of wholesale dealer, manufacturer, distributor or retail dealer, as the case may be, is carried on."

The chancellor's construction of act No. 7 gives full effect to the proviso "that in no event shall said tax exceed $250, for any one broker, distributor or wholesale dealer," and completely ignores all the language preceding and following it. If this proviso were stricken from said act, it would definitely appear that any broker, distributor or wholesale dealer, who sought license thereunder, would be required to pay a fifty dollar license fee in each county in which he might operate. Thus if business were done by such broker, distributor or wholesale dealer in each of the seventy-five counties of the State, a license fee of $3,750 would be required for such privilege. This language, however, is restricted by the proviso which follows it, and which has been heretofore quoted. Following the proviso, but appearing in the same section of the act, is the following language: "The tax shall be due and payable at each place where the business of wholesale dealer * * * is carried on."

It has long been the established doctrine of this court to so construe statutes that they may have a reasonable effect, agreeably to the legislative intent. Every word, clause and sentence should be given effect, if possible, and, in construing the whole act, if the legislative intent is found to be different from the literal import of some of its terms, then the legislative intent should prevail. *Wilson* v. *Biscoe,* 11 Ark. 44; *State* v. *Jennings,* 27 Ark. 419; *L. R. & F. S. Ry. Co.* v. *Howell,* 31 Ark. 119; *Haglin* v. *Rogers,* 37 Ark. 495; *Doles* v. *Hilton,* 48 Ark. 307, 3 S. W. 193; *Ingle* v. *Batesville Gro. Co.,* 89 Ark. 378, 117 S. W. 241.

The language of the proviso "for any one broker, distributor or wholesale dealer," when considered and construed with all other provisions of act No. 7, makes it

definite and certain that the legislative intent was to make each separate wholesale warehouse or distributing point a separate unit for the assessment and collection of the license fees provided for in said act. We think the language, "any one broker," etc., has reference to the situs of the business transacted, instead of the broader meaning attributed thereto by the chancellor.

Moreover, when all provisions of act No. 7 are construed and harmonized in the light of the rule of construction, heretofore quoted, it clearly appears that it was the legislative intent that a broker, distributor or wholesale dealer, who has and maintains only one wholesale distributing warehouse, may, upon the payment of a license fee of $250, make deliveries of his products from such point only to any or all the seventy-five counties of the State. On the other hand, any broker, distributor or wholesale dealer who undertakes to establish more than one wholesale warehouse or distributing point in other counties of the State, and such additional warehouse undertakes to operate in five or more counties, an additional license fee of $250 is chargeable against each such distributing warehouse. In other words, it was clearly the intention of the Legislature to assess a license fee for the privilege of wholesaling light wines and beers a tax of $50 per county as a prerequisite to the establishment of a wholesale warehouse for such distribution; and, in the event such warehouse or distributing point operates or serves trade in more than one county, to charge an additional fee of $50 for each county so served up to a maximum of five counties. For instance, if appellee's Pulaski County warehouse serves five or more counties, the fee on this distributing point should be $250; if it serves or operates in less than five counties, the license fee should be $50 for each county served. License tax fees on appellee's warehouses and distributing plants located at Hot Springs, Pine Bluff and El Dorado should likewise be determined. For instance, the warehouse at Pine Bluff must, in any event, pay a license fee of $50. This gives the privilege of doing business in Jefferson County only. If products are distributed from this ware-

house to five or more counties, the license fee on the Pine Bluff warehouse should be $250. If this warehouse serves only four counties, the license tax fee should be $200. In other words, each separate wholesale warehouse or distributing point for light wines and beers must pay a tax of $50 for each county served up to a maximum of five counties, or a maximum license fee of $250.

Appellee's warehouses at Hot Springs and El Dorado should pay license fees in the same manner as heretofore indicated.

The agreed statement of facts filed herein shows that appellee has and maintains four separate and distinct warehouses or distributing points for the distribution of light wines and beers, and that these four warehouses operate in seventeen counties. From this agreed statement, we cannot determine the number of counties actually served by the Pulaski County warehouse. Neither can we determine the number of counties served by the Hot Springs, Pine Bluff or El Dorado warehouses. Therefore we are unwilling to undertake to determine the amount now due the State.

The cause will be reversed and remanded to the Pulaski County Chancery Court, with directions to hear testimony on the additional amount due the State as license tax fees by appellee, and to render judgment in favor of appellant therefor in conformity with this opinion.

McHaney and Butler, JJ., dissent.

Kirk *v.* Mason.

4-3395

Opinion delivered March 5, 1934.

W. A. Bates and *Evans & Evans*, for appellant.

Connelly Harrington and *O. R. Smith*, for appellee.

SMITH, J. W. R. Kirk, a citizen of Scott County, died testate on or about June 24, 1929. He was living with his second wife at the time of his death, and no children had been born to either of his marriages. His second wife was a widow when he married her, and she later died without issue born to her.

Kirk's will was duly admitted to probate, and his surviving widow was appointed executrix, as was directed by the will, the relevant portions of which are as follows: The testator first directed his executrix to pay his just debts, if any. By the second paragraph he devised to his wife all his real estate, "to be hers, used and possessed by her, to enjoy the rents and profits therefrom during her entire natural life." Paragraph 3 of the will reads, in part, as follows: "It is my will that at my death my said wife, Mollie Kirk, is to make a division of my personal estate, consisting of stock, moneys, notes and accounts, choses in action and bank stock and personal property of every kind, and that she is to have as her share of said personal property a one-third interest in the whole of my personal estate." This paragraph directed that $500 be paid to the testator's brother, R. Kirk, "to reward him for taking care of my father and mother during their declining years and last sickness and death, and the remainder of the two-thirds of my personal estate to be divided equally among my brothers and sisters or their descendants, then living, namely, as follows: * * *." The brothers and sisters were there named, along

with the six children of a deceased brother, who were given their father's interest.

Paragraph 4 of the will reads as follows: "It is my will and desire that at my death my wife dispose of the personal estate as above set out, and retain only such of the personal property as is necessary for her in the operation of my farm, and that it is my desire that none of my land be sold or divided until the death of my wife, Mollie Kirk, and at her death, and after the payment of her just and legal debts and burial expenses, and the erection of a monument to each of our graves, it is my desire that my real estate and any personal property that remains undisposed of by my wife during her natural life be then divided equally among my brothers and sisters, and their descendants. The descendants of any one of my brothers and sisters to share only in the part that my deceased brother or sister would share in my estate. The above is conditioned that each of us die without issue, leaving no children."

By paragraph 5 the testator named his wife as executrix, and directed that she be empowered to act as such without giving bond. Letters testamentary issued, as was directed in the will, and the executrix caused an inventory to be made and the property to be appraised. The entire estate was appraised at $10,980.47, of which sum $1,680 represented the value of the land. The testator had made contracts to convey certain portions of the real estate, and, by appropriate orders, these contracts were performed, and the unpaid purchase money collected. The personal property consisted principally of money in bank and the capital stock of the bank in which the money was deposited, and certain notes and accounts. Most of this property was converted into money under orders of the probate court, and the executrix reported to the court that she had $9,000 on hand to be distributed as directed by the will. In her petition for an order of distribution the executrix reported the taxes and other disbursements which had been made. She alleged that she was entitled to one-third of the money under the will and to commissions of $320 as executrix, making an aggregate amount

to which she was entitled of $3,320. After allowing $500 to be paid R. Kirk, a balance of $4,972.99 was reported on hand for distribution among the surviving brothers and sisters and the six children of the deceased brother, the share of each being calculated and stated.

An order of distribution was made pursuant to the prayer of the petition, and this money appears to have been paid over to the devisees who were entitled thereto. Mrs. Kirk, the executrix, deposited her part to her individual credit in the bank with which her husband had been connected, and at the time of her death, which occurred in June, 1932, she had on deposit $1,400 in a checking account and $1,600 in the form of a time deposit. It was stipulated that all the money on deposit had been derived from the estate of the testator.

After the death of Mrs. Kirk, Emmett Miller qualified as executor in succession of Kirk's estate, and M. C. Bird took out letters of administration on the estate of Mrs. Kirk.

Certain claims were probated against the estates of both Mr. and Mrs. Kirk, which need not be considered, as there is no controversy about them. Kirk's estate was solvent, and the debts were small, and the will had directed the payment, not only of the testator's debts, but those of his wife's also, including her burial expenses and the cost of erecting a monument to each of their graves.

Mrs. Kirk was survived by Mrs. Myrtle Mason, her sister and sole heir-at-law, who was appointed administratrix of the estate of Mrs. Kirk by the probate court of Benton County, in which county Mrs. Mason resided and at whose home Mrs. Kirk had died.

Mrs. Mason filed a petition in the probate court of Scott County praying that the letters of administration granted to Bird upon the estate of Mrs. Kirk be revoked, and that he be required to account for and to pay over to her all assets of Mrs. Kirk which had come into his hands, including the bank deposits. This petition alleged that under § 1, Crawford & Moses' Digest, an administration upon Mrs. Kirk's estate was unnecessary. A response was filed by Bird, as administrator, putting the

allegations of the petition in issue. A consent order was entered by the probate court of Scott County directing Bird, as administrator, to pay over to Mrs. Mason the $1,400 demand deposit to the credit of Mrs. Kirk at the time of her death, and all other questions were reserved.

The heirs of Mr. Kirk appealed from this order, and on the trial of this appeal it was adjudged by the circuit court that Mrs. Kirk was the owner of both deposits, although the money they represented had been derived from the estate of her husband under the provisions of his will, and this appeal is from that judgment.

It is insisted for the reversal of this judgment that the circuit court erroneously construed the provisions of the will, hereinabove recited, and, in support of this contention, we are cited to the case of *King* v. *Stevens,* 146 Ark. 447, 225 S. W. 656, where it was held that an estate for life may be created in personal property of a durable nature, with remainder over, and in such cases the property remaining at the death of the life tenant is to be distributed to the remainderman. We are cited also to numerous cases announcing rules for the construction of wills containing conflicting provisions.

We do not review these cases, as we think there is no conflict in the provisions of the will. Paragraph 2 clearly gave the widow only a life estate in the real estate, but with equal certainty paragraph 3 gave her absolutely a third of the personal property, and we think there was nothing in paragraph 4 reducing this devise except only as to the personal property necessary for her use in the operation of the farm.

It has been many times said that the paramount rule in the construction of wills is to ascertain the intention of the testator from the language used, giving force and meaning to each clause in the entire instrument. *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20; *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018; *Kelly* v. *Kelly,* 176 Ark. 548, 3 S. W. (2d) 305; *First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S. W. (2d) 14.

It is the law also that technical rules of construction which require certain provisions of a will to be disre-

garded are never to be resorted to except for the purpose of escaping total inconsistency. *Little* v. *McGuire,* 113 Ark. 500, 168 S. W. 1084, and cases there cited.

There is, in our opinion, no provision of the will which requires some other portion of it to be disregarded; on the contrary, it may be construed as a harmonious whole. It is true, of course, that, having made no election to disregard the will, the widow is presumed to have elected to take the provisions made for her by the will, although it may now appear that she would have profited by renouncing the will. Section 3527, Crawford & Moses' Digest. But she does take what the will, read in its entirety, gives her.

While the widow was given only a life estate in the lands, it was evidently the intention of the testator that she should have the full benefit of this use, and as a means to that end she was given, in addition to the provisions made in paragraph 3, the right to retain and use so much of the personal property as was necessary to operate the farm; this last provision, however, to continue only so long as she lived; and paragraph 4 renews the direction to "dispose of the personal estate as above set out" in paragraph 3, but to retain and not to dispose of so much of the personal property as was necessary for the operation of the farm, as to which property there was a remainder, which was to be used, rather than the real estate, in paying the just and legal debts his wife might owe, including her burial expenses and the erection "of a monument to each of our graves," and the real estate and personal property used in connection with the farm then remaining was to be divided equally among the brothers and sisters of the testator and their descendants, in accordance with the directions in that behalf contained in paragraph 3.

Counsel for appellee ask, in their brief, that we direct the revocation of the letters of administration issued to M. C. Bird as administrator of the estate of Mrs. Kirk. But this question appears to be pending and undisposed of in the Scott Probate Court, and for that reason we do not dispose of this question.

The judgment of the circuit court accords with this construction of the will, and it is therefore affirmed.

MOONEY *v.* ALNETT.

4-3386

Opinion delivered March 5, 1934.

J. E. Gregson and *J. Loyd Shouse,* for appellant.

W. J. Tate, Tex Coxsey and *Festus O. Butt,* for appellee.

HUMPHREYS, J. This suit was instituted in the chancery court of the eastern district of Carroll County by appellees against appellant to set aside a deed of date January 5, 1933, executed by Mrs. E. W. Mooney to appellant, her husband, to about twenty or twenty-five acres of land in said county upon which they resided, on the ground that the same was procured through the undue influence of appellant over his wife, Mrs. E. W. Mooney, at a time when she was not mentally competent to transact business.

Appellant filed an answer, admitting the execution of the deed, but denying that he procured same through undue influence over his wife at a time when she was incompetent to transact business.

The cause was submitted to the court upon the pleadings and testimony, resulting in a decree cancelling the deed on the grounds alleged in the complaint, from which is this appeal.

About twenty-six years ago, Mr. Mooney married a widow, the mother of two daughters. One of the daughters died, and the other married Mr. Alnett, who joined her in this suit. Mrs. Mooney had been blind for about

twelve years when she died, but she had learned to keep house notwithstanding her affliction. Mr. Mooney was kind and attentive to her, and they lived happily together during their entire married life. Appellees resided with them a part of the time. They all lived in Larned, Kansas, until they moved to Arkansas in the spring of 1926. Mrs. Mooney received a small estate from her first husband, from which she realized $250 in cash. In 1924 or 1925 Mr. Mooney inherited $2,500 from a brother. Mr. Mooney purchased the tract of land in question after coming to Arkansas, and had the deed made to Mrs. Mooney, so that if he should die she would not be disturbed. They were afterwards advised that he would lose the home in case Mrs. Mooney died first, and it was agreed between them that she would convey the home to him, but she neglected to do so until both became ill with light cases of "flu" in January, 1932. On January 5, 1932, while both were in bed sick, appellant sent for a justice of the peace, who prepared a deed conveying the land in question, upon which they had been and were residing as their home. Mrs. Mooney, being blind, signed same by mark, which signature was witnessed by two men who came in about the time she signed same. One of them thought she was not able to transact business and the other expressed no opinion about it. When appellant sent for the justice of the peace, Mrs. Mooney got the old deeds out of the trunk for him to use as a guide in drafting the new deed when he should arrive. After the execution of the deed, the justice of the peace handed it to Mr. Mooney, who later gave it to Mrs. Mooney to put in the trunk, and it remained where she put it until after her death some fourteen months later. Appellant then recorded it.

The justice of the peace, J. W. Ash, testified, in substance, that both Mr. and Mrs. Mooney were sick in bed when he prepared and she signed the deed; that she sat on the edge of the bed when she signed by mark and acknowledged same; that he did not fill out the blank relative to dower and homestead and certify to that part of it because Mr. Mooney was present; that the only persons present were Mr. Mooney, Mrs. Stewart and him-

self; that he would not have had her sign the deed if he had thought she was unable to transact business; that he saw nothing out of the ordinary except that both were sick in bed.

Mrs. Stewart testified that she was a neighbor taking care of Mr. and Mrs. Mooney. In her first statement, she said she was in and out when the deed was being prepared and signed, but, in her rebuttal testimony, she said that she was present all the time; that the justice of the peace did not ask Mrs. Mooney if she executed the deed of her own free will and accord; that Dr. W. L. Watson told her Mrs. Mooney's temperature was running 104½ and that she did not think with this much fever; she was competent to transact business; that she did not regard Mrs. Mooney either crazy or delirious; that the night before the deed was signed she was in the adjoining room and heard Mr. Mooney ask Mrs. Mooney to make a deed to him and heard her say she did not want to do so.

Dr. W. L. Watson testified that he was called to see Mrs. Mooney in January, 1932, and found both her and her husband in bed with light attacks of "flu"; that he did not remember taking their temperature; that they responded to his treatment, and recovered in a short time; that he did not tell any one that Mrs. Mooney's temperature was running 104½ degrees; that he found nothing else the matter with them.

Mr. Mooney testified, relative to the sick spell of himself and wife, that they were in bed a short time with light attacks of "flu" from which both soon recovered; that, while they were sick, Mrs. Mooney executed a deed to him for the twenty or twenty-five acre home he had bought and put in her name of her own free will and accord, without any undue influence by him, and for fear she might die. He denied having any conversation with her about it the night before it was executed.

The record reflects that during their illness a number of neighbors called and some of them were of the opinion that, owing to Mrs. Mooney's illness, she was not competent to transact business, and others thought she was. Also that Mrs. Mooney wrote for appellees to come to

them on account of their illness, which they did. They remained with them for some fourteen or fifteen months or until a short time after the death of Mrs. Mooney. Also that they recovered and that Mrs. Mooney thereafter was sound in mind and body until she died.

Mrs. Elizabeth Alnett testified that, after her mother got well, she claimed she had never made a deed when she asked her whether she had done so.

In our opinion, this testimony fails to show that Mrs. Mooney was incompetent to transact business when she executed the deed, or that she was unduly influenced to do so by appellant. It was the just and equitable thing for her to do as he had paid for the property with his own inheritance, and had been devoted and kind to her during her long affliction. Further, the execution of the deed was but the fulfillment of Mrs. Mooney's avowed purpose after she found out that in case of her death, as the title stood, her husband would lose the home.

On account of the error indicated, the decree is reversed, and the cause is remanded with directions to reinstate the deed and dismiss the complaint for want of equity.

EQUITABLE LIFE ASSURANCE SOCIETY *v.* BAGLEY.

4-3396

Opinion delivered March 5, 1934.

W. P. Feazel and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

James S. McConnell, for appellee.

HUMPHREYS, J. Appellee recovered judgment against appellant in the trial court for $387.90, $100 attorney's fee, and 12 per cent. statutory penalty under the total disability clause in two indemnity insurance policies issued on the 14th day of August, 1931, representing the premium payments which were made by appellee in the month of November, 1931, and the disability benefits which accrued in accordance with the terms of the policies up to and including August 19, 1933, the date of the trial, together with interest on such accrued installments.

An appeal has been duly prosecuted to this court challenging that part of the judgment allowing benefits for total disability to appellee from September 15, 1932, to the date of the trial on August 19, 1933. It is conceded that the evidence adduced on the trial was sufficient to sustain the finding and consequent judgment under the provisions of the policies that appellee was totally disabled from the date of the injury until September 15, 1932, on which date he attempted to secure re-employment. The total disability provision in the policies is as follows:

"Disability is total when it prevents the insured from engaging in any occupation for remuneration or profit."

This identical clause, as well as clauses of similar import contained in accident indemnity policies, has been construed by this court as meaning such a disability as renders the insured unable to perform the substantial and material acts of his business in the usual and customary way, and not such disability as renders him absolutely helpless. *Travelers' Protective Association of America* v. *Stevens,* 185 Ark. 660, 49 S. W. (2d) 364, and cases therein cited on the point.

Appellant's contention is that the trial court erred in finding and adjudging that appellee was totally disabled after September 15, 1932, within the meaning of said disability clause as construed by this court. The sole question presented by this appeal therefore is

whether the evidence is sufficient to support the finding and judgment of the court.

The material facts reflected by the record are, in substance, as follows:

On the date the policies were issued and at the time appellee was injured he was engaged in running a distributing station for the Magnolia Oil Company. The distribution of the company's products to farmers and retailers was by truck. The duties incident to appellee's position required a strong, able-bodied person, and, in order to obtain such a position, one had to stand and pass a satisfactory examination. Appellee received an injury in an automobile wreck on October 15, 1931, which practically destroyed the use of his left hand and arm so far as labor was concerned. On account of this injury, he was discharged by his employer on February 15, 1932, and did not seek employment until September 15, 1932. At that time he had learned to drive an automobile with one hand, but not with the same security and speed he formerly did. He was unable to secure employment in any avocation he had theretofore followed until April 12, 1933, when he was employed by a friend, Walter Westbrook, largely through sympathy, at a salary of $30 a month, to assist him in running distributing oil and gasoline station. He was unable to do many things connected with the business, such as lifting tanks of considerable weight, changing tires, covering as much territory in the solicitation of business as he formerly did, and in loading and unloading the truck. In serving the customers, he had to depend on them for assistance. If the roads were in bad condition, he did not venture out to solicit business or deliver the products. The only lifting he could do was with his right hand and with his right knee or leg. Walter Westbrook, as well as appellee himself, testified that he could not install equipment, unload tank cars, load motor oil on the truck, or deliver many of the products to the customers without aid, all of which duties were required of an oil and gasoline agent or of one in charge of a distributing station.

There is no dispute in the testimony as to the permanency of the injury, and appellee's inability to per-

form, in the usual and customary way, the hard labor incident to any avocation or occupation for which he was qualified before the injury.

The facts detailed above disclose appellee's inability after the date of the injury and until the date of the trial to perform, in the usual and customary way, the substantial and material acts of any avocation or occupation for which he was qualified. The instant case is ruled by the cases of *Ætna Life Insurance Company* v. *Phifer,* 160 Ark. 98, 254 S. W. 335, and *Mutual Life Insurance Company* v. *Marsh,* 186 Ark. 861, 56 S. W. (2d) 433.

No error appearing, the judgment is affirmed.

[redacted]

SOVEREIGN CAMP W. O. W. *v.* EASLEY.

4-3388

Opinion delivered March 5, 1934.

[redacted]

Arnold & Arnold, for appellant.

J. F. Quillin, for appellee.

MEHAFFY, J. This is a suit on an insurance policy issued to Jesse A. Easley, the husband of appellee and the beneficiary named in the policy. On April 28, 1914, Jesse A. Easley applied to the appellant for membership and for a beneficiary certificate in the sum of $1,000. On May 8, 1914, the certificate was issued to him. On May 1, 1929, Jesse A. Easley, who was at that time 41 years of age, surrendered the certificate for cancellation, and

applied for a new certificate to be issued in exchange for the certificate issued May 8, 1914. Thereupon the appellant issued its certificate in the amount of $1,000 on the twenty-payment-life plan. The appellee was named beneficiary in each certificate. This suit is to recover on the certificate last mentioned.

The case was tried in the lower court by the court without the intervention of a jury on an agreed statement of facts. The court, after hearing the evidence and argument of counsel, entered judgment in favor of appellee in the sum of $911.13 with interest at 6 per cent. from April 25, 1933, to date of said judgment, and interest on the total of principal and interest at 6 per cent. from September 12, 1933. To reverse this judgment, this appeal is prosecuted.

Appellant urges three reasons for reversal. The first question to consider is, as stated by appellant: "Whether or not any cash values were available to insured under the automatic premium loan feature until thirty-six monthly premium payments had been paid upon said certificate by the insured. Appellant contends that it was a condition precedent to the availability of any of the cash values set out in the table of cash values in said certificate, that there should have been paid thirty-six monthly payments upon said certificate."

It is admitted by appellant that this case involves a certificate of insurance identical in every respect with the case of the *Sovereign Camp of Woodmen of World* v. *Hardee, ante* p. 542. The court in that case decided against the contention of the appellant, and, inasmuch as the first proposition involved in this case is identical with the case above referred to, it is controlled by that case, and it becomes unnecessary to discuss this first proposition.

Appellant's next contention is that there was not sufficient cash value in said certificate under the automatic premium loan feature to keep it alive from September, 1930, to March 29, 1933, the date on which Jesse A. Easley died. It is admitted that Easley died on that date; that the appellant was duly informed of said death

on April 25, 1933, and denied all liability under said certificate, on the ground, as stated in a letter from appellant, that Easley was suspended October 1, 1930, for the nonpayment of dues and assessments. The appellant alleged that the certificate became null and void on the date of his suspension, and that there was no liability whatever under the certificate. The agreed statement of facts recited that all monthly installments were duly paid on said new beneficiary certificate by the said Jesse A. Easley up to and including the month of August, 1930, and it is further agreed by the parties that, at the time of the death of said Easley, he was in arrears to the appellant for 30 monthly premiums, and that the total amount of said arrears, with compound interest at 5 per cent. per annum, was $88.87.

The original certificate issued to Jesse A. Easley was on May 8, 1914, which was for $1,000. It is further agreed by the parties that the certificate involved in this suit was issued on May 1, 1929, at which time the insured, who was 41 years of age, surrendered for cancellation and substitution the original certificate, and made application for insurance in exchange therefor, a new form twenty-payment-life certificate for the sum of $1,000, with no lien or interest charges against it, and it is agreed that the appellee is the beneficiary.

Appellant contends that appellee, in her calculation, arrives at the amount by departing from the automatic premium-loan provisions, and reverting back to option C, which is the extended insurance feature.

The policy provides that it is effective as to payment period, values and provisions as if issued on May 1, 1927, and the age of the insured is fixed at 39 years. It is contended that the policy lapsed for nonpayment of September, 1930, assessments. The calculations, in order to determine the amount available to pay premiums, must be calculated as if the policy issued on May 1, 1927, and not three years after the date of issue, May 1, 1929. Taking this as the date, May 1, 1927, the values as contended for by appellee are from that date, or three years and four months to the time when payment of premiums ceased. It is agreed that the amount of the arrears is

$88.87, so that, in order to keep the policy in effect, the available values must have equaled that amount at the time of the death of Easley.

The policy provided for a monthly payment of $2.78. It also provided that the cash or loan value at the end of the third year would be $42.95. Under the policy, the cash value increased each month upon the payment of premiums, and the payment up to and including August, 1930, increased the cash value to $50.54. The method of calculation adopted by appellee, which we think is correct, shows that the cash values available to pay premiums or assessments exceeded the amount due from Easley at the time of his death.

The cash value in the certificate must be sufficient to keep the policy alive or it will lapse, but the appellant's third proposition is whether or not the automatic advancement of premiums by appellant, under the automatic premium-loan feature, served to increase or enhance the cash value of the certificate so as to keep it in effect up to the date of insured's death, March 29, 1933.

In order to prevent a forfeiture, automatic advancement of premiums should increase or enhance the cash value so as to keep it alive. All the provisions of the policy must be construed together, and if, when so construed, the automatic advancements increase the amount, it should be considered, and the insured have the benefit of it, so as to prevent a forfeiture. When this is done, it is a mere mathematical calculation as to whether the accumulations equal the $88.87, premiums due.

We think, when the entire provisions of the policy are construed together, the evidence shows that there were sufficient funds available to prevent a forfeiture. The facts in this case are agreed on, and it is purely a question of law.

We find no error, and the judgment of the circuit court is affirmed.

PARKER *v.* GRAU.

4-3392

Opinion delivered March 5, 1934.

[redacted]

John M. Parker, for appellant.

Neill Bohlinger, for appellee.

MCHANEY, J. Appellant, being indebted to appellee for merchandise bought in the sum of $15.80, on Monday, November 10, 1930, in the forenoon, gave appellee his check for said amount, drawn on the Farmers' Bank of Dardanelle, where appellant at all times then and thereafter had more than sufficient funds to pay same. Appellee neglected to cash the check that day. The next day, Tuesday, November 11, was Armistice Day, a holiday, and the bank was closed. The check was not presented at any time during the week of November 10, and the bank failed to open for business on Monday, November 17, but was found to be insolvent, and was taken over for liquidation by the Bank Commissioner.

Thereafter, appellee demanded that appellant take up his check, which was refused, and this suit followed. Trial to a jury in the circuit court on appeal from the justice court resulted in a verdict and judgment for appellee.

We think the circuit court erred in refusing to direct a verdict for appellant at his request. The law is well settled in this State. Our statute, § 7952, Crawford & Moses' Digest, provides 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." This is one of the sections of the Uniform Negotiable Instruments Act of February 21, 1913. In *Burns* v. *Yocum,* 81 Ark. 127, 98 S. W. 956, decided in 1906, before the passage of

said act, this court held, quoting second syllabus: "Where the payee of a check and the bank on which it is drawn are in the same place, reasonable diligence requires the check to be presented for payment not later than the day after it is received, and delay beyond that time without excuse will discharge the drawer from liability if he is injured by the delay." See also *Pelt* v. *Marlor,* 95 Ark. 111, 128 S. W. 554. Several cases have arisen since said act. In *Federal Land Bank* v. *Goodman,* 173 Ark. 489, 292 S. W. 659, we held that a check must be presented for payment within a reasonable time after its receipt, and that what constitutes a reasonable time depends upon the circumstances of the particular case,—"such time as a prudent man would exercise or employ about his own affairs." Section 7763, 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." See also *George H. McFadden Bros. Agency* v. *Keesee,* 179 Ark. 510, 16 S. W. (2d) 994; *Board of Directors of St. Francis Levee District* v. *Hagan,* 180 Ark. 33, 20 S. W. (2d) 314; *Berry* v. *Harris,* 186 Ark. 481, 54 S. W. (2d) 289.

Appellee attempts to excuse his delay in presenting the check for payment by stating that he went to Booneville on the 11th, and from there to Little Rock, where he remained until his return on Saturday after banking hours; that, although his place of business was open during his absence, he had locked the check up in the safe, and it was not available to his employees for collection during his absence. The bank was less than 100 steps from his store. We are of the opinion that the facts stated are not sufficient to excuse the delay of a week in presenting the check, and that appellee was guilty of negligence as a matter of law in failing to present the check for payment sooner, or not later than November 12, to appellant's damage in the amount thereof.

There was therefore no question of fact to be submitted to the jury, as appellant's request for a directed verdict should have been granted.

Reversed, and cause dismissed.

ROBERSON *v.* ROBERSON.

4-3401

Opinion delivered March 5, 1934.

T. B. Abington and *Culbert L. Pearce*, for appellant.

John E. Miller, C. E. Yingling and *R. H. Lindsey*, for appellee.

McHANEY, J. Appellant is the widow and appellee is the mother of Marion F. Roberson, who died testate in the State Hospital for Nervous Diseases on November 20, 1932. The controversy between them arises over the proceeds of a life insurance policy on the life of said decedent in the sum of $905.68. The policy was originally made payable to his estate, but on September 24, 1931, he exercised the right reserved to him in the policy and changed the beneficiary from his estate to his mother, the appellee. On October 22, 1931, decedent executed a will by which he attempted to bequeath to his mother the proceeds from the same insurance above mentioned. This will was admitted to probate after his death over appel-

lant's objection, but no appeal was taken therefrom, appellant thereafter electing to renounce the will.

In April, 1933, this action was instituted by appellee against the insurance company, and the executors named in the will and appointed by the court, to collect the proceeds of said policy. The company answered, admitting the indebtedness above stated, paid said sum into the registry of the court, and was discharged. Appellant intervened in the action, alleging the invalidity of the change of beneficiary on the ground of mental incompetency of the insured at the time the change was made, and that appellee had made an election of remedies, that is on the will, and that she was now precluded from a recovery on a change of beneficiary. Motion to dismiss the complaint on the latter ground was overruled.

Trial to a jury resulted in a verdict and judgment for appellee.

For a reversal of the judgment, appellant first insists that appellee "elected to rely upon the will rather than the written change of beneficiary." This argument is based on the fact that she and the executors filed a motion in the White Chancery Court to dismiss an action brought by appellant as administratrix of her husband's estate to cancel the change of beneficiary in said policy. As to the will, there is nothing in this record to show that appellee had anything to do with its probate, or that she was a party to or even a witness in that proceeding. The record does show that the only parties who appeared in the probate court were the executors and appellant who contested its probate on the same ground as here. As to the proceeding in chancery, after the will was admitted to probate, she agreed that the motion to dismiss was well taken, and, on her own motion, dismissed her suit. Just how these matters can constitute an election by appellee to take under the will is difficult to perceive. In 9 R. C. L., p. 960, § 7, cited with approval in *Belding* v. *Whittington*, 154 Ark. 561, 243 S. W. 808, it is said: "An election of a remedy which has the effect of an estoppel *in pais* or an estoppel by record * * * is generally considered made when an action has been commenced on one of such

remedies.'' Here this is the only action appellee has ever commenced or been a party to, except to move to dismiss appellant's action in chancery. By bringing this action, appellee elected to stand on the change of beneficiary, and has taken no action inconsistent therewith.

It is next contended that the court erred in excluding certain testimony offered by appellant: (1) The court refused to permit Dr. Sloan, a witness for appellant, to testify to certain reports made to him by a physician in St. Vincent's Infirmary in Little Rock, where Roberson remained for several weeks for treatment from August, 1930. We think no error was committed in this regard for two reasons: First, they were secondary or hearsay evidence, and, second, no showing was made as to the nature of said reports, nor whether they shed any light upon the question at issue, the sanity or insanity of the deceased. (2) Two other offers of evidence were excluded. The judgment of the Independence Circuit Court of October, 1931, in a *habeas corpus* proceeding, for the custody of Marion F. Roberson, wherein appellant was the petitioner and appellee and others were respondents, was offered and excluded. Also appellant offered the judgment of the White Circuit Court of January, 1933. In both of these judgments it was found that said Marion F. Roberson was of unsound mind, and it is contended that they were competent as evidence to go to the jury to determine his sanity at the time of executing the change in beneficiary. We cannot agree with appellant that this was error. The judgment of the Independence Circuit Court was nothing more than adjudication of his mental condition at that time, which was some thirty days after the change of beneficiary had been made, and was incidental to the main purpose of the controversy, his custody being the real issue. The judgment of the White Circuit Court was some months after his death, and was in an apparently friendly lawsuit, to which appellee was not a party, relating to life insurance in another company. It was agreed in open court that Roberson was adjudged insane by the probate court of White County on May 29, 1932, and confined in the State Hospital for Nervous Diseases. All adjudications of Roberson's sanity oc-

curred after the act sought to be set aside. One such trial on the question of the validity of his will, which was executed nearly thirty days after the change of beneficiary, found him to be sane at that time. But, even had the adjudications finding him of unsound mind been before the act sought to be avoided, they would have been mere presumptions of continuing insanity, which might be overturned by evidence sufficient to convince the jury to the contrary. Our cases so hold. *Eagle* v. *Peterson,* 136 Ark. 72, 206 S. W. 55; *Cook* v. *Jeffett,* 169 Ark. 62, 272 S. W. 873. In the latter case we said: "An adjudication (of insanity) for the purpose of issuing letters of guardianship is, in a collateral proceeding, only *prima facie* evidence of mental incapacity. *Eagle* v. *Peterson,* 136 Ark. 72, 206 S. W. 55. But, if the court making the adjudication is without jurisdiction, the judgment has no probative force at all, and is not admissible in evidence in a collateral proceeding." It was there also held that the order of the probate court, made after the death of the person, approving the act of the clerk in appointing a guardian prior to the death of such person, was void. We think no error was committed in excluding these judgments. This court, in *Shores-Mueller Co.* v. *Palmer,* 141 Ark. 64, 216 S. W. 295, said: "The record does not show that Walter G. Kindel was insane at the time he executed the contract sued on. The fact that he was subsequently adjudicated to be insane does not establish insanity at a prior time." And this is in accord with the general rule as stated in 32 C. J., p. 646, § 224. See also *Uecker* v. *Zuercher,* 54 Tex. Civ. App. 289, 118 S. W. 149; *Rhoades* v. *Fuller,* 139 Mo. 179, 40 S. W. 760. The adjudication of insanity of the White Probate Court in 1932 was inadmissible under the same rule.

It is finally urged that instructions given at appellee's request were erroneous and in conflict with those given for appellant. We have carefully considered the instructions, and do not find them open to this criticism. The instructions submitted the theories of both sides fully and fairly to the jury. By its verdict it has found that said Roberson was sane at the time of executing the

change in beneficiary and upon evidence that is in sharp conflict. No error appearing, we must permit it to stand.

Affirmed.

[redacted]

MIDDLETON *v.* MIDDLETON.

4-3394

Opinion delivered March 5, 1934.

[redacted]

F. O. Butt, for appellant.

S. W. Woods, for appellee.

BUTLER, J. J. H. Middleton died on October 7, 1932, leaving surviving him sons and daughters, all adults, as his sole heirs at law. This action was brought by the

appellees to establish a lost holographic will of the said J. H. Middleton, which they alleged was in existence at the time of his death, and had since then been destroyed.

On the issue joined, and the evidence adduced, the court rendered a decree, which, after reciting preliminary matters, found as follows: "After hearing all of the evidence, argument of counsel, and being duly advised in the premises, the court finds that the above-named parties, both plaintiffs and defendants, are the children and only heirs at law of J. H. Middleton, deceased; that prior to and at the time of his death and thereafter there was in existence an instrument purporting to be the last will and testament of the said J. H. Middleton, deceased; that it is claimed by the plaintiffs that said instrument was written in the own proper handwriting and signed by the said J. H. Middleton, and it is alleged that after his death the said instrument purporting to be his said will was destroyed by the defendant, Paul Middleton; that said instrument was by the court found to be in words and figures as follows:

" 'Omaha, Arkansas, November 23, 1923.

" 'I, John Middleton, being of disposing mind and memory, do make this my last will and testament.

" 'I will that all my just debts and funeral expenses be paid. I will my daughters, Gertie Middleton and Addie Middleton, my home and all of its contents. All of block thirty and lots three and four in block 5 in the original town of Omaha, also all of the northwest quarter of the northeast quarter of section twenty-seven, township twenty-one north of range twenty-one west, with all improvements attached thereto, except eight acres of the aforesaid forty deeded to L. M. Rea.

" 'I will my daughter, Gertie Middleton, two thousand dollars.

" 'I will my daughter, Addie Middleton, two thousand dollars.

" 'I will to Omaha Missionary Baptist Church the plot of land upon which the church is now located, fronting on the Springfield and Harrison road a distance of 100 feet, as indicated by iron stakes, and extending westward a distance of 150 feet, and lying in the south one-

half of the northeast quarter of section twenty-seven, township twenty-one north of range twenty-one west.

" 'I will to my sons and daughters, Charley Middleton, Paul Middleton, Clyde Middleton, Ada Guier and Edna Lee, equal shares in all of the remainder of my property, both real and personal.

" 'I will that the share of Edna Lee be placed in trust and the interest only to be paid her annually during the lifetime of J. C. Lee. I appoint my son, Paul Middleton, as administrator of this my last will and testament.

" '(Signed) John H. Middleton.

" 'This will needs no witnesses as everyone knows my signature. Known as J. H. Middleton.' "

"The court finds that said instrument as hereinabove set out, purporting to be the last will and testament, should be re-established to the end that the parties plaintiffs may file same for probate in the probate court, and that the probate court may have an opportunity to pass on the question as to whether or not said instrument is the last will and testament of the said J. H. Middleton.

"It is therefore by the court considered, ordered, adjudged and decreed that said instrument purporting to be the last will and testament of J. H. Middleton, deceased, be, and the same is, hereby restored and established as such purported instrument. To which ruling and judgment of the court, the defendant at the time excepted, and caused same to be noted of record, which is done, and prayed for an appeal to the Supreme Court of the State of Arkansas, which appeal is granted. Whereupon the plaintiffs ask the court to find as a fact that said instrument and signature was made in the own proper handwriting of J. H. Middleton, deceased, and was entitled to probate as the last will and testament, which finding the court declined to make, and plaintiffs saved their exceptions to such refusal."

The appellants call attention to § 10,545 of Crawford & Moses' Digest, which provides as follows: "No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the

lifetime of the testator; nor unless its provisions be clearly and distinctly proved by at least two witnesses, a correct copy or draft being deemed equivalent to one witness." They also call attention to § 10,495, fifth subdivision, relative to holographic will, which provides: "Where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator or testatrix, such will may be established by the unimpeachable evidence of at least three disinterested witnesses to the handwriting and signature of each testator or testatrix, notwithstanding there may be no attesting witnesses. But no such will shall be pleaded in bar of a will subscribed in due form as prescribed in this act."

Appellants make two contentions: first, that the will was not established by competent evidence in that the witnesses testifying to the effect that the body of the instrument and the signature thereto were in the proper handwriting of the testator, were not disinterested witnesses, as they were beneficiaries under the will. The answer to this first contention is, that there was no controversy relative to the handwriting and signature of the testator. Rules of evidence were formulated for the purpose of providing how disputed questions of fact might be determined, and where there is no dispute, there is no occasion for the application of the rules. Our statute recognizes this where it provides that it shall not be necessary to offer proof of the allegations of the complaint which are not denied in the answer. Section 1231, Crawford & Moses' Digest.

The undisputed testimony is to the effect that, shortly after the death of J. H. Middleton, three of his sons went to his place of business and from a safe obtained the will of their father, which apparently was known to be in existence. They repaired with the will to the home which had been occupied by the deceased, where all the sons and daughters were gathered, and Charley Middleton, one of the sons, read the will aloud, and he and two of the other children stated that the entire body of the instrument and the signature thereto were in the proper handwriting of the deceased. This testimony was not disputed.

The first contention may also be answered in this way: The act of the appellants made it impossible to comply strictly with the provisions of the statute relative to the proof of holographic wills. The proof is undisputed that, immediately after the will was produced and read in the presence of the heirs of the testator, it was intrusted to the eldest son of the deceased, and that afterward it was torn to pieces and burned by him, without any one ever having seen it besides the appellants and the appellees. The evidence does not show any active participation by the residuary beneficiaries in the act of Paul Middleton in destroying the will. The inference is plain, however, from their subsequent conduct, and as they were the ones to be benefited by his act, that they acquiesced therein. Now the appellants point to the statute and invoke its provisions to defeat the will, but they are met by the maxim, "No man should be permitted to advantage by his own wrong," and "Every presumption is made against a wrongdoer." By the destruction of the will it was made impossible for it to be inspected for the purpose of ascertaining in whose handwriting the body of the instrument and signature were. The parties to be benefited by the destruction of the will were the residuary beneficiaries, appellants here, and the act of the spoliator supplies the lost proof.

The general rule deduced from the maxim that all things are presumed against a wrongdoer is so natural and just that it has become a part of the law of every civilized land, and by it the presumption is all against the spoliator. Where some written instrument, which is a part of the material evidence in a case, has been destroyed, the presumption arises that, if it had been produced, it would have been against the interest of the spoliator, and, where the instrument destroyed is of such nature as to destroy all evidence, there follows a conclusive presumption that, if produced, it would have established the claim of the adversary of him who destroyed the instrument where it is shown that the destruction was willful. Where a deed, will or other paper, is proved to be destroyed, a presumption arises in favor of the party who claims under the paper, even though the

contents are not proved. *Hay* v. *Peterson,* 6 Wyo. 419, 45 Pac. 1073; *Lee* v. *Lee,* 9 Pa. St. 169. "If the will be lost, secondary evidence may be given of its contents. If suppressed or destroyed, the same is true; and, if necessary, the law will prevent the perpetration of fraud by permitting a presumption to supply the suppressed proof." *In re* Lambies' Estates, 97 Mich. 49, 56 N. W. 223.

In *Pomeroy* v. *Benton,* 77 Mo. 64, the court said: "We come now to the discussion of evidence by defendant. * * * Nothing remains to us but to apply to the defendant the stern rule recognized alike in equity and at law embodied in the maxim *omnia praesumuntur in odium spoliatoris.* * * * It would seem too plain for argument that, if secondary evidence were at hand, all need for the application of the rule would cease, and that, if the rule could not be applied unless upon the production of secondary evidence, then the spoiler could assure his success, by cutting off every source of information and every supply of evidence, could become successful in proportion to the destruction he had wrongfully wrought. * * * The law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong."

In the case of *McClure* v. *McClintock,* 150 Ky. 250, 150 S. W. 322, it was held that willful destruction of evidence by the defendant may raise the presumption of guilt, overthrowing the presumption of innocence. The maxim referred to, *supra,* is recognized with approval by this court in the cases of *Miller* v. *Jones,* 32 Ark. 337; *Burke* v. *Napoleon Hill Cotton Co.,* 134 Ark. 580, 202 S. W. 827; *Gallup* v. *St. L., I. M. & S. Ry. Co.,* 140 Ark. 347-54, 215 S. W. 586.

The second contention of appellant is that the will was not proved as a lost will, as provided by § 10,545, *supra.* This contention falls for the reason that there was no dispute in the testimony regarding the existence of the will at the time of the death of the testator, or of its destruction, and its contents were clearly proved by three

witnesses, who, though interested, were competent to testify, there being no provision in the statute, *supra*, which would disqualify them on account of their interest.

There was some testimony regarding a purported family settlement by which it was agreed that the will should be denounced and withheld from publication, but as to this the evidence is in conflict, and it is clear whatever settlement was discussed, it was never in fact consummated.

The evidence is in conflict with respect to the contents of the will. We think that it preponderates in favor of the finding of the chancellor, and it would serve no useful purpose to set it out in detail. We conclude, under the peculiar facts of this case, that J. H. Middleton executed a will in his lifetime, the body of which, with the signature thereto, was in his own proper handwriting; that this will was in existence at his death and subsequently destroyed; that the proof is sufficient to warrant the court in establishing it as a lost will, and that its contents were as found by the chancellor.

We agree with appellees that the court below erred in not establishing the will as a valid holographic will. Its decree will accordingly be reversed, and the cause remanded with directions to establish the will and to order its decree certified to the clerk of the probate court for record, under the provisions of § 10,543 of Crawford & Moses' Digest.

JOHNSON, C. J., (dissenting). The exegeses of the majority opinion are not warranted or justified under the facts and circumstances here presented. The facts are, no set of circumstances warrant or justify a court in nullifying a plain and simple statutory provision. It is not a matter of construing a statute, but one which ruthlessly destroys it. Subdivision 5, § 10,494 of Crawford & Moses' Digest has been the established law in this State since the Constitution of 1836. Until now it has been respected by all the courts. Probably minor individual hardships have resulted from its application, but the many wholesome benefits which are safeguarded by its terms have fully compensated therefor.

I agree with the majority that it was necessary for the chancellor to determine that a valid will was executed by the deceased before an order could be effected restoring it. The chancellor refused however, on the testimony presented, to restore this instrument as a will, and he was eminently correct in so doing.

The only testimony offered by the proponents of the will were beneficiaries thereunder. The majority opinion concedes that these beneficiaries were interested parties. Subdivision 5 of § 10,494 in no unmistakable terms provides that a holographic will must be established "by the unimpeachable evidence of at least three disinterested witnesses." The majority opinion says: "The first answer to this contention is, that there was no controversy relative to the handwriting and signature of the testator." Certainly there was no controversy, because the man who executed the purported will was dead. The beneficiaries have no right to make a will for the testator, but this is exactly what is permitted by the majority opinion. If the plain provisions of the statuate are to be ignored in the future, testators had much better die intestate than to risk the probation of their holographic wills. In the future it will only be necessary for the beneficiaries to get their wits together and determine for themselves the distribution of property and thereby nullify and destroy the effectiveness of the will. The statute itself brings into question whether or not there is a valid will, and this wholesome statutory provision stands out as a safeguard in behalf of the deceased until it is overcome by unimpeachable testimony from at least three disinterested witnesses. Any other construction of the statute nullifies and destroys it. Section 1231 of Crawford & Moses' Digest, cited by the majority, has no application where the validity or invalidity of a will is involved.

It is next said by the majority that "the act of the appellants made it impossible to comply strictly with the provisions of the statute relative to the proof of holographic wills." No act of a beneficiary should be permitted to nullify and destroy a plain statutory provision. No question of estoppel should be invoked as

against the deceased. Deceased knew, when he executed this purported will, that subdivision 5 was in existence. He had a right to expect that its provisions would be complied with before his will became effective. Until this was done, there was no valid will.

The majority opinion next says: "No man should be permitted to have an advantage by his own wrong." This is beside the question. There is no testimony that appellants or either of them would obtain an advantage by reason of the alleged destruction of the will. The kind and character of property owned by deceased, at the time of his death, is not disclosed by this record. A number of cases are cited in the majority opinion supporting the theory of presumption, but no case cited touches the question here presented. I assert, without fear of contradiction, that no case can be found which nullifies and destroys a plain statutory provision just to accomplish the purpose of some beneficiary. The facts are, all the authorities agree that a holographic will must be executed in accordance with statutory formalities. Section 366, Page on Wills, second edition. Not only this, but the authorities all agree that statutes providing for the execution of holographic wills are mandatory and not directory. *In re* Thor's Estate, 183 Cal. 512; *In re* Jenkins' Will, 157 N. C. 429. This court is now permitting a holographic will to be probated and established by beneficiaries in the will. These beneficiaries are directly and pecuniarily interested therein. I can not refrain from sounding this warning! Courts are established to construe statutes and not to legislate.

I am authorized to say that Justices SMITH and HUMPHREYS concur in the views herein expressed.

SIMS *v.* ROBERTS.

4-3393

Opinion delivered March 5, 1934.

V. D. Willis and *Shinn & Henley,* for appellant.

J. Loyd Shouse and *Cotton & Murray,* for appellee.

BUTLER, J. At an undisclosed date J. L. Sims and the appellant, Ora Sims, became husband and wife, and thereafter, on the 20th day of October, 1930, they entered into a written contract, the material parts of which may be summarized as follows: an indebtedness was acknowledged by J. L. Sims due Ora Sims in the sum of $5,000, without interest, to be due and payable upon the condition that J. L. Sims died before Ora Sims, otherwise the "debt fund" should revert to the estate of J. L. Sims, and the agreement would be null and void. For security of the payment of the aforesaid sum, certain bank stock of the par value of $5,000 was pledged, assigned and transferred, and attached to the original contract to be held by the First National Bank, which bank was authorized upon the death of Sims to deliver to Ora Sims, in the event the estate did not pay the $5,000, the stock certificates to be sold and their proceeds in excess of the amount of $5,000 to be paid to the estate. It was recited that the amount mentioned above was the balance of the sum of $17,528, of which sum Ora Sims acknowledged receipt of $12,528 in cash, which, together with the $5,000 mentioned in the contract, constituted the $17,528 paid and to be paid to Ora Sims in consideration of her releasing all claim in and to the estate of J. L. Sims, both real and personal, including dower and homestead rights in and to all real property. In the event Ora Sims survived her husband, she was obligated to execute to his legal representatives all necessary documents to effectuate the agreement on her part. As a condition to the payment to Ora Sims of the balance named, it was provided "that

she perform the agreements and covenants set out, including her executing a full release to the estate as mentioned, it being understood and agreed by and between the parties hereto that the said sum of $17,528, of which the said sum of $5,000 is the balance to be paid, is in full settlement of all property rights, including dower and homestead, as between the said J. L. Sims and Ora Sims, husband and wife, and the same is made in consideration of the agreement entered into before their marriage, and in consideration of marriage, the same not having been reduced to writing until this date."

A further and final provision was to the effect that Ora Sims should care for J. L. Sims during any sickness or infirmity, and that, should she desert him, the contract would be void.

J. L. Sims died, and John Roberts was appointed administrator of his estate. Ora Sims presented to him, with the contract attached, her claim for $5,000, duly sworn to as prescribed by statute. This claim was disallowed by the administrator and also by the probate court. When the case reached the circuit court on appeal, the administrator interposed a demurrer on the ground that the claim "does not state facts sufficient to constitute a cause of action in that the contract upon which said claim is based is not a valid and binding contract against the estate of Dr. J. L. Sims, deceased." The court sustained the demurrer and dismissed the claim, from which judgment is this appeal.

To sustain the action of the trial court, the appellee relies on the statute of frauds, § 4862, Crawford & Moses' Digest, as follows: "No action shall be brought: * * * Sixth. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized." Appellee also relies on § 7028 of the Digest under the head of "Marriage Contracts," as follows: "All marriage contracts whereby any estate, real or per-

sonal, is intended to be secured or conveyed to any person, or whereby such estate may be affected in law or equity, shall be in writing and acknowledged by each of the contracting parties, or proved by one or more subscribing witnesses." He cites the case of *Galbraith* v. *Cook,* 30 Ark. 417, the second syllabus of which is as follows: "A marriage contract must be reduced to writing and acknowledged under our statutes."

The learned trial judge did not indicate on what theory he held the contract invalid. It might have been his opinion that an oral antenuptial contract, being within the statute of frauds, could not subsequently be validated by reduction to writing after the marriage. There is respectable authority to support this view. *Smith* v. *Greer,* 3 Humph. (Tenn.) 118; *Read* v. *Livingston,* 3 John. Ch. Rep. 481; *Wood* v. *Savage,* 2 Doug. (Mich.) 316. There are equally respectable authorities holding that a parol antenuptial agreement, where the marriage has been consummated on the faith of the same, reduced to writing after the marriage, is sufficient compliance with the statute. We find it unnecessary to pass upon this question because, in our opinion, the contract having been reduced to writing and signed by the parties, it is sufficient to make it valid between them and their privies whether it be treated as an antenuptial agreement reduced to writing or a post-nuptial settlement. There can be no doubt but that a husband may dispose of his property or provide for its disposal by any method he may deem proper which will be binding against all except creditors. If the contract be treated as having been made in consideration of a parol antenuptial agreement, it will appear by its recitals that there has been a substantial part performance. Ora Sims, having been paid in cash the sum of $12,528, and the marriage consummated, the presumption is that she and J. L. Sims lived together as husband and wife until the death of the former. As pointed out by Bishop in the first volume of his treatise on Law of Married Women, parol antenuptial agreements were valid at common law, and are not made void by statute. Our statute is a re-enactment of the English Statute of Frauds (29 Car. 2), and, in commenting upon

its language, Mr. Bishop, at § 807, vol. 1, p. 605, *supra,* has this to say: "Incautious persons have sometimes, not looking at the exact words of the statute, supposed that, if an agreement is founded on the consideration of marriage, and is not in writing, it is therefore void. But that is not what the statute says. It simply says that 'no action shall be brought whereby to charge any person upon' this parol agreement. For example, if the parol agreement has been executed, the rights of property acquired under it are as secure as if the contract had been written and duly signed. Therefore, although marriage, following a parol antenuptial agreement, is not even a part performance of it, to take the case out of the statute of frauds, yet, if there is such an antenuptial agreement founded on this consideration of marriage, and it is voluntarily carried out while the coverture lasts, it is, on the death of one of the parties, binding as between his representatives and the party living."

This court, in the case of *Storthz* v. *Watts,* 125 Ark. 393, 188 S. W. 1166, cited with approval in *Newton* v. *Mathis,* 140 Ark. 252, 215 S. W. 615, lays down the rule that a substantial part performance of a contract is sufficient to take a verbal contract from within the statute.

The test of the validity of the marriage contract is whether or not it would bar the widow of her right of dower in the estate of her deceased husband. In the instant case, Mrs. Sims, having acknowledged the existence of the antenuptial agreement and the receipt of a substantial part of the sum stipulated to be paid, could not be permitted to renounce the contract simply because it had not been reduced to writing before the marriage. This is true because the parol antenuptial agreement, not being void but merely unenforceable, the part performance subsequently acknowledged in writing rendered it enforceable against the wife and consequently against the representatives of the deceased husband.

The headnote in the case of *Galbraith* v. *Cook, supra,* failed to notice that the written contract might be proved by subscribing witnesses without the necessity of a formal written acknowledgment. That case is therefore no

authority for holding that the contract in the case at bar is void. It is true that it has not been proved and recorded as provided by §§ 7029-30 of Crawford & Moses' Digest, but by § 7032 it will be noticed that these sections do not apply as between the parties to a contract and such as have actual notice thereof. In this case the administrator occupies the same relationship to the appellant with respect to the contract as did her husband, and therefore the failure to prove and record the contract does not render it invalid as to him.

There is no contention before us that there was any fraud practiced in the procurement of the contract, that any of its material recitals are false, or that the rights of creditors are involved. We therefore cannot consider any of these questions, and, if any such exist, they may be raised on a remand of the cause.

From what we have said, it follows that the trial court erred in sustaining the demurrer. The judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceedings in accordance with law and not in conflict with this opinion.

DICKEN *v.* MISSOURI PACIFIC RAILROAD COMPANY.

4-3378

Opinion delivered March 12, 1934.

Haynie, Parks & Westfall, for appellant.

Henry Donham and *Mahony & Yocum*, for appellees.

JOHNSON, C. J. To compensate an injury, which resulted in death to Chester Dicken, this suit was instituted by appellant, Mattie Dicken, widow of deceased, against appellees, Missouri Pacific Railroad Company and the Standard Gravel Company, in the Nevada Circuit Court.

In effect, the complaint alleged that the Standard Gravel Company is a domestic corporation, and the Missouri Pacific Railroad Company is a foreign railway corporation, authorized to do business in this State. That on and prior to said second day of September, 1933, plaintiff's husband, Chester Dicken, was in the employ of defendant, Standard Gravel Company, engaged in helping to load on the cars of defendant, Missouri Pacific Railroad Company sand and gravel to be transported over the lines of railroad owned and operated by both of said defendants, as heretofore alleged. That, after two of said cars were loaded with sand and gravel, the engineers in charge of said locomotive of defendants was ordered by defendant to move said loaded cars from said gravel plant over said short line of railroad, to a point near the track of the defendant, Missouri Pacific Railroad Company, where same was to be unloaded, to be used for repairing the track or roadbed of said short line of railroad. That it was the duty of all of the employees of defendant, Standard Gravel Company, including Chester Dicken, to go upon said gravel cars and ride same to the point where the sand and gravel was to be unloaded for the purpose aforesaid.

That one of said cars owned by defendant, Missouri Pacific Railroad Company, then and there being transported over said short line of railroad, and which was loaded with sand and gravel, was equipped with a trap door or flooring controlled by certain cogs, chains and

gearing which held the bed of the car intact, until ready to be dumped by releasing the dog or a trigger which would release the bed of the car and permit the sand and gravel to be discharged upon the track or roadbed beneath.

That, shortly after said locomotives and cars were placed in motion, and while same were being transported to the point on said short line of railroad where same were to be unloaded as aforesaid, the trap door or bed of said car loaded with sand and gravel suddenly collapsed and fell from its position, permitting the load of sand and gravel, upon which said Chester Dicken was riding, to fall through upon the track, carrying with it the said Chester Dicken, and causing him to be run over by said gravel car and killed.

The prayer was for compensation in the sum of $3,000.

Appellees answered the complaint and affirmatively alleged a defect of parties plaintiff in that appellant was without authority under the law to prosecute or maintain the suit. After the filing of appellees' answers, appellant amended her complaint by alleging that no letters of administration had been issued upon the estate of her deceased husband, and that the deceased left no children or father or mother surviving; that deceased left no collateral heirs surviving him, except one half-brother, Isaiah Dicken, and one half-sister, Arminta Dicken Houston. Thereupon the half-brother and sister of deceased intervened in said cause and were made parties plaintiff.

At the conclusion of appellants' evidence, a verdict was directed by the trial court in favor of appellees, and against appellants, and a judgment was accordingly entered, from which this appeal is prosecuted.

Because of the views hereinafter expressed, we deem it unnecessary to detail the testimony introduced upon the trial.

The decisive issue is: Can appellants, the widow and heirs at law of Chester Dicken, maintain this suit? Or does the alleged cause of action rest exclusively in the personal representative of the deceased? In determining

this question, it must be remembered that at common law this cause of action, as alleged by appellants, did not survive the deceased, therefore the survival of said cause of action rests solely upon statutory law.

The first statutory law in this State on the subject here under consideration was enacted by the Legislature of 1883 and now appears as §§ 1074 and 1075, Crawford & Moses' Digest.

Section 1075 provides: "Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and, if there be no personal representative, then the same may be brought by the heirs at law of such deceased person, etc."

Under this provision of the statute, a suit arising under § 1074, Crawford & Moses' Digest, must be prosecuted and maintained by the personal representative of the deceased, if one there be, and, if none, the suit may be maintained by the widow and heirs at law. *St. L., I. M. & S. Ry. Co.* v. *Corman,* 92 Ark. 102, 122 S. W. 116, and *Southwestern Gas & Electric Co.* v. *Godfrey,* 178 Ark. 103, 10 S. W. (2d) 894.

The above sections of the statute remained unimpaired and not amended up to and until 1911, at which time § 7138, Crawford & Moses' Digest, was enacted. This section of the statute was construed in *Murphy* v. *Province,* 153 Ark. 240, 240 S. W. 421, and we there held, quoting from the fourth headnote:

"Crawford & Moses' Digest, § 7138 *et seq.,* known as the Railroad Hazards Act, repealed the Lord Campbell's Act, so far as the two acts were necessarily inconsistent, though the former act provides that it shall not be held to limit the duty of common carriers by railroads or impair the rights of their employees in the existing laws of the State."

In the more recent case of *Faulkner* v. *Faulkner,* 186 Ark. 1082, 57 S. W. (2d) 818, quoting from the third headnote, we held: "The railroad hazards act (Crawford & Moses' Digest, § 7138 *et seq.*) repealed the general death statute in actions arising under the former act."

Thus it appears that, in all cases which arise or are prosecuted under the Railroad Hazards Act of 1911, an

exclusive remedy is afforded, and §§ 1074 and 1075 of Crawford & Moses' Digest are impliedly repealed to the extent of the later act.

Thus the law stood until 1913, when the Legislature enacted act 175 of 1913, a part of which now appears as § 7144, Crawford & Moses' Digest, which provides:

"Every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such corporation, or, in case of death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, etc."

It definitely appears that the section of the statute just quoted was patterned after the Federal Employers' Liability Act. USCA, title 45, § 51, therefore the rules of construction promulgated by the Federal courts should be given great weight in construing the provisions thereof.

The Supreme Court of the United States has construed the Federal Employers' Liability Act to mean that all actions arising thereunder must be brought, prosecuted and maintained by the personal representative of the deceased. *M., K. & T. Ry. Co.* v. *Wulf,* 226 U. S. 570, 33 S. Ct. 135; *St. Louis-San Francisco Ry. Co.* v. *Maude Seale,* 229 U. S. 156, 33 S. Ct. 651.

Since § 7144, Crawford & Moses' Digest, is not dissimilar to § 51, title 45, USCA, we feel constrained and impelled to follow the decisions of the Supreme Court of the United States, and hold that all actions which arise or are prosecuted under act 175 of 1913 by an employee or his widow and heirs at law and against a corporation, which is not engaged in interstate commerce, must be instituted, prosecuted and maintained by the personal representative of the deceased.

We are not unmindful of the long-established doctrine of this court that repeals by implication are not favored. The converse of this rule is quite as well established, to the effect that, where two legislative acts relating to the same subject are necessarily repugnant to, and in conflict with, each other, the later controls, and, to the extent of such repugnancy or conflict, repeals the

earlier act, whether expressly so declared or not. *Hickey* v. *State,* 114 Ark. 526, 170 S. W. 562; *Coats* v. *Hill,* 41 Ark. 149; *Chicago, R. I. & P. Rd. Co.* v. *McElroy,* 92 Ark. 600, 123 S. W. 771; *City of DeQueen* v. *Fenton,* 100 Ark. 504, 140 S. W. 716.

Our conclusion is therefore that all tort actions arising under the laws of this State, for the benefit of deceased employee's widows and heirs at law and against corporations, other than corporations engaged in interstate commerce, must be instituted, prosecuted and maintained by the personal representative of such deceased employee, and to this extent § 1075, Crawford & Moses' Digest, is impliedly repealed by § 7144 of Crawford & Moses' Digest.

Appellant insists that we decided this contention otherwise in the Godfrey case, *supra.* Not so. The effect of the decision in the Godfrey case is that it is not prejudicial error to join the heirs at law with the personal representative in the prosecution of such suits.

Appellant also contends that we decided this question adversely in the case of *Thompson* v. *Southern Lumber Co.,* 113 Ark. 380, 168 S. W. 1068. This case was decided on June 15, 1914, and the statement of facts therein indicates that a prior suit had been litigated between the parties over the same subject-matter. The subject-matter over which the litigation arose was an injury inflicted in 1910. Just when the first suit was instituted, whether prior to or after the passage and approval of act 175 of 1913, does not appear. However, since the act of 1913 is not referred to or discussed in the opinion, we conclude that the Thompson suits were instituted prior to the passage and approval of said act. At any rate, the question here under consideration was not presented, discussed or decided by this court in the case referred to.

It follows from what we have said that appellants have not the legal capacity to institute, prosecute or maintain this suit against appellee, Standard Gravel Company, and the trial court committed no error in directing a verdict in its behalf.

It is not seriously contended that any liability is shown against appellee, Missouri Pacific Railroad Com-

pany. The uncontradicted testimony shows that the deceased, Chester Dicken, was in the employ of the Standard Gravel Company, which company had no connection, directly or indirectly, with the railroad company. The only circumstances in evidence tending to connect the Missouri Pacific Railroad Company with the alleged injury to the deceased was that the gravel car, which ran over and upon the deceased, was borrowed from the railroad company by the gravel company. This circumstance is entirely insufficient to establish liability against the railroad company, and the trial court was correct in directing the jury to return a verdict in its favor.

No error appearing, the judgment is affirmed.

NATIONAL EQUITY LIFE INSURANCE COMPANY *v.* PARKER.

4-3400

Opinion delivered March 12, 1934.

S. F. Morton and *M. J. Harrison,* for appellant.

Huie & Huie and *T. D. Wynne*, for appellee.

SMITH, J. Appellant issued a policy of insurance upon the life of Joseph W. Parker, payable upon his death to his wife, which contained this recital: "This policy is issued in consideration of the application herefor, a copy of which is attached hereto and made a part hereof, and of the payment in advance of seventy-six and 08/100 dollars, being the premium for one year's term insurance from the date hereof and the advance reserve required by law, and the further payment of a like amount on or before the 1st day of July in every year

thereafter during the continuance of this policy." The policy was dated July 1, 1931.

The insured died March 15, 1932, and this suit was brought to enforce payment of the policy, and from a judgment awarding that relief is this appeal.

The insurance company defended upon the ground that, upon the written application of the insured, the terms of payment of the premium had been changed from an annual payment to monthly payments, and that only one monthly payment had been made. There was indorsed upon the back of the policy the amount of premium to be paid if the payments were made annually, semi-annually, quarterly, or monthly, the amount of the premium if paid monthly being $8.70 per month.

A writing, which purported to be an application to change the plan of premium payments, to which the name, "Joseph W. Parker," was signed, was offered in evidence, but his wife and brother-in-law testified the writing was not the signature of the insured.

The agent who wrote the application and delivered the policy testified that the insured signed the application in his presence, and that the change of plan of payment was made as requested, and the insured made an initial monthly payment of $8.70 upon the delivery of the policy. Testimony on the part of the insurance company was to the effect also that no other payment was ever made, although monthly notices were sent to the insured of the amount and date of his payment, as well as a notice to the effect that the insurance would be suspended unless payments were made, and another notice to the effect that the insurance had been canceled upon the books of the company because the payments had not been made.

The court charged the jury that the possession of the policy by the insured at the time of his death raised the presumption that the policy had been properly delivered to him after the performance of all conditions precedent necessary to put it in force, and that the burden was upon the defendant insurance company to show that the annual premium had not been paid, and that a verdict

should be returned for the plaintiff unless this burden was met by the defendant.

The defendant requested—but the court refused to give—an instruction numbered 4 reading as follows: "You are instructed that if you believe from the evidence in this case that the only premium paid by Joseph W. Parker was the monthly premium of $8.70 paid at or before the time of the delivery of the policy, then said policy lapsed at the end of 31 days grace period on September 1, 1931, and you should find for the defendant."

This instruction so clearly and so correctly presents the controlling issue of fact that we think it was error to refuse to give it. It is not contended that the instruction is incorrect, but it is asserted that the refusal to give it was not prejudicial error, for the reason that the court had given, at plaintiff's request, an instruction numbered 3 which covers it. This instruction numbered 3 reads as follows: "The court instructs the jury that the policy in suit was issued on an annual premium payment basis, and the burden of proof is upon the defendant company to show by the greater weight of the evidence introduced in this case, that subsequent to the issual of the policy the premium payment basis was changed by mutual agreement to a monthly payment basis."

We think, however, the court should have given appellant's instruction numbered 4, although appellee's instruction numbered 3 had been given. Instruction numbered 3 declared the law to be that the policy had been issued upon an annual premium payment basis, and not upon a monthly premium payment basis, and that the burden was upon the defendant to show that the premium payment basis had been changed by mutual agreement to a monthly payment basis. But there it stopped, and there appellant's instruction numbered 4 began, and the jury should have been told, as appellant's instruction numbered 4 declared the law to be, that a single monthly premium of only $8.70 would not suffice to keep the insurance in effect beyond September 1, 1931, which date was some months prior to the date of the death of

the insured. *Washington Fidelity National Insurance Co.* v. *Anderson,* 187 Ark. 974, 63 S. W. (2d) 535.

Appellant's instruction numbered 4 should have been given, and for this error the judgment will be reversed, and the cause will be remanded for a new trial. It is so ordered.

[redacted]

NEW YORK LIFE INSURANCE COMPANY *v.* SHIVLEY.

4-3397

Opinion delivered March 12, 1934.

[redacted]

Louise H. Cooke, W. J. Schoonover and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

W. A. Jackson and *George M. Booth,* for appellee.

MEHAFFY, J. This action was begun by appellee in the Randolph Circuit Court, against the appellant, to recover on an insurance policy issued April 20, 1909, for $2,000. The annual premium was $64.74, running for twenty years. The policy was issued by appellant to Nicie J. Shivley, wife of the appellee, and the appellee was the beneficiary. The premiums had all been paid, and it was a paid-up policy. The last premium was April 20, 1929. The insured died on December 26, 1932.

Appellant, in its answer, admits that the policy became paid up in April, 1929, but that it was charged with a loan, and the appellant alleges that on September 24, 1932, the total debt, including interest, equaled the

cash surrender value of the policy, and that on that date appellant notified the insured that the policy would become void without further notice if no payment on account of the indebtedness was made before the expiration of one month after the mailing of the notice. No further payment was made on account of the indebtedness, and appellant alleged that, according to the terms of the loan agreement, the policy had lapsed, and become void on October 23, 1932, and that at the time of insured's death the policy was not in force.

There were several loans made on the policy, the first one being for $120, and the loan agreement provided that interest on this loan at the rate of 5 per cent. per annum from date to the anniversary of the policy should be paid, and should be paid annually thereafter on each anniversary of the policy. The agreement further provided that, if interest was not paid on the date when due, it should be added to the principal and bear interest at the same rate. It was further provided in the loan agreement that the sum so advanced shall become due and payable either, (a) if there is default in the payment of any premium on said policy, in which event the sum so due and payable with interest should be deducted in the manner provided in said policy, and said indebtedness thereupon be deemed fully paid. The agreement further provided that, whenever the total indebtedness to the company on said policy, however evidenced, shall equal its cash surrender value, then, in the event of failure to pay interest thereon, said company shall mail to the last known address of the insured, and of the assignee of record at the home office of the company, if any, a notice that the total indebtedness to the company on said policy equals its cash surrender value, and thereupon said policy shall, one month after the mailing of said notice by the company, and without any other or further notice or action of any kind, be void and of no effect, unless said defaulted interest shall be paid within said one month after the mailing of said notice, and whenever said policy so becomes void and of no effect, all of said indebtedness to the company shall be fully paid and satisfied.

The policy provided that, when the total indebtedness to the company on said policy should equal its cash surrender value, then, in the event of failure to pay interest thereon, said company shall mail to the last known address of the insured a notice that the total indebtedness to the company equals its cash surrender value, and thereupon said policy shall, one month after mailing said notice, be void. The policy does not require that the insured shall receive the notice, but it does require that the notice be mailed to the last known address of the insured.

We think, however, that it was unimportant whether notice was given or not, because, unless the indebtedness equaled the cash surrender value of the policy, there was no forfeiture. The company made several loans on this policy, and, when it would make a new loan, it would always deduct the amount of the former loan and interest from the amount advanced as a loan on the policy. In all instances, also, where a loan was made, there was a policy loan agreement. The last loan was made on May 21, 1931, and was not due until May 21, 1932, and in April, 1932, the interest of $46.44 was added to the principal, making the total indebtedness $1,086.44.

The appellant's witnesses testify, and the record shows, that the interest for 1932 was added to the loan thereby extended until 1933. There was no promise to pay, and no obligation to pay either principal or interest until May, 1933; but, in order to show that the indebtedness equals the cash surrender value of the policy, appellant calculates the interest accrued, although not due until May, 1933. The only question in this case therefore is whether, in order to declare a forfeiture of the policy, the appellant will be permitted to calculate the interest that is not due, and will not be due for several months, and add this to the principal, so as to make the indebtedness equal to the cash surrender value. We do not think this should be permitted, nor do we think it was the intention of the parties. The interest not yet due should not be available to increase the amount of the indebtedness so as to forfeit the policy. The policy itself increased in value annually, although such increase was not

available to the insured until the beginning of the next policy year, and the interest accrued, but not due, should not be available to the insurance company to increase the indebtedness so as to declare a forfeiture.

There is some argument made about failure to pay defaulted interest. There was no defaulted interest, and there was no interest due until the following May.

"It is a general principle that forfeitures are not favored in law, and nowhere is this more applicable than in the construction of insurance contracts (*Palatine Ins. Co.* v. *Ewing,* 92 Fed. 111, 34 C. C. A. 236). A construction of a policy resulting in a forfeiture will not be adopted except to give effect to the obvious intention of the parties. * * * Nor will provisions for the forfeiture in policies of insurance be extended beyond the mischief intended to be met thereby. Contracts of insurance, whether of life or fire insurance, will therefore be construed so as to avoid a forfeiture if possible." 2 Cooley's Briefs on Insurance, 991; *Maloney* v. *Maryland Cas. Co.,* 113 Ark. 174, 167 S. W. 845; *Pfeiffer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847.

The policy in this case provides that it shall be incontestable after one year from its date, except for the nonpayment of premiums. There were, of course, no premiums due, because this policy was paid up. Of course, if interest is calculated up to the time the company gave the notice, the indebtedness would equal the cash surrender value of the policy; but, in order to arrive at this result, interest that is not due must be added to the indebtedness, and we do not think there was any more intention of adding interest due in the future than there was in calculating the increased value of the policy, which would not be available until the beginning of the next policy year.

Under the terms of the policy, of course, there was no increase until the beginning of the next year. But there was no interest due on indebtedness until the next policy year.

In vol. 2 of Cooley's Briefs on Insurance, 994 and 995, the rule is stated as follows: "In accord with these principles, it is recognized as the settled doctrine that a

policy of insurance must be liberally construed in favor of the insured, so as not to defeat, without necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted."

In construing the contract most strongly against the insurance company, as we must do, we think it clear that the company did not have the right to declare a forfeiture at the time it did.

This view is strengthened by the statements in the policy and in the policy loan agreement; in both it is stated that the interest is payable annually, and it is also stated in the policy loan agreement that the policy becomes void unless the defaulted interest shall be paid, etc.

We think that defaulted interest means interest that is not paid at the time it is due according to the contract, and, according to the contract, this interest was not due until the end of the policy year.

The judgment of the circuit court is affirmed.

HOOD *v.* SOVEREIGN CAMP WOODMEN OF THE WORLD.

4-3398

Opinion delivered March 12, 1934.

Robert Bailey, for appellant.

Rainey T. Wells and *Lee Miles,* for appellee.

MEHAFFY, J. This suit was brought by appellant against the appellee in the Pope Circuit Court to recover on an insurance policy issued to appellant's husband, Robert L. Hood, who died October 16, 1932.

In 1898 the appellee issued to Robert L. Hood, husband of appellant, an insurance policy in the sum of $2,000, payable to his wife, the appellant. All of the premiums and dues were paid by Hood up to August 9, 1910, when he canceled and surrendered the certificate originally issued to him, and directed the issuance of a new certificate, making his wife and children beneficiaries. This second certificate was issued August 16, 1910. On April 18, 1929, this second certificate was surrendered and canceled, and application made for a new form of ordinary life certificate in the amount of $2,000 at an increased rate of assessments. The beneficiary in this last certificate, the one involved in this suit, is appellant.

Robert L. Hood was in the drug business at Russellville, and paid his dues to appellant's agents for about 30 years. During all that time, up to July, 1932, the dues were paid at Hood's place of business, at his drug store. About this there is no dispute. The agents of the appellee and others testified that the agents of the appellee would go to Hood's place of business and collect premiums, and Mrs. Hood, the appellant, testified that all the dues were paid up to the time of his death. She did not, however, have receipts for all of them. She did have receipts or checks, showing that she paid all of the premiums and dues up to and including the payment for June, 1932. In April, 1932, Hood borrowed $203.06 from the company.

The testimony of the appellant shows that no notice that the dues had not been paid was ever received. She also testified that, after the change in the policy was made, they paid $7.84 dues, and 25 cents camp dues, a

total of $8.09. She testified that they always collected dues at the store; that this was the custom from the very beginning, more than 30 years, down to the death of Mr. Hood; that they were paid up at the time of his death; and that no one ever notified them that they were not paid. She opened all the mail, looked after the books, and no information ever came that they were not paid. After Hood's death, she wrote appellee that she had money to pay the loan, but she never received any answer to her letter.

On cross-examination she testified that sometimes she paid the dues, and sometimes her son paid them, but they were always paid at the store; paid to the local secretary; paid them down to the time of Hood's death. She did not know there was any contention that they had not been paid until after his death. She had receipts for January, February, March and April that she found, and she testified that one box of receipts, she could not find. Her testimony was corroborated by her son, Louis Hood.

Robert Bailey, attorney, introduced a letter which had been written to the appellee, notifying the company of the death of Mr. Hood, and also a letter in reply, saying that Shepherd notified them of Hood's death, and they also stated that Hood had been suspended for the nonpayment of June dues.

Joe D. Shepherd, financial secretary of appellee, testified that he worked for the local camp during 1932 as financial secretary; that his records show that Hood was suspended for the nonpayment of the June installment. This witness does not remember whether he ever collected any dues at any place other than Hood's place of business. He does not remember whether Hood ever paid him at his office. The local camp had no meetings for years, and the financial secretary had no place of business for appellee in Russellville. Shepherd testified that the office of financial secretary was given to him by the State manager of appellee. Witness did not remember whether he collected once or twice from Hood money that witness had advanced. This witness admitted that Hood gave him a check in June, and also that the receipt introduced, dated June 13, was signed by him, and he

also testified that he could not say whether he received cash and the check, too, or not. He testified that on the book, after Hood's name, was the word "see"; that this was a notation made by Mr. Young, who preceded witness as financial secretary, and he took that to mean that he was to go to Mr. Hood's place of business to collect dues.

Roy Young, Mr. Shepherd's predecessor, testified that he was financial secretary for eight years, perhaps ten; that Hood was a member of the camp, and that he collected dues regularly; that he collected the dues at Hood's store; always collected them there the first of the month; that he turned the office over to Shepherd in April or May; that Hood paid every time he went there to collect. He also said that he made the notation on the book, and told Shepherd to go to Hood's place of business to collect; that the last dues witness collected were in April or May, he did not know which.

There was other evidence introduced with reference to the loan, and the available values, and, at the close of the evidence, the court directed a verdict in favor of the appellee. There was sufficient evidence to submit the question as to whether dues had or had not been paid to the jury. It was a question of fact for the jury, and not for the court. If the dues had been paid, then the other question discussed became immaterial.

Whenever an insurance company seeks to avoid payment, claiming that the policy is forfeited for nonpayment of dues, the burden is on it to establish this fact by a preponderance of the evidence.

"While the burden is on the plaintiff in an action on a benefit certificate to show insured's good standing at the time of his death, still, as the certificate is proof of good standing at the time of its issuance, and raises a presumption that such good standing continued, it follows that, when the certificate is introduced, the burden is on the association to prove loss of good standing. * * * And, generally, in an action on a policy or mutual benefit certificate, the issue of the policy or certificate of insurance, and the insured's death being shown by plaintiff, the burden is on the company to show nonpayment of

premiums or dues or other matters going to avoid the policy." Cooley's Briefs on Insurance, vol. 4, 3863-3864; *United Order of Good Samaritans* v. *Reavis,* 186 Ark. 1143, 57 S. W. (2d) 1052; *Supreme Council American Legion of Honor* v. *Haas,* 116 Ill. App. 587; *Ry. Passenger & Freight Conductor's Mut. Aid & Benefit Ass'n* v. *Thompson,* 91 Ill. App. 580; *United Brotherhood of Carpenters & Joiners of America* v. *Fortin,* 107 Ill. App. 306; *Sleight* v. *Sup. Council of Mystic Toilers,* 107 N. W. 183; *Kidder* v. *Sup. Commandery, United Order of Golden Cross,* 78 N. E. 469.

Counsel for appellee correctly states that the Supreme Court will not disturb the verdict of a trial court where there is substantial evidence to support it, although the evidence introduced is conflicting, but that has no application where the verdict was directed by the trial court. If the case had been submitted to the jury on questions of fact, this court would not disturb the verdict if there was any substantial evidence to support it, but questions of fact are to be tried by the jury, and not by the court, if there is any substantial evidence to submit to the jury.

Counsel for appellee says that some of the evidence introduced was not abstracted. That evidence, however, is with reference to the funds in the hands of the insurance company belonging to the insured, and it is abstracted by the appellee, but, if it had not been, the view that we take of the case makes it wholly unnecessary, because, if Hood's premiums had been paid, it would then, of course, be immaterial, because, if the premiums whether there was any accumulation of funds or not. As to whether there was an accumulation of funds, is a question of fact which, if there is conflicting evidence, will be a question for the jury.

As to the proper construction of the provisions of the policy, we call attention to the case of the *Sovereign Camp, Woodmen of the World,* v. *Hardee, ante* p. 542, and the case of *Sovereign Camp, Woodmen of the World,* v. *Easley, ante* p. 1012.

From what we have said, it follows that the case must be reversed and remanded for a new trial.

It is so ordered.

FRANKLIN FIRE INSURANCE COMPANY *v.* HOLMES.

4-3406

Opinion delivered March 12, 1934.

Verne McMillen, for appellant.

Emmet Vaughan and *George W. Craig,* for appellee.

BUTLER, J. On November 9, 1930, Mrs. Frank L. Goodwin, as owner, secured a policy of fire insurance

in the sum of $800 on a dwelling house situated on lots 7 and 8, block 28, Watkins' Survey to the town of Des Arc, loss, if any, payable to Henry Nichols, mortgagee. The policy provided that it should be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple; also, that in the event of the destruction of the property by fire, as a condition precedent to recovery, proof of loss should be made within 60 days.

Mrs. Goodwin died in December, 1930, and on January 19, 1931, J. J. Holmes was appointed administrator of her estate. On April 2, 1931, the property was destroyed by fire, and the insurance company was so notified. Henry Nichols, acting for himself as mortgagee, made the proof of loss necessary to effect a settlement between him and the company, which paid him the amount of his debt secured by the mortgage in the sum of $401, and, under a stipulation in the policy, the company took an assignment of the mortgage from Nichols on June 20, 1931. During this time an investigation was made concerning the title to the property, and it was found that on July 8, 1926, Mrs. Goodwin had conveyed the property by warranty deed to Mrs. Frank Hall Murphy, a niece, who lived with her, and, on April 11, 1927, following, Mrs. Goodwin had executed another deed to Mrs. Murphy to correct the descriptions contained in the deed executed in 1926. Mrs. Frank Hall Murphy, claiming to be the owner of the property and entitled to the insurance thereon, employed E. F. West and J. P. Kerby, of Little Rock, attorneys, to represent her in an attempt to effect a settlement, and, on October 1, 1931, signed a letter addressed to the insurance company advising it that she had authorized West and Kerby, as her agents and attorneys, to settle for the insurance loss "on what is known as the Goodwin or Murphy property, consideration that I get an assignment of the Henry Nichols mortgage, which is the mortgage that was transferred and assigned to your company, the same being of record in record book "Y," at page 625, records of Prairie County, Arkansas, and you are requested to assign this mortgage and de-

liver same to my said attorneys, making a full settlement with them for all consideration, etc.'' This was witnessed by Mrs. Ruth Johnson, a sister of Mrs. Murphy, and by a Miss Mary Hall. Mrs. Murphy claimed there was some writing in the letter not there when she signed it, but there was no claim that West and Kerby did not have authority to settle for her with the company. The insurance company settled with the said attorneys by assigning to them the Nichols mortgage and paying the sum of $100 in cash. After this settlement was effected, on May 3, 1932, Mark Bell filed a complaint in the Prairie Chancery Court against Mrs. Frank Hall Murphy, on which no summons was issued, but which Mrs. Murphy answered, and there appeared on the judge's docket the following notation: ''5-7-32, decree setting aside deed. No summons.''

On August 23, 1932, J. J. Holmes, as administrator of the estate of Mrs. Goodwin, brought the action from whence this appeal comes, to recover on the policy of insurance.

On issue joined, testimony was adduced, the case was submitted to a jury, which returned a verdict in favor of the plaintiff for the sum demanded. The court thereupon rendered judgment for that sum with interest, 12 per cent. penalty, and attorney's fee. On appeal it is insisted that the court erred in giving certain instructions for the plaintiff and in refusing others requested by the defendant, which we need not notice for the reason that it is our opinion that the court erred in refusing to direct the jury, at the request of the defendant, to return a verdict in its favor.

The testimony established beyond question the facts heretofore stated. During the trial the plaintiff, in response to the contention that his intestate was not the owner of the property, offered in evidence the chancellor's notation which we have quoted *supra,* and a decree was entered purporting to be based upon the notation aforesaid, in which the court found as the basis for its decree cancelling the deed from Mrs. Goodwin to Mrs. Murphy of April 12, 1927, was that the same ''was executed while the said Frank L. Goodwin (Mrs. Goodwin)

was mentally incompetent to execute the same.'' Without determining how this decree would affect the right of the defendant company, no notice having been given it of the pendency of that action, in so far as the deed of April 12, 1927, is concerned, it was not sufficient to divest the title of Mrs. Murphy, for that title rests not on the deed of April 12, 1927, but on the deed executed July 8, 1926, the latter deed being executed merely to correct a description in the former. There was no finding by the court that Mrs. Goodwin was mentally incompetent to execute a deed on the first-mentioned date, and, in the absence of a finding to that effect, the presumption is that she was legally competent to make the conveyance. It follows that Mrs. Goodwin, at the time of the execution of the contract of insurance and at all times thereafter, was not the owner in fee simple of the property on which the building insured was located.

During the progress of the trial a letter, dated September 12, 1931, from Mrs. Frank Hall Murphy to her attorney, John P. Kerby, was introduced. This letter was in response to a letter she had received from him a few days preceding and in which she stated that Holmes was appointed administrator for Mr. Nichols, and, if it was necessary, she would prefer to have one appointed of her own choice, but that she had been informed that Mr. Nichols and Mr. Holmes were willing to do all they could to assist her in collecting the insurance.

The case was heard on the testimony of witnesses present before the court, and not by deposition, and neither Nichols nor Holmes denied the implication contained in Mrs. Murphy's letter to her attorney. From this the inference follows that Holmes, the administrator, was apprised of Mrs. Murphy's claim and of the effort she was making to effect a settlement with the insurance company. Holmes, in testifying, did not claim that he had made proof of loss or claim for the estate, but stated in effect that he merely accepted the appointment as administrator and did nothing regarding the claim for insurance. Mr. Nichols, the mortgagee, testified that he made no proof for the estate, but simply did what was necessary to protect his own interest.

The settlement of the mortgagee's claim and that made with Mrs. Murphy were beyond sixty days from the fire, and the company's action in making these settlements could not be deemed to be a waiver of any defense it might have against the estate of Mrs. Goodwin, or to constitute an estoppel to assert the same, for there was nothing in its action which could be said to have misled the administrator or to have prejudiced the rights of the estate. On the contrary, it appears that an estoppel works to preclude the claim of the administrator, for it is clear that he stood by while the company was negotiating with Nichols and Mrs. Murphy without intimating that the estate was claiming any interest in the insurance. By his silence, he permitted the insurance company to conclude its negotiations which clearly it would not have done had he, with any reasonable diligence, asserted a claim for the estate of the proceeds of the policy. Manifestly, there was no act of the insurance company which placed the administrator in a position to suffer loss, whereas his conduct was such as to reasonably mislead the company. The loss occurred on April 2, 1931, and we gather it was at least a year before the administrator gave any indication of an intention to claim the insurance. Certainly, far beyond the time for making the proof of loss had elapsed, and there was none such ever made. The stipulation in the policy that the insured must be the sole and unconditional owner of the property, or the owner of the fee-simple title to the ground on which the building is located, is a valid provision, and, where the ownership is otherwise, the policy of insurance is void. *Phoenix Ins. Co.* v. *Public Parks Amusement Ass'n,* 63 Ark. 187, 37 S. W. 959; *Planters Mut. Ins. Co.* v. *Loyd,* 67 Ark. 584, 56 S. W. 44; *Western Assurance Co.* v. *White,* 171 Ark. 733, 286 S. W. 804.

It is equally well settled that the provision for making proof of loss within sixty days after the fire is a reasonable and valid provision and that failure to make such proof within the time prescribed forfeits the rights of the insured. *Teutonia Ins. Co.* v. *Johnson,* 72 Ark. 484, 82 S. W. 840; *Home Fire Ins. Co.* v. *Driver,* 87 Ark.

171, 112 S. W. 200; *Commercial Fire Ins. Co.* v. *Waldron,* 88 Ark. 120, 114 S. W. 210; *Queen of Arkansas Ins. Co.* v. *Laster,* 108 Ark. 261, 156 S. W. 848; *Ill. Bankers Life Ins. Co.* v. *Byassee,* 169 Ark. 230, 275 S. W. 519.

As suggested by counsel for the appellant, if the administrator had made his claim and proof of loss within the time provided by the policy, the company then would have had an opportunity to determine who actually owned the property at the time of the loss, and, the claim not having been made, it had a right to rely upon the record title, and the administrator is now estopped from making any such claim. It follows that the judgment of the trial court is reversed, and the case is dismissed.

FREEMAN *v.* STATE.

Criminal 3873.

Opinion delivered March 12, 1934.

Coleman & Gantt, for petitioners.

Hal L. Norwood, Attorney General, and *John H. Caldwell,* Assistant, for respondent.

BUTLER, J. On or about the 26th day of October, 1933, the circuit judge of the 11th judicial circuit, having been informed that certain gambling devices, commonly called slot machines, were being operated in Jefferson County, under the mandatory provisions of § 2630-37 of Crawford & Moses' Digest, caused to be issued a warrant to the sheriff directing him to make search for such devices and to seize the same, if found, for such further action as the court might find proper. Acting on this warrant, the sheriff and his deputies, on the 27th of October, 1933, seized some twenty-one slot machines of various kinds. While the question of the disposition of the alleged gambling devices was still pending, on October 31, 1933, the Pine Bluff Commercial carried the following editorial:

"WHAT DO YOU THINK

"By Walter Sorrells, Jr.

"This paper does not advocate the violation of any law.

"Unfortunately, there are many laws that should never have been passed and should be repealed.

"However, spasmodic enforcement of any law will accomplish nothing. I do not blame the officers for taking up the marble machines.

"Regardless of how they might feel personally about it, they are officers of the court and cannot do otherwise.

"Lack of continuity of effort or inconsistency in the enforcement of the law does much to encourage violation, however.

* * * * *

"For instance, the State of Arkansas comes along and levies a tax on marble machines. In other words the State gives the operator a license to do business. Bluntly speaking, the State licenses the violation of this specific law.

"The City of Pine Bluff, not to be outdone, levies an additional tax on the machines, and the circuit court comes along and has them confiscated.

"This is not a criticism of Judge Parham's action. But somewhere down the line, law enforcement agencies should get together.

* * * * *

"It is unfair, and unjust, to charge the operators a State and city license, then fine them for operating them, and confiscate the machines.

"It is true that a warning was issued. But it is not true that the warning was issued before the State and city licenses were paid. And that is where inconsistency in the enforcement of the law works a hardship. If it had been the practice to take up marble machines before, few operators would have paid a State and city license.

"There has never been any concerted drive to rid the county of such machines before, hence they were led to believe that inaction on the part of the law enforcement agencies justified them in paying a State and city license tax.

"The fair thing to do would be to state plainly that hereafter and henceforth, the operation of all such machines will be prohibited, and the machines, together with the money contained in them returned to the operators. Before the operators lose, and few if any can afford to lose, the law enforcement agencies should

establish a fixed policy in regard to such machines and stick to it.

"I think that the same thing should apply to the carnival, brought here by the baseball team. In the first place, I don't believe that a carnival should be permitted to stop in Pine Bluff. But those interested in baseball in Pine Bluff should have been given sufficient warning before they contracted with the carnival.

"They claim no warning was issued.

"Few people in Pine Bluff would object to the indiscriminate enforcement of all laws. But they should know that they are subject to arrest and fine when they do violate them. They should not be led to believe by inaction on the part of the enforcement agencies that they are safe in paying a State and city license, then lose the amount of the tax as well as the privilege of making a little money, by a sudden impulse on the part of the enforcement agencies.

* * * * *

"I have observed closely Judge Parham's official actions since he has been on the bench, and I am satisfied that the people in the district that he serves have found him fair and impartial, but he must see how unfair it is to force these operators to pay a State and city license, then confiscate their money as well as machines, since they were not warned before the license was paid that a law that seemingly has been ignored by laymen as well as officers would suddenly be enforced.

"If the marble machine law, whatever it might be, is going to be enforced rigidly against all alike in every town in the district, well and good. I'm for such action because by strictly enforcing such laws, some acts conceded to be merely nuisances might be repealed. But if that is to be the policy of the law enforcement agencies, then let's give the merchants who are having a pretty hard struggle a fair warning. I'm sure if it is made clear that such will be the policy of the officers hereafter, there will be no marble machines in Pine Bluff.

"What do you think?"* * *

Immediately following the publication of the foregoing editorial, the prosecuting attorney filed a petition

in the circuit court setting out the article and praying that the owner of the Pine Bluff *Commercial,* E. W. Freeman, Sr., and its editor, Walter Sorrells, Jr., be cited to appear and show cause why they should not be punished for contempt of court for the publication of said article. On the day named in the citation, the appellants appeared and filed their disclaimer of intention to reflect upon the court or any officer thereof, or to publish anything tending to embarrass the court or to influence its action with reference to any issue pending before it, and affirming that the publication was not intended to be contemptuous, disrespectful, or an effort to dictate the judicial determination of any issue before the court, but that it was published under the belief that it was an honest and proper opinion regarding a matter of public interest. Continuing, the respondents stated that, at the time the article was published, they believed, and still believe, that the judge of the court is a man of honor and integrity, fair and impartial in his judicial decisions and not to be influenced by newspaper articles or other considerations except the law and the evidence in each case; that the article was not intended to be partisan, or to comment upon evidence, or to dictate what the court's opinion should be. They alleged that they did not believe at the time the article was published, and do not now believe, that the publication could, or would, have had any effect on the court, and that, if any statements in the article were untrue or not founded upon the law, it was unknown to them.

The response also contained a demurrer to the petition for citation on the ground "that the said newspaper article is not disrespectful or derogatory to the court or any of its officers, is not defamatory or threatening, does not tend to intimidate the court, and is not calculated to embarrass the court in the decision of any pending cause or to interfere with the administration of justice; that the said response filed by the petitioners purged any possible contempt which might have existed by reason of the publication of the said newspaper article." The demurrer was overruled, and testi-

mony heard which established the facts before narrated, and, in addition, that the Pine Bluff *Commercial* is a newspaper which covers the city of Pine Bluff and approximately fifty miles of surrounding territory in southeast Arkansas; that appellants were the owner and editor, respectively, of the paper which had a circulation at that time of 6,588 subscribers.

The court thereupon found that the appellants were in contempt of court in that the editorial published was of a character "having a tendency to influence the action of the tribunal before which the case is pending," and "where a newspaper takes sides, comments on the evidence, and expresses an opinion as to the merits or proclaims an accused's innocence * * * may be an unlawful interference with the proceedings of the court * * * and its publication in the place where the court is sitting may be punished as a misbehavior in the presence of the court."

On the law of contempts the court quoted from 4 C. J. 34, 6 R. C. L. 509, the cases of *Globe Newspaper Co.* v. *Commonwealth,* 188 Mass. 449, 74 N. E. 682, 3 Ann. Cas. 761, and *Bee Publishing Co.* v. *State,* 107 Neb. 74, 185 N. W. 339, and held that the editorial offended against the rules announced in those cases. The law of contempts is well settled in this State, and the rules announced by our decisions do not differ from those laid down in the authorities cited by the learned trial judge. Early in the history of this court, it had occasion to discuss at length and determine the powers of the court with relation to the punishment for contempt, to distinguish between true liberty of the press and license, and to make inquiry into and determine the nature and effect of those acts and declarations deemed to be contempts and the reason therefor. To determine what the law of contempt is, and the power of the courts with respect thereto, we need therefore to look only to our own decisions, and from these we derive the following rules: (1) That the power of punishment for contempt is independent of statutory authority, being inherent in and an immemorial inci-

dent of judicial power, its conclusions to be reached and judgments found without the intervention of a jury; (2) that, because of this extraordinary and inherent power, the administration of which is entrusted to the conscience of the court alone, the power should never be exercised except in those cases where the necessity is plain and unavoidable if the authority of the courts is to continue; (3) that courts entertain proceedings for contempt for two purposes, one to preserve the power and dignity of the court and to punish for disobedience of orders, and the other to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found the parties to be entitled.

It is the first class with which the court has to deal in the instant case. In order to preserve the dignity and efficiency of courts, it is essential, among other things, that no conduct be permitted which is either a direct or a consequential contempt—a direct contempt which openly insults the court or infringes on its power committed in the presence of the presiding judges, or consequential, which, without open insult or direct opposition, plainly tends to create an universal disregard of their authority. In the latter class are included any speaking or writing contemptuously of the court or judges acting in their judicial capacity; or by printing false accounts of causes then pending before the court; or printing articles with respect thereto which would be calculated to influence, intimidate, impede, embarrass or obstruct the courts in the due administration of justice. *Neel* v. *State,* 9 Ark. 259; *Cossart* v. *State,* 14 Ark. 541; *State* v. *Morrill,* 16 Ark. 384; Ex parte *Winn,* 105 Ark. 190, 150 S. W. 399; *Bryan* v. *State,* 99 Ark. 163, 137 S. W. 561; *Turk* v. *State,* 123 Ark. 341, 185 S. W. 472; *Weldon* v. *State,* 150 Ark. 407, 234 S. W. 466.

It was the opinion of the circuit court that the article questioned came within the law of contempts for the reason that the paragraph reading, "I do not blame the officers for taking up the marble machines. Regard-

less of how they might feel personally about it, they are officers of the court and cannot do otherwise," carried with it the implication that the court was alone to blame, whereas the court was but obeying the plain mandate of the law.

The construction further placed upon the article by the trial court was that it was a contempt to obstruct the free judgment of the court by exciting in the readers of the paper a prejudice against the proceedings before the court, and that this was "unfair and unjust." The court further reasoned that the article tended to embarrass it because if it should finally order the machines destroyed the article would tend to give rise to a public opinion that the judgment of the court was arbitrary and unfair, whereas, if the facts and circumstances should convince the court that the machines should be returned to their owners as not being gambling devices within the meaning of the law, the court might be subject to the criticism that it was merely following the "*Commercial's*" bidding.

The language is susceptible of the interpretation placed upon it by the trial court, but we think it also comports with the idea that it was not the action of the court, either past or prospective, which the writer had in mind and intended to make the subject of his animadversion, but rather the law itself and the action of the revenue officers of the State and city as tending to lull the owners of slot machines into a sense of false security. In other words, we think the language of the article is susceptible of more than one construction; indeed, it is difficult, because of the inherent infirmity of our language, to state anything in writing with such clarity and precision that a single meaning may be conveyed. Such being our view of the doubtful meaning of the article, and where it might have been given an innocent construction, the contempt was purged by the disavowal of the appellants, made under oath, of any intent to influence or embarrass the court or to cast any aspersion upon its integrity and fidelity to duty. It is undoubtedly the tradition of the press of this country

that it has uniformly upheld and maintained respect for the judiciary, and it is generally held that a denial under oath of want of intent will purge a contempt arising from language used in publishing articles which are susceptible of two interpretations. 6 R. C. L. 534, § 47; *Percival* v. *State,* 45 Neb. 741, 50 A. S. R. 568; Ex parte *Earman,* 85 Fla. 297, 95 So. 755, 31 A. L. R. 1226; *Ib.* note 1243; In re *Robinson,* 117 N. C. 533, 23 S. E. 453, 53 A. S. R. 596.

The rule announced in the authorities last cited was approved in the early case of *State* v. *Morrill, supra.* In that case an order was made reciting the publication of an article and the summoning of the publisher to appear before the court to show cause why he should not be adjudged guilty as for criminal contempt. A demurrer was first filed to the order and citation on several grounds, one of which was that by no construction could the article be deemed to be libelous or in contempt of court. In overruling the demurrer on this ground, the court held that the language of the article was not an attack upon the trial, character or conduct of the members of the court as men, but appeared to be an imputation against the purity of their motives while acting officially as a court in a specified case. Whereupon a response was filed in which the statement was made under oath that there was no intention to reflect upon the integrity of the court or to intimate that it was corruptly influenced in reaching its decision, but that, justly interpreted, the language referred to other persons, and that he positively denied all intention to commit a contempt by the publication of the article. In that case the court said: "The response being upon oath, we shall treat it as true, and the rule will be discharged."

Following the general rule and the action of the court in the case of *State* v. *Morrill, supra,* it is our opinion that when the petitioners filed their sworn disclaimer the court should have exonerated them, save for the costs which had been incurred. The judgment of the trial court is therefore quashed.

TURLEY *v.* OWEN.

4-3413

Opinion delivered March 19, 1934.

C. W. Norton, for appellant.

Mann & Mann, for appellee.

JOHNSON, C. J. This proceeding was instituted by A. B. Owen, the Central Life Insurance Company of Cincinnati, Ohio, and A. B. Oliver against appellant, Linn Turley, seeking cancellation of a certain commissioner's deed executed by J. F. McDougal, commissioner in chancery, to appellant, Linn Turley, conveying the northeast quarter of southeast quarter, section 13, township 5 north, range 6 east. Concisely stated, the facts are as follows:

St. Francis Road Improvement District No. 12 was created by special act No. 620 of 1923. The district was duly organized, assessment of benefits effected, bonds sold, and the improvement contemplated under the act regularly completed. Section 28 of said act, among other things, provides, in effect, that, upon completion of the improvement provided for in the act, the district shall not be dissolved, but shall continue in effect for the purpose of maintaining the highways of the district; that the commissioners shall annually estimate and report to the county court the amount of money required for maintenance of said highways for the ensuing twelve months. Said section further provides that the estimate of the cost of the contemplated maintenance shall be filed in the office of the county clerk not later than September 1 of each year, and upon the filing of such estimate that the commissioner shall cause a notice to be published for one week in a newspaper in St. Francis County setting forth that such estimate has been filed, and will be presented to the county court on a day of its next regular term. Said section further provides that the county court shall hear all complaints filed against the estimate, and shall determine and adjudge the amount reasonably required for the upkeep of said roads, and shall levy the sum as a maintenance tax upon lands within the district in the same proportion as the lands and other items of real estate were originally assessed, and that such additional assessment shall be added to the other tax, and extended upon the tax books for the ensuing year, and collected in the same manner, and at the same time as other assessments are collected.

Act 112 of 1927 amends act 620 of 1923 by limiting the amount which may be assessed against the lands in the improvement district not to exceed 1 per cent. on the assessed benefits in the district.

In the pursuance of the authority conferred under § 28 of said act 620 of 1923, and the amendatory act of 1927, the commissioners of said road district in September, 1929, filed with the county clerk of St. Francis County an estimate of and for the maintenance of roads in said district for the year 1930. Said estimate deter-

mined a maintenance charge of 1 per cent. upon the original assessment of benefits.

On October 28, 1929, the county court of St. Francis County made and entered an order, based upon the petition of the commissioners, levying a tax of 1 per cent. in value upon all the lands in the district based upon the original assessment of benefits.

This judgment of the county court does not reflect upon its face that notice was given or published prior to the determination thereof.

The maintenance tax, thus levied by the county court, was not paid by the owner or any one for him during the time allowed by law for payment. Thereafter, Road Improvement District No. 12 instituted foreclosure proceedings in the St. Francis Chancery Court against the lands here in controversy; notice of the pendency of the suit was published in compliance with the statute, and thereafter, on October 27, 1930, said tract of land was condemned and ordered sold for nonpayment of the delinquent taxes aforesaid. On December 26, 1930, in pursuance of the decree therefore entered, this tract of land was sold to one J. T. Campbell, and thereafter the report of sale was in all things approved by the chancery court. At the expiration of the period of redemption, a deed was executed to the holder of the certificate of purchase, which seems to have been the present appellant, Linn Turley, which deed was, in all things, approved by the chancery court.

Thereafter, on April 17, 1933, this suit was instituted for the purpose aforesaid, and thereafter a decree was entered canceling appellant's deed, and this appeal is prosecuted to reverse this decree. The decree appealed from, which was rendered on November 9, 1933, contains the following finding of law and fact:

"That this cause is a direct attack on a decree of this court heretofore rendered in cause No. 5434, wherein St. Francis County Road Improvement District No. 12 was plaintiff, and George C. Brown & Company *et al.* were defendants. The court finds further that the process and proceedings, had in said cause No. 5434, were regular, and that the decree rendered therein was good as

to form, but that the same should be vacated for the reason the proceedings had in St. Francis County Court, October 28, 1929, attempting to levy a maintenance tax for the year 1930, upon which the decree in cause No. 5434 in this court was based, were void, and hence rendered the process of this court inoperative."

It appears from the chancellor's findings of law that it was his opinion that this suit was a direct attack upon the prior decree of the St. Francis Chancery Court condemning the lands in this controversy for sale. The chancellor was in error in this conclusion of law.

It is true that appellees filed an amendment to their complaint in which it was alleged that "a fraud was practiced on the court in obtaining the judgment establishing a lien on said lands, and ordering a sale thereof," but there is no testimony establishing or tending to establish this allegation.

Conceding, without deciding, that the county court judgment, assessing the maintenance benefits and levying the tax, was a void order, nevertheless, and for the reasons hereinafter stated, this would not be decisive of this case.

The mere fact, if it be a fact, that the decree of the St. Francis Chancery Court in foreclosure was based upon a void or voidable order, and judgment of the county court is entirely insufficient to show that the foreclosure decree was procured by fraud.

In *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, quoting from the seventh headnote, we held:

"Fraud as the basis of an action to impeach a judgment, must be a fraud extrinsic of the matter tried in the cause; it must 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 that is assailed; it must be a fraud practiced upon the court in the procurement of the judgment."

In 15 R. C. L., page 762, the rule is stated thus:

"The acts for which a court of equity may, on account of fraud, set aside or annul a judgment at law between the same parties have relationship only to fraud

which is extrinsic or collateral to the matter tried by the first court, and not to fraud in the matter on which the judgment was rendered."

In the case of *United States* v. *Throckmorton,* 98 U. S. 61, the Supreme Court of the United States had under consideration a petition which sought to set aside and vacate a previous order and judgment, because based upon an instrument in writing which was falsely and fraudulently executed. The court stated the rule as follows:

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

Thus it appears that practically all the authorities agree that judgments will not be set aside and vacated merely because they were superinduced by false testimony or based upon false, fraudulent or forged instruments.

Since we have determined that the foreclosure decree was not procured through fraud, it remains only to determine whether or not this proceeding is a direct or a collateral attack on the judgment in foreclosure in the chancery court.

For the reasons just stated this proceeding does not come within the purview of § 6290, Crawford & Moses' Digest, and for this reason is not a direct attack on the judgment sought to be vacated because of said section. Independently of the statute just quoted, is this a direct or collateral attack on the chancery court decree in foreclosure?

In *Hooper* v. *Wist,* 138 Ark. 289, 211 S. W. 143, we held:

"This brings us to a consideration of whether the present case is a direct or collateral attack on the former chancery decree. A direct attack on a judgment is usually defined as an attempt to reform or vacate it in a

suit brought in the same action and in the same court for that purpose. On the other hand, a collateral attack upon a judgment has been defined to mean any proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio*. 15 R. C. L. 838, par. 311. This is the effect of our decisions in the cases above cited as well as numerous other decisions of the court."

In *Cassady* v. *Norris, supra,* we held an action attacking a decree of the chancery court condemning for sale certain lands for the nonpayment of taxes to be collateral.

In the case of *Pattison* v. *Smith*, 94 Ark. 588, 127 S. W. 983, we held: "That the findings and recital of a decree in foreclosure of a tax lien were binding and conclusive upon a collateral proceeding," and cited as supporting the rule: *McLain* v. *Duncan,* 57 Ark. 49, 20 S. W. 597; *McConnell* v. *Day,* 61 Ark. 464, 33 S. W. 731; *Porter* v. *Dooley,* 66 Ark. 1, 49 S. W. 1083; *Porter* v. *Tallman,* 68 Ark. 211, 56 S. W. 1071; *Palmer* v. *Ozark Land Co.,* 74 Ark. 253, 85 S. W. 408.

In the instant case, it may be said that the validity or invalidity of the county court judgment levying the maintenance tax and assessment for 1930 was an issue of fact in the foreclosure proceedings of October, 1930, and the adjudication of the question in favor of the district and levy was and is conclusive and binding upon all parties thereto, which includes not only the landowner, but his privies in estate. Moreover, the rigor of the rule thus stated is not modified or impaired, because the proceeding was one *in rem* and not *in personam.*

In *Pattison* v. *Smith, supra,* we held that, by the filing of a suit in foreclosure and the publication of the notice required by statute, the court acquired jurisdiction over the land involved in the action, and that the question as to whether or not the taxes on the land were delinquent was but an issue of fact to be passed upon by the court. It was further determined in that opinion that the jurisdiction thus acquired was as complete and effec-

tive as if personal service of process had been had upon the owner of the land.

Neither is the rule just announced in conflict with the previous holding of this court in *Taylor* v. *Bay St. Francis Drainage District,* 171 Ark. 285, 284 S. W. 770. In the case just referred to, a petition was filed in the circuit court seeking certiorari to bring up and quash certain proceedings of the county court. The judgment and order of the county court sought to be quashed was made and entered at a time when the original proceedings in suit were pending in the Supreme Court. Thus it appears that the Taylor case was a direct attack authorized by § 2237, Crawford & Moses' Digest, upon a judgment of a court of inferior jurisdiction, and is therefore no authority against the position here taken.

Neither can we agree that our present holding is in conflict with *Grayling Lumber Co.* v. *Tillar,* 162 Ark. 221, 258 S. W. 132. In this case the facts were, that on November 7, 1901, a decree confirming title was entered in favor of Red Fork Levee District. Frank Tillar was not made a party to the confirmation proceedings. Many years thereafter Tillar instituted conformation proceedings against the Grayling Lumber Company, which had succeeded to the rights and title of the Red Fork Levee District. The lumber company pleaded the former adjudication in bar. The trial court found, as a fact, that Tillar paid the taxes on the land in controversy for the years 1895 to 1901, inclusive. The decisive issue in that case was thus determined.

"The confirmation proceedings were had pursuant to our statute regulating the procedure in confirming and quieting title to lands. Sections 8362-8373, inclusive. Section 8369, among other things, provides that the decree in the cause shall not bar or affect the rights of any person, who, within seven years preceding, had paid the taxes on the lands, unless such person shall have been made a defendant in the petition, and duly summoned to answer the same."

Thus it appears that Tillar fell within the statutory exception; he had paid the taxes, was not served with

summons, and was not bound by the decree under the plain mandate of the statute.

The result of our previous opinions is that any proceeding provided for by law which has the purpose of avoiding or correcting a judgment or decree is a direct attack which will be successful upon showing error; while an attempt to do the same thing in any other proceeding is a collateral attack which will be successful only upon showing a want of power.

The chancery court of St. Francis County had jurisdiction of the subject-matter and parties in the foreclosure suit of October, 1930, and therefore had full power and authority to determine all the issues here presented, and appellees' failure or refusal to appear in said foreclosure proceedings and contest the same has foreclosed and barred their rights to now be heard.

We agree with appellees that act 112 of 1927 does not repeal act 620 of 1923, and that notice to the landowner of the assessment of benefits for the purpose of maintenance was a prerequisite to the validity of the county court judgment. But, even so, this does not militate against the rule that a judgment rendered by a court of competent jurisdiction which acquires jurisdiction of the subject-matter and the parties is conclusive and binding between parties and their privies.

The interest of the Union Central Life Ins. Co. rises no higher than that of A. B. Owen. The life insurance company's title was derived from Owen subsequent to the foreclosure decree and sale.

It follows from what we have said that the foreclosure decree of the St. Francis Chancery Court, of date October, 1930, is conclusive and binding upon all parties to this record, and the title of appellant acquired by purchase from the foreclosure sale is superior and paramount to appellees' title.

For the reasons aforesaid, the case will be reversed and remanded with directions to the St. Francis Chancery Court to enter a decree in conformity to this opinion.

SINCLAIR REFINING COMPANY *v.* JONES.

4-3407

Opinion delivered March 12, 1934.

J. Loyd Shouse, for appellant.

Shinn & Henley, for appellee.

JOHNSON, C. J. This suit was instituted by appellees against appellant, Sinclair Refining Company, to recover damages alleged to have accrued by reason of false, malicious and fraudulent claims and assertions by appellant of a valid and effectual leasehold contract upon and against a certain leasehold interest owned and possessed by appellees in and to a certain gasoline service station located in the city of Harrison, Arkansas.

The case was tried to a jury, and they were warranted in finding the following facts from the evidence:

That on and prior to February 9, 1933, appellees owned a certain leasehold interest in and to a gasoline service station in Harrison, Arkansas, and on said date signed and acknowledged a certain lease contract in favor of appellant. The lease, as thus executed, was submitted to the home office of appellant for approval or rejection, but up to March 17, 1933, the submitted form of lease had neither been accepted nor rejected by appellant. On the last mentioned date, appellees directed to appellant's home office the following telegram:

"You are hereby notified that proposed lease on lot 416 at North Vine, Harrison, Ark., recently signed by

N. W. Jones and M. O. Jones will not be accepted and is hereby canceled.

(Signed) "M. O. Jones,
"N. W. Jones."

On April 11, 1933, appellant responded to appellees telegram of March 17, 1933, as follows:

"We agree to cancellation of lease as per your telegram dated March 17.

(Signed) "Sinclair Refining Company."

That after the last mentioned telegram was received by appellees, appellant, through its agents, servants and employees, knowingly, maliciously and wantonly continued to assert and claim ownership of and to a valid lease contract against said service station property to a number of other oil and gas distributing companies; that said false and fraudulent assertions were communicated by appellant to Magnolia Petroleum Company, the Standard Oil Company, the Marathon Oil Company, etc., and that said false and fraudulent assertions of ownership were continued to be asserted by appellants to the companies aforesaid up to the last days of June, 1933, that the result of said false and fraudulent claims of ownership were to and did cause the companies aforesaid to refuse to furnish or sell to appellees gas and oil products for resale.

From the facts thus established, the jury returned a verdict in favor of appellees and assessed damages in the sum of $400. A judgment was entered in conformity to the verdict of the jury, and this appeal is prosecuted therefrom.

Appellant asserts, and appellees deny, that the lease contract of date February 9, 1933, was a valid lease against the property in controversy, but we find it unnecessary to decide this question. The uncontradicted evidence shows that the parties on April 11, 1933, voluntarily agreed to a cancellation and renunciation of the lease contract, and any asserted claims of ownership by appellant of a valid leasehold contract after that date was without foundation in fact or right in law.

The law in reference to slander of title is stated thus in 17 R. C. L., page 456:

"In an action for slander of title, or for disparagement of goods or property, it is essential that the plaintiff prove that the defendant acted maliciously in uttering the words in question. It has been held that, while malice is not necessarily presumed from the falsity of the statement of the defendant, it may in certain cases be inferred therefrom. A *bona fide* claim of title on the part of the defendant is generally sufficient to rebut any implication of malice in making the utterance in question, and one who has reasonable ground to suppose himself possessed of the legal title to lands, or of an equity therein which would enable him to maintain an action for a conveyance, is not liable in damages in an action for slander of title. In the case of disparagement of goods, the fact that the defendant sought to protect his own goods, rather than to attack the plaintiff's, has been held to deprive the plaintiff of his right to recover, on the ground that malice is negatived in such a case, but the authorities on this point are in conflict."

It is true, of course, that malice is not necessarily presumed from the falsity of assertions made, but, where the assertions are known to be false by the one making them, malice may be inferred by the triers of fact. Moreover, the evidence in the instant case warranted the jury in finding actual malice. Appellant was engaged in the wholesale distribution of gas and oils in the vicinity of Harrison, where this controversy arose, and at the same time appellant had as competitors in this territory the Standard Oil Company, the Magnolia and Marathon Oil Companies. The jury was fully warranted in finding that these false assertions of ownership were communicated to the companies aforesaid by appellant for the specific purpose of injuring appellee's business, and that such was the result. This was a question of fact for the jury to determine, and its findings in favor of appellee conclude the question.

The court's instructions to the jury, submitting the questions of fact for their consideration, were in conformity to the views here expressed, and, since it is not contended that the verdict is excessive, the judgment will be affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY *v.* LYONS & CARNAHAN.

4-3403

Opinion delivered March 12, 1934.

[redacted]

Barber & Henry, for appellant.

J. W. House, Jr., and *Philip McNemer*, for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered by the circuit court of Pulaski County, Third Division, against appellant in favor of appellee for $3,276.15 on an indemnity bond executed by appellant to appellee for the faithful performance of Parlette Bros., Inc., the principal in the bond, of a contract entered into between Parlette Bros., Inc., and appellee, relative to the sale and exchange of text books for use in the public schools of Arkansas and an accounting of proceeds derived therefrom. The bond was to cover a period of time beginning July 5, 1929, and ending July 5, 1930.

Appellant admits that the court rendered a judgment for the correct amount if it is liable for any amount under the bond, but denies liability thereon and contends for a reversal of the judgment on the ground that Parlette Bros., Inc., the principal in the bond, defaulted in payment of the books under paragraph 6 of the contract between it and appellee, and, after appellee's knowledge of such default, they failed to notify appellant thereof within the time provided by § 3 of said bond, thereby discharging appellant from the obligations under same.

Paragraph 6 of the contract is as follows:

"The first party agrees to render to the second party a statement of all sales and exchanges, four times each year, at the following dates: October 1st, December 30th, April 1st, July 1st, and to remit to second party the proceeds of such sales and exchanges within sixty days from the date of such statement. (Except that final payment of the proceeds of sales reported April 1st may be delayed until July 31st.) In addition to such reports, first party shall also make, each month during the continuance of this contract, a remittance which shall cover in a general way the receipts to the dates of such remittances, this monthly remittance, however, to be considered as a remittance on account previous to the complete report to be made four times annually as above specified."

Paragraph 3 of the bond is as follows:

"In the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in the city of Baltimore, written notice thereof with a statement of the principal facts showing such default and the date thereof."

The bond does not expressly provide that the surety (appellant) shall be discharged from the obligation thereof for failure to comply with the conditions therein, and the language used does not necessarily imply a discharge in case of default in payment by Parlette Bros., Inc. The provision relative to notice was not made a condition precedent or of the essence of the contract expressly or by implication, so we cannot construe the contract and bond, as suggested by appellant, to mean that a failure by appellee to give notice to appellant of defaults of Parlette Bros., Inc., to remit within sixty days from the date of quarterly statement or to make monthly remittances to appellee on current quarterly liabilities, automatically and in any event, released appellant from the obligations of the bond. This court is committed to the rule of construction that "a failure to give notice within a certain time of liability under an insurance policy does

not operate as a forfeiture of the right to recover unless the policy in express terms or by necessary implication so provides." *Hope Spoke Co.* v. *Maryland Casualty Co.*, 102 Ark. 1, 143 S. W. 85; *Home Life & Accident Co.* v. *Beckner*, 168 Ark. 283, 270 S. W. 529; *Sovereign Camp, W. O. W.* v. *Meek*, 185 Ark. 419, 47 S. W. (2d) 567; *Home Indemnity Co.* v. *Banfield Bros., Inc., ante* p. 683.

The entire account between appellee and Parlette Bros., Inc., as reflected by the ledger sheets beginning on January 11, 1928, and ending on July 31, 1930, was introduced in evidence, and an analysis thereof shows that the only defaults, if any, consisted in a failure to remit balances which were subsequently wiped out or off-set by books shipped to appellee by Parlette Bros., Inc., in accordance with the provisions of their contract for the return or exchange of text books, until May 9, 1930, at which time, appellee notified appellant that they understood from reliable sources that Parlette Bros., Inc., was insolvent. The shipment or return of books on exchange and the checking and prices to be allowed for them necessarily resulted in some delay in Parlette Bros., Inc., getting a credit for them, but the delays were reasonable in point of time and could not be characterized as defaults on the part of Parlette Bros., Inc., in the performance of its contract with appellee. According to the manner of doing business, the books showed no defaults in making remittances to meet current liabilities which would not be wiped out by the amounts to be credited for books returned or to be returned. It was not shown by the testimony that Parlette Bros., Inc., made any collections on accounts for books sold by it to retail dealers which were not remitted to appellee. It was not contemplated by the parties to the contract that Parlette Bros., Inc., should remit to appellee sums or amounts not collected from the retailers.

There is ample evidence in the record to sustain the finding of the court that there was no substantial default in the performance of the contract by Parlette Bros., Inc., before appellee gave notice to appellant that Parlette Bros., Inc., was insolvent. This notice was given to appellant on May 9, 1930, and Parlette Bros., Inc.,

was not adjudged a bankrupt until July 25, 1930. Even at the time the notice was given, appellant had no knowledge that Parlette Bros., Inc., had defaulted or would default in the performance of the contract.

No error appearing, the judgment is affirmed.

GUTHRIE *v.* STATE.

Criminal 3876

Opinion delivered March 12, 1934.

John C. Sheffield, L. L. Harris and *Brickell & Douglas,* for appellant.

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

MCHANEY, J. Appellant was convicted of murder in the second degree, and sentenced to twelve years in the penitentiary for the killing of Bryant Graves on October 1, 1933.

The only assignment of error relied upon for a reversal of the judgment is that a material witness for the State, Willie Heriod, a negro boy 15 years of age, was disqualified by reason of his inability to appreciate the sanctity of an oath. After the witness had testified to facts very damaging to appellant, on cross-examination he testified that he didn't know what it was to tell the truth, didn't know what an oath was, nor what would happen to him if he testified falsely. The court overruled a motion to exclude his testimony from the jury. After a short recess of court, and after talking with the

State's attorney, the witness was again examined, and stated that he did understand the nature of an oath.

We think the matter of his qualification as a witness rested in the sound discretion of the court. *Payne* v. *State,* 177 Ark. 413, 6 S. W. (2d) 832; *Yother* v. *State,* 167 Ark. 492, 268 S. W. 861; *Sanders* v. *State,* 175 Ark. 61, 296 S. W. 70; *Durham* v. *State,* 179 Ark. 508, 16 S. W. (2d) 991.

Affirmed.

STATE EX REL. ARKANSAS CONSTRUCTION COMMISSION *v.* TOLER.

4-3454

Opinion delivered March 19, 1934.

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

J. B. Milham, for appellee.

SMITH, J. Petitioner prays the issuance of a writ prohibiting the circuit court of Saline County from hearing and adjudging a suit wherein the Arkansas Construction Commission was garnished by a plaintiff who sought to enforce a demand against his debtor who had been employed by the Construction Commission in the discharge of the duties conferred upon it by act 180 of the Acts of 1929, page 884. By this act a commission was created for the purpose of constructing and equipping a State Hospital for Nervous Diseases and a Tuberculosis Sanitarium.

The case of *Bull* v. *Ziegler,* 186 Ark. 477, 54 S. W. (2d) 283, is decisive of the question that such agencies of the State are not subject to garnishment. See also *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. (2d) 993.

The writ will be awarded as prayed prohibiting further proceedings in that suit.

SMITH *v.* HOUSLEY MINING COMPANY.

4-3367

Opinion delivered March 19, 1934.

Houston Emory and *C. T. Cotham,* for appellant.

Martin, Wootton & Martin, for appellee.

SMITH, J. A complaint was filed in this cause which contained the following allegations: The plaintiff, Housley Mining Company, a corporation under the laws of this State, owned a tract of land, there described, which it leased to H. H. Smith and W. J. Hemphill, who assigned it to the Amity Development Company, a nonresident corporation, whose stock was chiefly owned by the original lessees. The lease was dated the.....day of October, 1929. The consideration therefor was a royalty, payable weekly, of five per cent. of the market value of all ore mined and sold during the preceding week.

The lease contemplated that the lessees should "prospect and mine for lead, zinc and other valuable mineral

substances,'' and that operations should begin at once. The complaint alleged that the lessees had failed to perform this requirement from the.....day of August, 1931, until the date of the filing of the complaint, which date was December 1, 1932. It was alleged that because of this failure the lessor had, at a meeting of its stockholders held on the.....day of August, 1932, declared said lease forfeited, of which action the lessees had been duly notified, but, notwithstanding this action, the lessees remained in possession of the leased premises and refused to surrender it. It was prayed that the lease be canceled.

A demurrer to the complaint was overruled, and it is insisted that this action was erroneous for the reasons (1) that the plaintiff had an adequate remedy at law, and (2) the lease, not relating to oil and gas, and containing no express covenant providing for a forfeiture, was not subject to cancellation under the allegations of the complaint.

An answer was filed when the demurrer was overruled, in which it was denied that there had been any such nonoperation of the lease as entitled the lessor to cancel it. It was alleged that, if there had been any breach of the conditions of the lease, the same had been waived, and that there had been no abandonment of the lease. It was answered also that the lessor had acquiesced in the nonoperation of the lease, and that it would be inequitable to cancel it without compensating the lessees for the cost of the improvements which they had placed upon the land, and also that the lessor was barred by laches from maintaining the suit.

The court found the facts to be that the lessees had failed to comply with the implied covenant of the lease to continuously explore and develop the lease, as alleged, and, as a consequence thereof, that the lease should be canceled.

Inactivity during this period is conceded, but the lessees insist that this inactivity was acquiesced in by the lessor as evidenced by a letter written and signed by M. A. Eisele, who was the secretary of the lessor corporation, addressed to one of the original lessees. This letter, dated December 12, 1931, reads as follows:

"Replying to your letter of December 6, 1931, we have no one in view at present that will take on the Point Cedar mines. My own opinion is that you are wise in closing down on account of price of ores and the financial market conditions. I am cheered up somewhat from what I hear, and see that a gradual betterment is approaching, but a mining proposition generally requires property to be floated successfully. I hear the new cinnabar (quicksilver) development at Pike County will probably be a success, with headquarters at Amity. If it is, it won't hurt our properties and may bring additional capital in the section for development. No matter what propositions are made to us as to this property in the future, we will surely be fair with you. Have no fears on that score. The Housley boys feel as I do about this and will, I am sure, be guided by me. Yours truly, (Signed) M. A. Eisele."

It will be observed that this letter was not signed by Eisele in his capacity of secretary, and that it was expressing, as the letter recites, only his own opinion, and that even the writer did not intend, and had not authorized, the entire suspension of operations of the lessees of which they were later guilty.

It was decreed that the lessees might remove their improvements, but that they should not have any other compensation for their expenditures, which, according to the testimony on the part of the lessees, totaled about $18,000.

The testimony on the part of the lessees was to the effect that they never intended at any time to abandon the lease or to cease work in its development, and that work was suspended only because of the general depression and the lack of a profitable market for the output of the mines which had been developed. It was shown also that the lessees had endeavored during this time to secure the financial assistance necessary to continue operations, and also that an effort had been made to sell the lease to some one having the necessary capital to operate it. For a considerable portion of the time during which operations were suspended the lessees employed a watchman, who

remained in charge of the plants which had been previously operated.

It is very earnestly insisted that the demurrer to the complaint should have been sustained, and, in support of that argument, attention is called to the fact that the lease did not contemplate exploration for oil and gas, but related to mining for mineral ores, and it is insisted that such a lease should not be canceled in the absence of a provision in the lease authorizing that action except for an abandonment of the lease.

The finding of fact made by the court, set out above, does not appear to be contrary to the preponderance of the evidence, and the law applicable to the facts as found by the court was declared in the case of *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837. The case cited has become the leading one in this State, and has since been frequently cited and followed in the numerous cases cited in the briefs.

The lease there considered was "for the purpose of mining, boring and operating for lead, zinc, coal, gas, oil and other minerals," for which the lessee agreed to pay to the lessor a certain per cent. of the value of such minerals, with the right in the lessee to remove all buildings and machinery placed upon the land in the event of a failure to obtain any minerals by reason of the operation of the lease. There was no express provision for a forfeiture for lack of diligence in operating the lease, but the court found that there had been a lack of such diligence, and upon this finding declared the law to be that: "Equity may enforce a forfeiture of a contract of lease giving the exclusive right to explore for minerals upon a tract of land where it would be inequitable to permit the lessee longer to assert such right by reason of his continued default." The reasons for this rule were there stated, and numerous cases which supported it were there cited, and need not be again reviewed, especially as the case has since been frequently cited and followed by this court. It was there stated that the purpose of a mineral lease was not to make a grant of the land or to transfer any estate therein, but that such would be its effect if the lessee were not required to perform the conditions of the

lease which constituted the consideration for its execution.

The case of *Miller* v. *Mauney,* 150 Ark. 161, 234 S. W. 498, involved a lease for the purpose of exploring and mining for diamonds, and it was there held (to quote the third headnote of that case) that: "Where a lessee in a mining lease, the consideration of which is a royalty to be paid, has, after a reasonable time, failed to begin and to continue the work of development and exploration provided in the contract, the lessor has three remedies, *viz*: (1) he may sue in equity to cancel the contract and recover incidental damages; (2) he may sue at law for damages for breach of the contract; or (3) he may treat the contract as rescinded and sue at law to recover possession of the property leased."

The late case of *Ezzell* v. *Oil Associates, Inc.,* 180 Ark. 802, 22 S. W. (2d) 1015, again reviews the law of the subject, and states, as one of the reasons why relief by cancellation will be awarded the lessor in a proper case, that it would be difficult for the lessor to prove his damages.

It is insisted that it is inequitable to cancel the lease without compensating the lessees for the expenditures made in its development. But the lease contains no such provision, nor is any such to be implied. All the cases recognize the hazardous nature of mining leases. They usually prove to be entirely worthless or very profitable, and in no case has the lessor been held to be a guarantor of the success of the enterprise unless he expressly assumed that obligation.

It is argued also that the lessor is barred by laches from prosecuting this suit. This contention does not appear to be consistent with the other contentions made. Had the lessor acted more promptly in suing to cancel the lease, the contention would, no doubt, have been made, even more earnestly, that the suspension of operations had not continued long enough to support a finding that there had been a forfeiture through lack of operation.

It was held, in the case of *Rozell* v. *Chicago Mill & Lumber Co.,* 76 Ark. 525, 89 S. W. 469, that a complaint

seeking to cancel a deed to wild and unoccupied lands is not open to demurrer merely on account of delay in bringing the action, if it did not appear that the rights of the defendants were prejudiced thereby, and numerous cases have declared that "laches, in legal signification, is not mere delay, but delay that works disadvantage to another." *Casey* v. *Trout,* 114 Ark. 359, 170 S. W. 75; *Nobles* v. *Poe,* 121 Ark. 613, 182 S. W. 270.

The decree appears to be correct, and it is therefore affirmed.

MORROW *v.* SCROGGINS.

4-3402

Opinion delivered March 19, 1934.

Williams & Williams, for appellant.

Daniel B. Byrd and *Robert Bailey,* for appellee.

HUMPHREYS, J. This is an appeal from a judgment rendered by the circuit court of Johnson County, sitting as a jury by agreement, finding and adjudging that appellee was entitled to recover $970.25 from W. J. Morrow, Jr., administrator in succession, and his bondsmen, J. S. Kolb and W. J. Morrow, Sr., who are appellants herein. The judgment recites on its face that it was rendered on June 17, 1933, and filed July 15, 1933. The judgment also recites that the cause was duly submitted to the court at a regular term thereof and was heard on

June 17, 1933, both appellants and appellee being present by their respective attorneys. The record reflects that the regular term of court at which the cause was submitted was adjourned on May 8, 1933, to June 19, 1933, and was not in session between said dates; hence that the cause was heard and determined in vacation. The subsequent proceedings show that the judgment rendered in vacation was filed during the adjourned term, which convened on June 19, 1933, or, to be more definite, was filed on July 15, 1933.

Appellant contends for a reversal of the judgment because there is no constitutional or statutory law vesting the circuit court with authority to take a case under submission at a regular term of court, and to hear and determine it in vacation. This is true, but in the instant case the judgment rendered in vacation was not filed or entered until the court reconvened. The filing or entry of the judgment in term time amounted to a confirmation of the findings of fact and law in vacation and to a rendition of the judgment in open court.

Appellants also contend for a reversal of the judgment because the court rendered a judgment in favor of appellee for $970.25. Appellee brought suit against appellants to recover the balance due her for her dower interest in her husband's estate. The appellant, J. W. Morrow, Jr., brought a suit against George H. Scroggins and appellee to recover amounts alleged to have been unaccounted for in his final settlement as administrator. The two cases were consolidated and submitted to the court, sitting as a jury, upon the pleadings and evidence adduced, which resulted in a finding that W. J. Morrow, Jr., administrator in succession of the estate of William Scroggins, was not entitled to go behind the final settlement of George H. Scroggins, which was approved by the probate court on February 23, 1931, and that appellee was entitled to recover from appellants the balance due on her dower interest, less $1,003.74, for which George H. Scroggins wrongfully took credit as adjudged in a former case. The issues involved in these consolidated cases were involved in the trial of *Scroggins* v. *Osborn Company,* 181 Ark. 424, 26 S. W. (2d) 95, and were decided

adversely to the contention of appellants herein upon practically the same record now before us. The findings of the court herein are supported by substantial evidence in the record.

The judgment is therefore affirmed.

DOMINION TEXTILE COMPANY, LTD. *v.* BECK.

4-3409

Opinion delivered March 19, 1934.

Williams, Williams & Shaver and *Partain & Agee,* for appellant.

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

KIRBY, J., (after stating the facts). It is contended by appellant that the court erred in refusing to direct a verdict in its favor at the conclusion of the testimony, as well as in the giving and refusal of certain instructions

and in the admission of certain testimony objected to by it.

It appears from the testimony that appellee only in fact owned 28 of the 330 bales sold, the rest of the cotton belonging to other individuals with whom the deal was made; and the great preponderance of the testimony shows that the sale was made, that it was made on call, and that the appellant's agent agreed that the purchaser would hold the cotton subject to the seller's call, and, if the price advanced over the 17 cents per pound paid when the cotton was delivered, the seller had the right to call the contract and realize the difference between the price paid and the price to which the cotton had advanced when it was called; while, if the price went down, the seller could not lose more than the $5, or one cent per pound retained upon the sale, no agreement having been made to pay any greater difference should the market price go below said price advanced. The court therefore did not err in refusing to instruct a verdict for the appellant, the testimony being ample to show the contract and to support the verdict as found by the jury.

Neither was error committed in allowing the introduction of the statement by appellee of what certain witnesses, who were the other parties to the sale, told him about the deal having been closed and the cotton delivered in accordance with the agreement made before he left for the Rio Grande Valley. He knew what the negotiations were before leaving, and had authorized the others to close the deal in his absence, which was done, and the testimony was but a report to him of the closing of the contract from which he could testify that the contract had been made and closed and the cotton delivered and paid for in accordance with its terms. The draft paid for the cotton was made payable to him and put in the bank until his return, when the money was distributed by him in accordance with the amount of cotton owned by the different persons interested in the sale.

There was testimony tending to show that a different contract was made after the first one, after the sale of the cotton in fact, and that under this contract the appellee was liable to the payment of the difference between

the price for which the cotton was sold and the price to which it had declined before it was called by appellant; and it is complained that two of the instructions refused would have properly submitted this question to the jury, but the pleadings did not allege any new contract, but only the issue as already stated, and, while the court could have refused to allow the introduction of any such testimony showing a changed contract, which was not alleged, it could have as effectively refused to instruct the jury upon such issue, which it did, and no error was committed in so doing. It was within the discretion of the court to allow an amendment stating a different cause of action after the trial was begun, and there was no abuse of discretion shown in refusing the instructions on such an issue which had not been raised, and such action amounted to a refusal to allow the amendment. *Cole* v. *Branch,* 171 Ark. 611, 285 S. W. 353; *Temple Cotton Oil Co.* v. *Davis,* 167 Ark. 449, 268 S. W. 38; *Butler* v. *Butler,* 176 Ark. 626, 2 S. W. (2d) 63.

Moreover, there was no testimony showing any consideration passing for the making of the alleged new contract, or amendment of the terms of the contract of sale, which could not therefore have been valid anyway. *Cook* v. *Cave,* 163 Ark. 407, 260 S. W. 49; *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766.

We do not find it necessary to discuss the objections raised to the other instructions, but conclude that upon the whole case the jury was properly instructed upon the issue alleged and submitted, and that the testimony was amply sufficient to support the verdict. The judgment is affirmed.

SOVEREIGN CAMP WOODMEN OF THE WORLD *v.* JOHNSON.

4-3405

Opinion delivered March 19, 1934.

[redacted]

[redacted]

Rainey T. Wells and *Lee Miles,* for appellant.

Madison K. Moran, for appellee.

KIRBY, J., (after stating the facts). The testimony showed, as the court found, that the insured was insane when the March assessment became due, and continued so until his death. The appellant insists that there was no provision in its constitution and bylaws, when the forfeiture for nonpayment of the March dues was claimed, exempting insured's failure to pay his assessment or relieving against the forfeiture for failure to pay such dues, and such appears to be the case.

The insured, however, upon the dissolution of the local camp at Cabot elected to become a member of Loyal Camp No. 555 of Omaha, Neb., and was charged and paid camp dues not fixed by the bylaws of said camp, together with all other assessments by check directly to the treasurer of the Sovereign Camp. He was charged and paid 25 cents monthly for such unauthorized camp dues, and because thereof was entitled to credit for the payments made therefor and had on hand to his credit when the March assessment was required to be paid an amount more than sufficient to pay the said March assessment; and said amount should have been applied to the payment thereof, it being the money of the insured, which would have prevented the forfeiture relied on by appellants. The insured was entitled to have any of his money in the hands of the association credited against the charge of the assessment for March

before a forfeiture could be effective under the terms of the certificate and the bylaws of the association. *Mutual Aid Union* v. *Perdue,* 162 Ark. 551, 258 S. W. 375; *Gallegly* v. *American Ins. Union,* 180 Ark. 4, 20 S. W. (2d) 642.

In the case of *Mutual Aid Union* v. *Perdue, supra,* it was held that, where, under the bylaws, assessments are required to be levied by the board of directors, the levy of such assessments by the secretary is without authority, and a failure to pay an assessment so levied did not work a forfeiture of the policy. Here the bylaws of the association state that the camp dues shall be fixed under the bylaws of the particular camp of which he is a member, and, Loyal Camp No. 555 having no bylaws, the camp dues were fixed by the president, who was not a member of said camp (neither do any of the other officials belong to said camp) and since the failure to pay dues wrongfully assessed could not cause a forfeiture of the policy, certainly dues wrongfully assessed and paid would still be the property of the insured in the hands of the association applicable to payment of the March assessment to prevent a forfeiture of the policy, and should have been so applied. *Gallegly* v. *American Ins. Union, supra.*

We do not find it necessary to determine the other questions raised, having held that the forfeiture claimed for the nonpayment of the March assessment could not be effective because the insured had in the hands of the association available to his credit, more than enough to pay the said March assessment; and it was the duty of the association to apply such available funds of the insured to the payment of such assessment to avoid a forfeiture of said certificate.

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

MODERN WOODMEN OF AMERICA *v.* SEARGEANT.

4-3410

Opinion delivered March 19, 1934.

Geo. G. Perrin, George H. McDonald and *Harrison, Smith & Taylor,* for appellant.

Claude F. Cooper and *T. J. Crowder,* for appellee.

MEHAFFY, J. John C. Seargeant, husband of appellee, in January, 1917, made application for membership in the Modern Woodmen of America, and for a benefit certificate. The benefit certificate was issued on January 17, 1917. On August 19, 1930, John C. Seargeant made application for exchange of his benefit certificate for a term certificate expiring at the age of 65. The certificate was issued, and the assessments were $1.45 per month, and 35 cents per month local camp dues. The dues and assessments were not paid in June, 1932, and on July first he was suspended from membership in the company. The appellee was named beneficiary in the certificate, which was for $1,000.

About November 1, 1932, J. C. Seargeant became ill, was taken to the hospital in Blytheville, Arkansas, on November 7th, and his case was diagnosed as ruptured appendix, and he died in the hospital on November 15, 1932.

On November 14th the appellee, wife of said Seargeant, mailed to the local camp at Paducah, Ky., a money order for $11.30, as payment for all back dues and assessments. When the clerk of the camp at Paducah received the money order on November 15, 1932, he issued a receipt for the dues, and cashed the money order. The money order sent to the clerk at Paducah paid for the months of June to November, inclusive. No formal application was made for reinstatement, but the clerk of the camp signed the receipt and mailed it back to the insured. The clerk also wrote him at the time that he would have to make formal application for reinstatement, and that he, the clerk of the camp, would write to the head clerk to mail application blanks direct to Seargeant.

On November 17th the clerk saw in a paper published in Paducah, an account of Seargeant's death, and the next day the clerk wrote to Mrs. Seargeant a letter, and sent her his check for the amount she had sent him. The money was returned because Seargeant had not been reinstated, and the clerk did not know, and had no way of knowing, of the physical condition of Seargeant, as he was in Blytheville, Arkansas, and the clerk in Paducah, Kentucky. Mrs. Seargeant returned the check, and there was no letter explaining why it was returned.

A letter containing the following paragraph was introduced in evidence without objection: "Under a new ruling a member may go in suspension as long as 12 months and then reinstate without examination and that is the way many are doing. A large number that went in suspension a year ago have reinstated."

The case was tried before the circuit judge sitting as a jury, and no declarations of either law or fact were made, and the court found in favor of appellee in the sum of $1,000, with interest from date of judgment until paid, and all costs. The case is here on appeal.

It is admitted that Seargeant was suspended for nonpayment of dues and assessments for June, 1932, and that no other assessments were paid until the day before his death, when a money order was sent, paying his dues up to and including the month of November.

The only question for our consideration is whether the policy was in effect at the time of Seargeant's death. There is no dispute about his being suspended; no dispute about his illness; no dispute about the fact that the day before he died the money order was sent to Paducah, Ky., to pay his dues, and no dispute about the clerk of the local camp sending a receipt for the money.

The application, benefit certificate and bylaws were introduced in evidence. It is unnecessary to copy them in this opinion, but we will call attention to those provisions that affect the question here involved.

Section 44 of the bylaws reads as follows: "Section 44. No Waiver of Any By-Law.—No officer of this society, nor any local Camp, or officer or member thereof, is authorized or permitted to waive any of the provisions of the bylaws of this society which relate to the contract between the member and the society, whether the same be now in force or hereafter enacted. Neither shall any knowledge or information obtained by, nor notice to any local camp officer or member thereof, or by or to any other person, be held or construed to be knowledge of or notice to the head camp, or the officers thereof, until after said information or notice has been presented in writing to the head clerk of the society."

Section 66 of the bylaws provides that a beneficial member in suspension for more than three months but less than six months on account of nonpayment of assessments, fines or dues, if in sound health, * * * may be reinstated upon furnishing a certificate of sound health from the camp physician, or if beyond the jurisdiction of any local camp, then by some reputable practicing physician, possessing the qualifications provided in § 329 of these bylaws, upon form prescribed by executive council, after medical examination duly approved by the Supreme Medical Directors within six months of the date of suspension, and upon payment of the current assessments and dues and arrearages of every kind, including all assessments, dues, and fines for which the suspended member would have been liable by remaining in good standing.

One paragraph in the application for membership by Seargeant reads as follows: "I understand and hereby agree that if this application is accepted and I become a member of said society and afterwards cease to be a member thereof either by suspension, expulsion, or because of the violation of any provision of the bylaws of the society, or otherwise, I will have no interest whatever in the Benefit, General, or other funds of said society, and I hereby agree that any payments I may have made to any such fund shall be forfeited to said society whenever I shall so cease to be a member."

The certificate contains the following paragraphs: "This certificate is issued in consideration of the warranties and agreements contained in the application therefor, and in further consideration that the member shall make payments to the society of the sums required by the bylaws of the society, on or before the last day of each calendar month in accordance with said bylaws.

"This certificate is issued and accepted with the express agreement that the provisions and conditions contained on this and the succeeding pages of this benefit certificate, and in any authenticated riders attached hereto, shall form a part of this contract as fully as if recited over the signature hereto affixed."

The certificate provides "that the contract between the society and said member consists of (1) the Articles of Association of this Society, (2) this Benefit certificate, (3) the application for membership signed by the member and, (4) the bylaws of the society, with all present and subsequent amendments to each thereof."

This court recently said: "The application for membership in appellant order and the certificate issued thereon both expressly refer to the laws, rules, and regulations of appellant, and make the certificate null and void, if the holder thereof fails to comply with such laws, rules, and regulations.

"It is well settled by our own cases, as well as the authorities generally, that the constitution and laws of a mutual benefit fraternal society, such as that of appellant, form the basis and constitute a part of the contract of insurance. This contract measures the obligations of

the members and the liability of the association or governing body." *Sovereign Camp Woodmen of the World* v. *Clark,* 184 Ark. 1035, 44 S. W. (2d) 336.

The application, articles, certificate and bylaws constitute the contract in this case, and it is expressly provided that suspended members may be reinstated after suspension for more than three months and less than six months if in sound health. Seargeant was not only not in sound health, but was critically ill, and in fact died the next day after the money was sent to appellant, and it was received probably a few hours before his death. The undisputed evidence shows that neither appellant nor its agents knew anything about Seargeant's illness when it received the money and issued the receipt. The undisputed evidence also shows that the clerk of the camp, when he received the money order, wrote to Seargeant that he would have to make formal application for reinstatement, and that the clerk of the local camp did not have the application but would write the head clerk to send the blank applications for reinstatement direct to Seargeant. This was the day before he learned of Seargeant's death. It is apparent that when Seargeant was at the point of death, the dues were sent to the camp without saying anything about Seargeant's illness. When the contract provides that a member may be reinstated if in good health, the mere fact of making application for reinstatement without disclosing the illness of the member is itself an implied statement that he is in good health.

"The parties made their own contract which is free from ambiguity, and necessarily must be enforced according to its terms. The beneficiaries must stand in the shoes of the insured, and will be bound by the terms of the policy issued; and the insured accepted and retained without objection the policy until it was forfeited for nonpayment of premiums upon the date fixed by its terms." *Craig* v. *Golden Rule Ins. Co.,* 184 Ark. 48, 41 S. W. (2d) 769; *Mutual Life Ins. Co.* v. *Hynson,* 171 Ark. 218, 283 S. W. 357.

"But the mere payment of assessments to the financial secretary or supreme treasurer does not operate

to reinstate a member, where those officers have no authority to waive the laws of the society, which require a new medical certificate and a majority vote. * * * And, since no right to reinstatement exists, while insured is mortally ill, acceptance of arrearages without knowledge of such fact does not effect a waiver. Nor is there a reinstatement where, without knowledge by insurer of insured's illness, it accepts overdue payments, even though insured's agent, in making said payments, had no knowledge of such illness. And where the policy has lapsed, and payment is accepted without knowledge of an accident to insured during delinquency, there is no liability therefor." Couch on Insurance, vol. 6, § 1376.

The bylaws of appellant expressly provide that the officers are not authorized to waive any of the provisions in the policy.

"It is usually provided that the insured, who has defaulted in his payments, can be reinstated on payment of arrears if he is in good health. Where such is the provision of the contract or bylaws, the good health of the insured is a prerequisite to reinstatement, and a payment of arrears when not in good health will be ineffective." Cooley's Brief on Ins., vol. 4, § 3787.

It is also said in the same volume, § 3788: "Under provisions authorizing reinstatement of persons in good health, a reinstatement obtained by one not in good health, without the association's knowledge thereof, may be repudiated unless the association has waived the matter or is estopped."

Appellee relies on a letter written by the clerk of the camp at Paducah, June 21, 1932, which contains the paragraph above set out. This letter was introduced in evidence without objection, and this statement is not contradicted. The rule itself was not introduced in evidence, and there is no statement in the letter indicating what was in the rule except the statement that the member might be reinstated without examination. There is nothing in the letter indicating that there could be a reinstatement if the member was not in good health.

Under the contract in this case, the member could not be reinstated if he were not, at the time, in good

health, and, as the evidence conclusively shows that he was mortally ill at the time the dues were sent, he was not in good standing when he died, and there can be no recovery.

The judgment of the circuit court is reversed, and the cause dismissed.

RICHARDSON *v.* MERCHANTS' & PLANTERS' BANK & TRUST COMPANY.

4-3412

Opinion delivered March 19, 1934.

J. H. Lookadoo, for appellant.

McMillan & McMillan, for appellee.

McHANEY, J. Appellee sued appellant and his nephew, Keelie Richardson, on a joint promissory note executed by them to the appellee bank for $2,500, and, on July 12, 1933, obtained a decree against both in the sum of $3,165.41, with interest from that date until paid at 8 per cent. per annum. Keelie Richardson has not appealed.

For a reversal of the judgment, appellant first contends that he was induced to sign the note through the fraud of appellee, in that appellee's officers promised him that he would not be held liable on the note. In the first place, this defense cannot be availing, for it runs

counter to the parol evidence rule. As we said in *Randle v. Overland Texarkana Co.*, 182 Ark. 877, 32 S. W. (2d) 1064: "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 * * * . Under such circumstances the rule is that parol evidence is not admissible to contradict or vary the written instrument, which appellant Nash sought to do." See also cases there cited. Moreover, in the second place, the court found there was no fraud practiced on appellant on evidence which is in dispute, and we cannot say this finding is against the preponderance thereof. We think the case of *City National Bank* v. *Riggs, ante* p. 420, relied on by appellant, is not in point here.

It is next contended by appellant that there was no consideration for his signature on the note, because at the time he signed same appellee had already advanced the amount of the loan to Keelie Richardson. But again the evidence on this point is in conflict. The bank officials testify positively that no part of the money was paid to Keelie Richardson until after appellant had signed the note, and again we cannot say that the court's finding against him in this regard is contrary to the preponderance of the evidence.

The next contention is that appellant is relieved from liability because the bank on March 26, 1931, accepted a new note and mortgage on future crops from Keelie Richardson. The evidence shows that a new note and mortgage were executed by Keelie Richardson, and the bank presented the new note to appellant for his signature, but he refused to sign, so the deal fell through. The court found against appellant, and this finding is supported by the evidence that the bank did not accept the new note and mortgage without the signature of appellant on the new note, or that it did anything showing a release of his liability on the old note.

It is finally contended that appellant should be relieved of liability because the bank was negligent in collecting certain security deposited with it as collateral

to the note. There was no legal duty resting upon the bank in this regard. *Thornton* v. *Bowie,* 123 Ark. 463, 185 S. W. 793; *Cravens & Boren* v. *Barr,* 123 Ark. 528, 185 S. W. 1084. Moreover, the evidence shows the bank was not negligent in this respect, but acted diligently in the premises.

We find no error. Affirmed.

ARNETT *v.* STATE.

Crim. 3874

Opinion delivered March 19, 1934.

W. M. Thompson, for appellant.

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

BUTLER, J. From a conviction on the charge of embezzling the property of F. C. O'Neal, F. E. Arnett prosecutes this appeal on the sole ground that the evidence was not legally sufficient to warrant the submission of the case to the jury. This contention is based on the theory that the evidence fails to show (1) that the

property embezzled was that of O'Neal, and (2) that the relation of principal and agent was not established by the evidence. These contentions are not tenable.

The evidence introduced on the part of the State tended to establish the following facts: O'Neal had procured a loan from the United States Government in the sum of $60, which was secured by a chattel mortgage on the crops of cotton he might raise during the year in which the loan was procured. He produced three bales of cotton which he sold and delivered to Arnett with the understanding that the latter would pay to the Government's agent the $60, Arnett having paid O'Neal the difference between said sum and the purchase price. Arnett disposed of the cotton, collected the proceeds, and failed to pay the Government the $60 appropriating it to his own use. Arnett testified that he had not appropriated the money, but had paid it to the cotton broker who had purchased the cotton from him, for transmission to the Government.

The jury found against the appellant on the disputed question of fact, and, it being the exclusive judge of the credibility of the witnesses, its judgment is binding upon us. The appellant cannot escape criminal liability on the ground that O'Neal, having executed a chattel mortgage on the cotton, was not the owner of the same. He had the right of possession with the power to sell the cotton and discharge the mortgage by the payment of the debt it was given to secure.

There is also no merit in the claim that Arnett was not the agent of O'Neal, but of the Government in the transaction. There is no intimation in the testimony that he secured possession of the cotton and retained the $60 by any authority derived from the Government, but clearly was acting for O'Neal and as his agent.

Embezzlement is the fraudulent appropriation to one's own use of property of another intrusted to his care. The evidence found to be true by the jury establishes that this is precisely what Arnett did. The evidence is clear that O'Neal sold and delivered the cotton to Arnett at a specified price receiving a part of the proceeds and intrusting the remainder to Arnett to pay to

the Government; that Arnett in turn sold the cotton and appropriated the $60 to his own use, and under the rule announced in *Gurley* v. *State,* 179 Ark. 1149, 20 S. W. (2d) 886, the jury was warranted in finding the appellant guilty as charged.

Let the judgment be affirmed.

[redacted]

JETT BROTHERS STORES *v.* MCCULLOUGH.

4-3418

Opinion delivered March 26, 1934.

[redacted]

Jay M. Rowland and *C. Floyd Huff, Jr.,* for appellant.

C. T. Cotham, for appellee.

JOHNSON, C. J. Appellee brought this suit in the Garland Chancery Court against appellants, seeking recovery of $273.40, the purchase price of a certain delivery of turkeys effected on November 23, 1931.

Appellants answered the complaint, and admitted the purchase and delivery of the shipment and the aggregate purchase price, but affirmatively alleged payment as follows:

The acceptance of a valid check drawn by appellants against their account in the Community Bank & Trust Company of Hot Springs, Arkansas, which check was negligently withheld from presentment for payment by appellee for an unreasonable time, and that during such negligent delay the bank on which the check was drawn discontinued business. Briefly, the facts presented in evidence were as follows:

Appellee was engaged in the produce business at Mineral Springs and Nashville, in Howard County, and appellants were engaged in a similar business at Hot Springs, in Garland County. Pursuant to a contract theretofore made, appellee, on November 23, 1931, delivered to appellants' place of business in Hot Springs a shipment of turkeys, which was accepted by appellants, and, in payment of the agreed purchase price, appellants delivered to appellee their check for the sum of $273.40, drawn against their account in the Community Bank & Trust Company of Hot Springs. Appellee accepted the check, but, instead of presenting it for payment to the bank on which it was drawn on the date of issuance or the following day for the reason as explained by him, that he did his banking business with a Nashville bank, and that the check was withheld for the purpose of deposit in his home bank. On November 25th the check was deposited for credit and collection in the Nashville bank, and thereafter it took its usual and customary course, which resulted in its arrival at the drawee bank on November 30th, on which date the drawee bank closed its doors for business. The check, not having been honored by the drawee bank, was thereafter returned to appellee. Appellee resides at Mineral Springs, which is some ninety miles distance from Hot Springs.

At the close of the evidence, the trial court directed the jury to return a verdict in favor of appellee for the amount sued for, and this appeal is prosecuted to reverse the judgment entered thereon.

Appellants contend that the evidence presented a question of fact for the jury's determination as to whether or not appellee negligently withheld the check

from presentment for payment for an unreasonable time. The check was deposited by appellee in his home bank at Nashville on Wednesday, November 25, 1931, for credit and collection, and the evidence is not in dispute but that the check was thereafter handled in the usual and customary manner. The issue of fact is therefore reduced to whether or not it was unreasonable for appellee to withhold the check until his return home and then make deposit in the bank in which he did his business. Only one banking day intervened between the issuance of the check and its actual deposit for collection. The witness, Mr. Stone, a deputy State Bank Commissioner, testified that appellee's actions in returning to his home to make deposit of the check was the usual and customary practice, and that the withholding of the check for this purpose was not a negligent delay nor an unreasonable one. This evidence was not contradicted by any other witness.

In *Federal Land Bank* v. *Goodman,* 173 Ark. 489, 292 S. W. 659, we held that a check must be presented for payment within a reasonable time after its receipt, but that what constitutes a reasonable time depends upon the circumstances of the particular case under consideration. The test is, such diligence as a prudent man would exercise in his own affairs. See *George H. McFadden Brothers Agency* v. *Keesee,* 179 Ark. 510, 16 S. W. (2d) 994; *Parker* v. *Grau, ante* p. 1016.

The only conflict appearing in the testimony is in reference to the failure of appellee to present the check in person to the drawee bank either on the 23d or 24th days of November, 1931. This apparent conflict is of no importance under all the facts and circumstances here presented. Appellee had the legal right to pursue the usual and customary custom in effecting collection of the check, and this appears to have been to make deposit for collection in the bank with which he did his banking business. Appellants were charged with knowledge of this custom when they delivered their check to appellee. If appellants desired immediate presentment for payment, they could have effected it by presenting the check for payment themselves and paying to appellee in cash, but,

when they elected to pay appellee by check, they thereby agreed that the check might be presented for payment in the usual and customary manner. This seems to have been pursued by appellee, and the trial court was correct in so finding.

The judgment is affirmed.

SMITH *v.* MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

4-3417

Opinion delivered March 26, 1934.

Melbourne M. Martin, for appellant.

Frederick L. Allen and *Rose, Hemingway, Cantrell & Loughborough*, for appellee.

JOHNSON, C. J. Appellant, by jury trial, recovered a judgment against appellee for the sum of $177.23 upon a certain life insurance policy theretofore executed by appellee in favor of appellant. The trial court sustained a motion for new trial upon the following theory:

"The policy in this case, by its plain language, provides that the proof of disability must be made before the plaintiff has reached the age of sixty years. There is no proof in this record that the plaintiff's proof of disability was made prior to the reaching of sixty years, and, under the plain terms of the policy, the court is of the opinion that there is no liability in the case. For this reason, the motion for a new trial is granted."

The pertinent provisions of the policy of insurance in controversy were to the following effect: "If the insured, after the payment of premiums for at least one full year, shall, before attaining the age of 60 years, and provided all past-due payments have been duly paid and the policy is in full force and effect, furnish due proof to the company at its home office either (a) that he has become totally and permanently disabled by bodily injury or disease so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, or (b) that he has suffered any of the following 'specified disabilities' (which shall be considered total and permanent disabilities thereunder), namely, etc., the company, upon receipt of approval of such proof, will grant the following benefits:

"The company will, during the continuance of such disability, waive payment of each premium as it becomes due, commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the company must be paid in accordance with the terms of the policy, but if due after receipt of said due proof, will, if paid, be refunded upon approval of such proof.

"The company will, during the continuance of such disability, pay to the insured a monthly income at the rate of $10 for each one thousand dollars of the face

amount of this policy (but not including dividend additions), the first such monthly payment being due on receipt of said due proof and subsequent payment on the first day of each calendar month thereafter, if the insured be then living and such liability still continuing. No income payments, however, will be made prior to approval of such proof by the company as satisfactory, but upon such approval, whatever income payments shall have become due will then be paid and subsequent payments will be made when due."

The plain meaning of the language employed by the parties, as aforesaid, is that, if the insured suffers total and permanent disability prior to attaining the age of 60 years, and has paid all premiums up to the receipt of such injury, liability shall attach.

It would be a strained construction to construe the language thus quoted to mean that proof of loss must be filed with the insurance company before the insured attains the age of 60 years. Evidently this was not the intention of the parties. At any rate, the language employed is not susceptible of such construction.

Appellee contends that, under the doctrine announced in *New York Life Ins. Co.* v. *Farrell,* 187 Ark. 984, 63 S. W. (2d) 520, the trial court was justified in the conclusion reached. This is not the effect of the Farrell case. We held in the Farrell case, as we have in all other cases decided, that liability attached upon causation of the injury suffered, but that the cause of action on such liability accures only after the filing of the proof of disability. The making of the proof of loss was not treated or considered as a condition precedent to liability in the Farrell case, but it was treated as a condition precedent to the right of recovery. The rule is, as announced in the Farrell case, and in all others on the subject announced by this court, that liability attaches upon causation of total and permanent disability of the insured, but that the right of recovery is postponed until notice to the insurer of the disability or the filing of the proof of disability or the lapse of time provided for in the policy in reference to the accrual of the right of recovery. *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398; *W. O. W.* v. *Meek,*

185 Ark. 419, 47 S. W. (2d) 567; *Ætna Life Ins. Co.* v. *Pfeifer,* 160 Ark. 98, 254 S. W. 335.

Appellant insists also that *New York Life Ins. Co.* v. *Jackson, ante* p. 292, is authority for the trial court's holding. Neither can we agree to this contention. In the Jackson case, no proof of loss was ever submitted to the insurance company. No notice was given to the insurer or to any agent with authority of the asserted right of liability. The first information brought to the knowledge of the insurance company was a letter of date January 16, 1932, addressed to the general agent at Little Rock. In the Jackson case, as heretofore stated, no effort had been made to effect proof of loss prior to the filing of the suit, and the suit was filed more than five years after the receipt of the alleged injury.

Neither can we agree that *Ætna Life Ins. Co.* v. *Person, ante* p. 864, is authority for the holding of the trial court. The Person case was disposed of on the theory that there was no substantial evidence that plaintiff's physical condition had prevented him from doing all the substantial acts of his vocation in the usual and customary manner. We therefore held that the trial court erred in not directing a verdict in favor of appellant insurance company.

Neither can we agree that our present holding is in conflict with *Bergholm* v. *Peoria Life Ins.,* 284 U. S. 489, 52 S. Ct. 230. The policy construed in the Bergholm case contains the following language:

"To entitle the insured to the above total and permanent disability benefits, this policy at the time of making claim for such benefits must be in full force, and all premiums becoming due prior to the time of making claim must have been duly paid."

The Supreme Court of the United States was eminently correct in holding that the language just quoted must be performed by the insured as a condition precedent to his right of recovery. This is the plain and unmistakable meaning of the language employed. However, we have no such language in the policy of insurance here under consideration. We think the language here employed is plain and definite to the effect that, if the

insured suffers total and permanent disability prior to his sixtieth birthday, and at the time has paid all premiums due, liability then and there attaches, and recovery is postponed until notice or proof of loss is submitted. For instance, suppose the insured, on the day prior to his sixtieth birthday, suffers an injury which results in the loss of both legs and both arms. In the natural course of events it would be impossible to make proof of loss prior to the insured's sixtieth birthday. Such construction would nullify the plain intentions of the parties. True, this is an extreme imaginary case, but it is not beyond the limits which the parties had in mind at the time the contract was effected.

It is self-evident that the paramount consideration the parties had in mind at the execution of this contract was insurance against total and permanent disability. Any construction which nullifies this paramount consideration should be avoided, if possible. All courts agree that it is a fundamental rule of construction that insurance contracts, when ambiguous, should be construed most strongly against the insurer. *Mutual Life Ins. Co.* v. *Hurni Co.*, 263 U. S. 167, 44 S. Ct. 90; *Stipcich* v. *Ins. Co.*, 277 U. S. 311, 48 S. Ct. 512.

Under any view, the trial court was in error in granting a new trial to appellee.

It is true the verdict of the jury and the judgment entered thereon were excessive, but this is no reason for granting a new trial in this case. The uncontradicted testimony shows that on April 1, 1933, notice of the injury and claim for compensation were given to appellee; that on April 11, 1933, formal proof of disability was made. Under our previous holding the cause of action accrued on the happening of these events. The suit was filed in June, 1933, and judgment was effected on September 27, 1933, for the sum of $177.23.

It clearly appears therefore that the verdict of the jury and judgment of the court are excessive, but this is a matter that can and should be cured by remittitur. It is simply a matter of calculation to determine the compensation which accrued from the first of April, 1933, to September 27, 1933, when the judgment was entered.

Only six months elapsed between the date of the notice and of the entry of the judgment, and the recovery must be measured by that period of time. A new trial is never necessary under circumstances like these. Matters of calculation are not questions of fact, but are deductions drawn from proved facts The testimony in this regard is not in controversy, and would not be upon a new trial.

Therefore the case will be reversed, and judgment will be entered here in appellant's favor for the sum of $60, the amount of accrued benefits up to September 27, 1933, the date of the trial.

Justices SMITH and MCHANEY dissent.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* FOSTER.

4-3399

Opinion delivered March 26, 1934.

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

Shaver, Shaver & Williams, Malcolm T. Garner, Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

JOHNSON, C. J. Seeking recovery upon two certificates of insurance theretofore issued by appellant to appellee, this suit was instituted. A trial to a jury was had which resulted in a verdict in favor of appellee upon each of these certificates, and judgments were accordingly entered, and this appeal is therefrom.

Certificate No. 24,414, issued under master policy No. SAH-534, provides indemnity of $10 per week for a period not exceeding twenty-six weeks against injuries effected through external, violent and accidental means, or the same amount per week for disability resulting from bodily disease which prevents performance of every kind of duty pertaining to the insured's occupation, provided no payment shall be made for the first seven days of disability, etc. The master policy No. SAH-534, just referred to, is an industrial insurance contract effected between appellant as insurer in favor of the Missouri Pacific Railroad Company as employer and for the use and benefit of the employees of the railroad company.

Certificate No. 24,314 was issued under master policy G-2377, an industrial insurance contract effected between appellant and the same railroad company, and this certificate provides indemnity of $1,000 to be paid to the beneficiary of the insured in the event of death or to the insured in the event of total and permanent disability resulting from bodily injury or disease before attaining the age of sixty years. This certificate provides:

"Total and permanent disability benefits.

"If the employee shall furnish the company with due proof that, before having attained the age of sixty years, he or she has become totally and permanently disabled by bodily injury or disease, and that he or she is then, and will be at all times thereafter, wholly prevented thereby from engaging in any gainful occupation, and that he or she has been so permanently and totally disabled for a period of six months, the company will immediately pay to the employee in full settlement of all obligations hereunder, the amount of insurance in force hereunder on the employee at the time of the approval by the company of the proofs as aforesaid."

This certificate No. 24,314 has the following instructions indorsed thereon:

"It is not necessary for the employee or the beneficiary to employ any individual firm or corporation to secure any benefits under this certificate. Communicate directly with either the employer or the Missouri State Life Insurance Company, Fifteenth and Locust Streets, St. Louis, Missouri.

"Missouri State Life Insurance Company,
"St. Louis, Missouri."

During the progress of the trial, the parties stipulated that master policies No. SAH-534 and G-2377 and the certificates issued thereunder were in full force and effect during the month of August, 1931. Hereafter, we shall deal with master policies and certificates issued thereunder separately.

Master policy SAH-534, which provides weekly indemnity for sick disability, contains the following clause:

"Immediate written notice, with full particulars and full name and address of the insured employee, shall be given by the employer to the company of any accident, injury or sickness for which claim shall be made."

This master policy was never in the possession of the insured. Appellee testified that he gave notice to his employer, the Missouri Pacific Railroad Company, of his disability under policy No. SAH-534 in October, 1931,

but that he was denied blanks upon which to make his proof of disability.

It is especially noticeable that the certificate of insurance delivered to the insured contained no requirement of notice of disability. As we understand appellant's contention, it is to the effect that the insured was bound to take notice of the provisions of the master policy and give to appellant the notice required to be given by the employer.

We think the facts and circumstances in reference to liability under policy SAH-534 has been determined adversely to appellant's contention in the case of *Missouri State Life Insurance Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. (2d) 407; in which we held:

"It is true, as argued here, that he did not notify appellant of the accident and consequent injuries for about nineteen months, but he testified that his failure was due to the fact that the major policy requiring notice be given was not in his possession or subject to his inspection. The requirement for notice and proof of the injuries was not in the certificate delivered to him. When he obtained information that notice was required, he notified appellant."

Moreover, the policy and certificate of insurance here under consideration does not by express terms or by necessary implication make the giving of notice a condition precedent to the right of recovery. *Hope Spoke Company* v. *Maryland Casualty Co.,* 102 Ark. 1, 143 S. W. 85.

In addition to what we have just said, we are definitely committed to the doctrine under policies of insurance wherein the provision for notice is not made a condition precedent to the right of recovery that it is immaterial how and when the proof of disability is made, if within the statutory period of limitations. *Ætna Life Ins. Co.* v. *Davis,* 187 Ark. 398, 60 S. W. (2d) 912.

The necessity for such rule of construction is made to appear more definitely when we consider that the class of risks usually insured under industrial contracts of insurance are people of little learning.

Appellant also contends that the certificate of insurance was forfeited on September 1, 1931, because of nonpayment of premiums.

The rule is stated thus in 31 C. J. 967: "In view of the nature of industrial insurance and the class of people with whom the company mostly deals, the policy is liberally construed in favor of insured, and the courts give effect to slight circumstances in order to prevent a forfeiture based on provisions of the policy inserted for the company's benefit."

We are definitely committed to the doctrine that liability attaches under contracts of insurance similar to the one under consideration upon causation of the injury, and it necessarily follows from this that no subsequent act or acts of the parties can destroy the liability thus created. Notice was not made a condition precedent to the right of recovery under the certificate and policy here under consideration therefore a suit may be brought and maintained within the statutory period of limitations. Forfeitures cannot and should not be declared when the rights of parties have become vested, therefore the payment or nonpayment of premiums subsequent to causation of the injury is immaterial. We conclude therefore that the judgment in favor of appellee under policy SAH-534 is right, and should be affirmed.

Appellant contends that no liability attached under certificate No. 24,314 issued under master policy G-2377 until proof of disability was filed with the company, and approved by it showing appellee to have been disabled for a period of six consecutive months. In other words, the contention is, that liability did not attach on this certificate until six consecutive months' disability had elapsed, and that the payment of premiums during this six months' period was a condition precedent to the right of recovery. The jury has found under proper instruction, and, appellant tacitly admits, upon sufficient evidence that appellee was totally and permanently disabled prior to August 31, 1931.

Conceding without deciding that the payment of premiums for six months subsequent to the causation of total and permanent disability is a condition precedent to the right of recovery, it avails appellant nothing here. The monthly premium on certificate 24,314 was sixty cents per month, and on September 1, 1931, when the

premium should have been paid, appellant had in its possession sufficient funds belonging to appellee under policy SAH-534 to have paid this premium. We are committed to the doctrine that, as long as the insurer has funds in its possession belonging to the insured, such funds must be used to avoid a forfeiture. *Illinois Bankers' Life Ins. Co.* v. *Wilken,* 187 Ark. 337, 59 S. W. (2d) 1046; *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865; *American Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514, 164 S. W. 276; *Missouri State Life Ins. Co.* v. *Miller,* 163 Ark. 480, 260 S. W. 705; *Knights of Pythias of N. Amer.* v. *Sanders,* 174 Ark. 279, 295 S. W. 25; *Pfeiffer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847.

It is earnestly contended on behalf of appellant that liability did not attach under policy G-2377 until proof of disability had been filed and approved by the company showing a total disability to have existed for six consecutive months. In support of this contention we are cited the recent case of *Kingsland* v. *Mo. State Life Ins. Co.,* by the Kansas City Court of Appeals, wherein the court held, in effect, that six months total and permanent disability must exist during the lifetime of the master policy, and that this was a condition precedent to liability.

The case referred to is in direct conflict with the previous decisions of this court on this subject. We are irrevocably committed to the doctrine that, when liability attaches, no subsequent act of the parties will effect a forfeiture of the policy, unless the contract of insurance by definite and explicit terms so provides. We are unwilling to impair our previous decisions in deference to this opinion.

We are also cited in the case of *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 52 S. Ct. 230, in support of this contention. In the case referred to by plain and definite language the payment of premiums up to the filing of the proof of disability was made a condition precedent to the right of recovery. Such is not the effect of the language employed in the instant case.

We therefore conclude that no reversible error appears, and the judgment will be affirmed.

Justices SMITH and MCHANEY dissent.

GEORGIA CASUALTY COMPANY *v.* BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT.

4-3341

Opinion delivered March 26, 1934.

[redacted]

Sam Costen and *House, Moses & Holmes,* for appellant.

S. W. Ogan, J. L. Shaver and *G. B. Segraves,* for appellee.

James G Coston and *J. T. Coston,* for indemnitors—cross-appellants.

HUMPHREYS, J. This is an appeal by Georgia Casualty Company from a decree for $38,366 rendered against it in favor of appellee on an indemnity bond executed by it to appellee on March 18, 1930, agreeing to pay not to exceed $40,000 to appellee any loss it might sustain on account of deposits made in the Bank of Osceola, said bank being the principal in the bond and appellant the surety therein. Also an appeal by J. L. Williams, H. V. Cartwright, Ike Miller, and O. W. Knight from a decree in like amount rendered against them in favor of appellant on an indemnifying agreement to reimburse appellant

herein for all loss it might sustain on account of the bond executed by it.

The issues joined by the pleadings were whether the bond sued upon by appellee had expired at the time said bank failed on December 17, 1931, and, if not, whether the bond was obtained through the fraud of appellant's own agent, in which fraud appellee participated; and whether J. L. Williams, H. V. Cartwright, Ike Miller, and W. O. Knight were released from their agreement or undertaking when the bond sued upon was extended.

The bond sued upon by appellee was executed on March 18, 1930, to expire March 18, 1931, in consideration of $5 a thousand or $200, which was paid to B. Frank Williams, the general State agent of appellant. Prior to the execution of this bond, the deposits of appellee were protected by indemnity bonds executed by the Southern Surety Company. J. L. Williams was president of the board of directors of St. Francis Levee District, appellee herein, and president of the Bank of Osceola. B. Frank Williams was his son, who was located in Little Rock in the bonding business, and represented appellant as its general agent in the State for the purpose of transacting all its business. He had a power of attorney from it which read, in part, as follows: "To make, execute, seal, and deliver for and on its behalf as surety, any and all bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, which are or may be allowed, required, or permitted by law, statute, rule, regulation, contract or otherwise, and the execution of all such instruments in pursuance of these presents shall be as binding upon said Georgia Casualty Company, as fully and amply, to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal office."

An application was made to appellant for a bond in the sum of $15,000 by appellee and said bank, but a bond was written for $40,000 to cover the deposits by the agent in the name of appellant, for which the agent was paid $200. He accounted to appellant for $75 premium only. At the time he wrote and delivered the bond to

appellee, he also delivered his power of attorney to its secretary. On the same date the bond and power of attorney were delivered to appellee J. L. Williams, and the other directors of the said bank executed and mailed an indemnity agreement to appellant, referred to above. No amount was fixed in said agreement. In October, 1930, appellant wrote a letter to appellee stating it was surety on a $15,000 bond for it, and asking for a copy of the bond. Appellee sent the letter to B. Frank Williams at Little Rock, but made no answer to the letter itself. In November appellant wrote asking B. Frank Williams for a copy of the bond, but failed to get it.

In February, 1931, before the expiration of the bond, appellee notified B. Frank Williams that appellant must furnish another bond in like amount or it would get a bond from the Southern Surety Company. On the 26th of February, 1931, he furnished another bond in which the said bank joined as principal and appellant as surety to expire February 26, 1933, and later extended the original bond to March 18, 1932, and afterwards changed the expiration of the new bond to February 26, 1932, and charged and collected a premium of $800 from appellee, which it seems was never sent to appellant.

There is testimony in the record tending to show that B. Frank Williams violated the confidence placed in him by his company, and some tending to show that the officials of appellee participated in the fraud or had knowledge thereof, but there is other testimony tending to show that appellee had no such knowledge, and did not participate therein.

The chancellor found that both of the bonds sued upon were executed by B. Frank Williams, that the Levee District paid the premiums on both bonds, and that it had no knowledge or notice of the fraud practiced upon appellant by its own agent.

After a very careful reading of the testimony, we are unable to say that this finding is contrary to the weight of the evidence. The law is plain that, where one of two innocent parties must suffer on account of the wrongful act of a third party, the one must suffer who placed it in the power of the third party to perpetrate

the wrongful act. *Maccabees, Incorporated,* v. *Pierson,* 177 Ark. 243, 6 S. W. (2d) 305. In the instant case, appellant placed it in the power of B. Frank Williams to perpetrate the fraud complained of, and must bear the loss resulting therefrom.

The only question now left for determination is whether, under the power of attorney, B. Frank Williams had authority to extend the indemnity bond by changing the date of expiration. Having power to execute the bond in the first instance without restriction as to amount or time and without submitting it to appellant for approval or confirmation, it follows that he might extend the time for any reasonable period. There is no restriction whatever in the power of attorney as to the amount or time for which it might be extended. He could have executed a new bond, and he actually did so, but later chose to extend the original bond. The power to extend a bond is necessarily conditioned upon power to make one for an unlimited time. A majority, however, are of the opinion that the power or authority to make or extend a bond does not confer authority to release a bond given to indemnify the surety against loss. In this latter view, the writer does not concur, being of the opinion that the power of attorney was broad enough to authorize the agent to do anything the officers of appellant might do.

The decree is therefore affirmed on both direct and cross-appeals.

BUTLER, J., (dissenting). I cannot agree to the conclusion reached by the majority of the court. In the discussion of this case it was conceded that the effective bond was that of date, March 18, 1930, and that the bond of February 26, 1931, sometimes called the "second bond," was never in fact accepted by the Levee Board. In fact, when the Bank of Osceola became insolvent, and the Casualty Company was advised of this, the Levee Board based its right to recover of the Casualty Company the amount of its deposit in the Bank of Osceola on the first-mentioned bond, and when the representative of the Casualty Company was making an investigation no information was conveyed to him of the existence of

the last-mentioned bond or of any claim made thereunder; also, when this suit was filed, the right to recover was predicated on the bond of March 18, 1930, and while, by an amendment to the complaint, the bond of February 26, 1931, was pleaded, this was clearly an afterthought.

The power of attorney given by the Casualty Company to its agent, Frank Williams, is set out in the majority opinion, which holds that its terms were sufficiently broad to give authority to alter bonds which had been formerly executed by the agent, and that when he, in February, 1931, altered the bond by changing the date of its expiration, making it to run for a year longer than as originally executed, he was acting within the authority conferred upon him by the power of attorney.

It will be observed that the power given to Frank Williams by the Casualty Company was to "make, execute, sell and deliver for and on its behalf as surety any and all bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof." The general principles governing the power of an agent acting under authority as was Frank Williams, the agent of the Casualty Company, is stated in 2 C. J. 645, as follows: "Presumptively an agent is employed to make contracts, not to rescind or modify them, to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, nor has any agent any implied power to waive or give up rights or interests for his principal, or to increase his obligations and liabilities for the mere benefit of third persons, unless the principal knows or approves of such modifications by the agent. Thus an agent has no implied authority to extend the time for the performance of a contract, except where it is clearly within the scope of his agency. However, a general agent may act under such broad power to contract in his own name, or to make terms or to settle within his own discretion, as to overcome this presumption and bind the principal by a modification, rescission, or release."

In other words, as stated in the case of *U. S. Bedding Co.* v. *Andre,* 105 Ark. 111, 150 S. W. 413, 41 L. R. A.

(N. S.) 413, where the authority must be found from implication, "the act of the agent must be practically indispensable and essential in order to execute the duty actually delegated to him. * * * His implied authority is limited to those acts of like kind with the very act he is expressly impowered to do and from which the authority is implied, but his authority can never be extended by implication to do an act or make an agreement which is beyond the obvious purpose of his employment. * * * Being employed for one purpose, he has no authority to do another, either actual or implied."

An examination of the power will disclose that it did not authorize the agent to alter the bond which he was authorized to write after it was executed and delivered. Under the rules of law, *supra,* an attorney in fact under a power of attorney must conform strictly to the authority expressly given, and his acts are necessarily confined within the express powers granted. The agent, therefore, had no authority to make the alteration by which the obligation of the bond was extended for the period of another year. It is quite evident, from the testimony of the secretary of the Levee Board, that he knew that this was an unusual act, and he must have known from the provisions of the bond itself that no extension of its terms could be made in this manner by the agent. This is clear from a consideration of the following paragraphs of the bond:

"Provided that no erasure or change and no change or waiver of any of the terms or conditions of statements shall be valid unless indorsed on the bond and signed by the president or vice president and attested by one of the secretaries or assistant secretaries of the company."

"This obligation may be continued for any subsequent period by continuation certificates signed by the surety by its president or one of its vice presidents under seal, and attested by its secretary or one of its secretaries."

The provision is clearly made that no erasure or change shall be valid unless made in a specified way,

and it is also clearly directed how the obligation of a bond may be continued; so these provisions apprised the Levee Board of the limitation of the agent's authority, and it knew when the alteration was made that this was beyond the scope of the agent's power.

There is another reason why the Levee District ought not to be allowed to prevail in this action. It is undisputed that the agent of the Casualty Company violated his trust in the execution of the bond of March 18th. The Bank of Osceola made application for a $15,000 bond. It was in this amount that the agent reported to the company that he had written it, and for a bond of this size a premium of $75 was charged, the agent's commission being $22.50, and the balance to be remitted to the company. The agent remitted $52.50, but he collected $200 from the Levee Board. On February 17, 1931, the company notified its agent that on the 1st of March, 1931, it would cease to do business in Arkansas. Two days before the company was to withdraw from the State, without notice to it and without application having been made by the Bank of Osceola, the agent went to the office of the Levee Board, secured the bond of March 18, 1930, which by its terms expired March 18, 1931, and altered the same by making the expiration date March 18, 1932, charging and collecting $200, of which he failed to advise his principal. After the company withdrew from the State, from time to time it wrote its agent to secure and return to it the original bond of March 18, 1930. The agent ignored all of these letters, and finally the company wrote the Levee Board, in September, 1931, that it had written a depository bond to the Levee District on the Bank of Osceola for $15,000 which had expired March 18, 1931, and that it desired to have the canceled bond, or a statement from the Levee Board that it claimed no liability thereunder. Instead of replying to the Surety Company, the Levee Board turned the letter over to the agent, and the first communication the surety company received from the Levee Board was a letter in December giving notice that the Bank of Osceola had closed its doors on the 17th of that

month; that it had a deposit of $38,366.05 in said bank, and that it claimed and demanded the payment of the same by the Casualty Company by reason of a bond executed March 18, 1930, expiring on the same date in 1932. This was the first knowledge the Casualty Company had that any such bond was in existence.

From the testimony of the secretary of the Levee Board, it is clear that he knew that the action of the agent in writing a bond on February 26, 1931, for $40,000, and a day or two later coming in and changing the expiration date on the bond of March 18, 1930, and his request for the return of the bond written February 26, 1931, and later on his change of the bond written February 26, 1931, so as to make it appear that it was written preceding that date, was irregular and so suspicious that he (the secretary) refused to surrender either one of the bonds. With these facts within the knowledge of the Levee Board, when it received the letter from the Casualty Company in September, 1931, asking for a return of the canceled bond, the amount of which was stated, it then knew, or ought to have known, that the agent had practiced a fraud upon the Casualty Company, and good faith demanded that it should have answered the letter of the company disclosing all the facts within its knowledge. Had it done so, the Casualty Company would have had the opportunity to protect itself by cancelling the bond, and the Levee Board could have protected itself by a withdrawal of its deposit from the Bank of Osceola.

It is elementary that one may estop himself, either by his positive acts or by omission, from asserting a right against a party who has been injured. It is difficult to lay down any accurate rule by which estoppels *in pais* may be measured, for each case must depend upon its own facts, and in no two cases are the facts precisely the same. But this is a case which calls for application of the doctrine, for clearly good law and good morals required the Levee Board to disclose to the Casualty Company the fact that its agent had written a bond in a greater amount than it had supposed and then, by altera-

tion, had extended its obligation for a year longer than when the bond was written, and to disclose to the Casualty Company that it then claimed that a valid and subsisting bond for $40,000 existed for which the Casualty Company was liable. As already said, had the Levee Board done this, both it and the Casualty Company had ample means of protection, and by its silence it acquiesced in the fraud of the agent, and should not be allowed to recover in this case. It follows that there was no liability on the part of the indemnitors.

I think, therefore, that the judgment of the trial court should be reversed, both on direct and cross-appeal, and that the case should be dismissed. I am authorized to say that Mr. Justice McHaney concurs in the views I have expressed.

Missouri State Life Insurance Company *v.* Withers.

4-3389

Opinion delivered March 26, 1934.

[redacted]

George Pike, F. A. Isgrig, A. D. DuLaney and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Meehan & Moncrief, Sam T. Poe, Tom Poe and *McDonald Poe,* for appellee.

KIRBY, J., (after stating the facts). The opinion in *Missouri State Life Ins. Co.* v. *Foster, ante* p....., written by our learned Chief Justice in a like case, handed down this date, is controlling in all respects herein.

The policies and certificates of insurance herein do not, by express terms or by implication, make the giving of notice of the disability a condition precedent to the right of recovery; and, as said in the Foster case, *supra*: "We are definitely committed to the doctrine that liability attaches under contracts of insurance similar to the one under consideration upon causation of the injury, and it necessarily follows from this that no subsequent act or acts of the parties can destroy the liability thus created. Notice was not made a condition precedent to the right of recovery under the certificate and policy here under consideration, therefore a suit may be brought and maintained within the statutory period of limitations. Forfeitures cannot and should not be declared when the rights of parties have become vested; therefore the payment or nonpayment of premiums subsequent to the causation of the injury is immaterial."

When the premiums became due on these certificates, for the nonpayment of which they were attempted to be forfeited, the appellant company had in its possession sufficient funds belonging to the appellee under said contracts to have paid the premiums, if it had been so applied, and, such being the case, the insurer was bound to apply such funds in its possession to avoid a forfeiture. *Mo. State Life Ins. Co.* v. *Foster, ante* p. 1116, and cases there cited.

On the whole case, we find no prejudicial error in the record, and, said case being controlled by the Foster case, *supra,* the judgment is affirmed.

MISSOURI STATE LIFE INSURANCE COMPANY *v.* BROWN.

4-3390

Opinion delivered March 26, 1934.

George Pike, F. A. Isgrig, A. D. DuLaney and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

Meehan & Moncrief, Sam T. Poe, Tom Poe and *McDonald Poe*, for appellee.

MEHAFFY, J. The appellant, Missouri State Life Insurance Company, issued to the Missouri Pacific Railroad Company three group policies. One of them provided for indemnity in the event of accidental dismemberment; one provided for indemnity for a period of not exceeding 26 weeks for sickness, and the other provided for indemnity for total and permanent disability. The appellee, an employee of the Missouri Pacific Railroad Company, was issued a certificate under each of the group policies.

On May 3, 1931, the appellee lost a leg in an accident, and the company paid him $500 in settlement of his claim under the policy which provided for indemnity in cases of accidental dismemberment. This policy therefore is not involved in this suit.

The next policy provided for payment of $10 per week for the period of disability, not exceeding 26 consecutive weeks. The appellant paid on this policy $77.14. Suit was brought on this policy for the balance due, and also on the policy for total and permanent disability, and for 12 per cent. damages and attorney's fees.

It was contended in the court below that § 6155 of Crawford & Moses' Digest, when applied to a case in which the insurer has reasonable grounds for contesting the claim, is unconstitutional. Appellant states, however, that its understanding is that a case is now before the Supreme Court of the United States involving the constitutionality of our statute as construed by this court. This court held that the statute was constitutional, and that the good faith of the insurance company did not excuse it from the plain provisions of the statute. *Life & Casualty Ins. Co. of Tenn.* v. *McCray,* 187 Ark. 49, 58 S. W. (2d) 199.

This case was appealed to the Supreme Court of the United States, and, since the appellant prepared its brief, the Supreme Court of the United States has decided the case. It was decided March 5, 1934, 54 S. Ct. 482. That court held that the allowance of attorney's fees and 12 per cent. damages in insurance cases did not violate the provisions of the Federal Constitution, and affirmed the case. The questions as to attorney's fees and 12 per cent. damages is therefore settled by the decision of the Supreme Court of the United States.

The next question argued by appellants is the right of appellee to recover $10 a week for the balance of 26 weeks, for which appellant had not paid. It was the contention of the appellant that appellee had no ailment outside of the loss of his leg, and physicians testified that the claim of heart disease was nothing but a pretense. Other physicians, however, testified that he was totally and permanently disabled because of other ailments. This was really the only controversy as to this claim, and appellant states in its brief: "The jury's verdict has settled this controverted question of fact."

There is therefore nothing for us to consider except the action on the policy for $1,000 for total and perma-

nent disability benefits. Appellant contends that, before appellee would be entitled to recover under this certificate, it was necessary that he keep the same in force for a period of six months following May 3, 1931, the date on which he was injured, and that appellee had not kept this policy in force by the payment of premiums. It is admitted that no premiums were paid on this certificate after the month of July, 1931, and appellant contends that for that reason the certificate or policy was lapsed and forfeited on account of failure to pay premiums.

Appellant's contention cannot be sustained for the reason that the undisputed evidence shows that appellant had more than enough funds in its hands belonging to the appellee to pay the premiums.

"The rule is that insurance companies cannot declare forfeiture of policies for the nonpayment of premiums where 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." *Illinois Bankers' Life Ins. Co.* v. *Wilken,* 187 Ark. 337, 59 S. W. (2d) 1046; *Security Life Ins. Co.* v. *Matthews,* 178 Ark. 775, 12 S. W. (2d) 865; *American Nat. Ins. Co.* v. *Mooney,* 111 Ark. 514, 164 S. W. 276; *Mo. State Life Ins. Co.* v. *Miller,* 163 Ark. 480, 260 S. W. 705; *Knights of Pythias of North America* v. *Sanders,* 174 Ark. 279, 295 S. W. 25; *Pfeiffer* v. *Mo. State Life Ins. Co.,* 174 Ark. 783, 297 S. W. 847.

It is contended that the appellee was not totally and permanently disabled. This court has many times decided what constitutes total and permanent disability. "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such character and degree that common

care and prudence required him to desist from his labor so long as was reasonably necessary to effect a speedy cure." *Mo. State Life Ins. Co.* v. *Snow,* 185 Ark. 335, 47 S. W. (2d) 600; *Ætna Life Ins. Co.* v. *Phifer,* 160 Ark. 98, 254 S. W. 335; *Industrial Mutual Indemnity Co.* v. *Hawkins,* 94 Ark. 417, 127 S. W. 457.

The evidence as to whether total disability existed was in conflict, and the verdict of the jury settled this question of fact.

We find no error, and the judgment of the circuit court is affirmed.

McCain *v.* Fender.

4-3416

Opinion delivered March 26, 1934.

C. T. Bloodworth and *C. T. Bloodworth, Jr.,* for appellant.

E. G. Schoonover, W. J. Schoonover and *Wear K. Schoonover*, for appellee.

Butler, J. Vance Fender and his mother, Mrs. D. W. Fender, purchased an automobile from the Alcorn Motor Company of Poplar Bluff, Missouri, and made and executed their promissory note for the balance of the purchase money to the Alcorn Motor Company for the sum

of $360, due nine months after date with interest at 10 per cent. This note was assigned for value before maturity to the appellant, L. McCain. On December 7, 1931, after the maturity of the note, Mrs. Fender, one of the makers, called on McCain at his office in Poplar Bluff and paid the interest then accrued. Sometime thereafter the Alcorn Motor Company paid McCain $20 on the note which was duly credited thereon. Nothing further having been paid, the appellant brought suit to recover for the balance and interest according to the terms of the note.

Among the defenses interposed was that the note sued on evidenced an indebtedness due on a conditional sales contract for the purchase price of an automobile, and that before suit the car had been retaken by the Alcorn Motor Company with the consent and authority of McCain, the assignee, and that thereby the debt evidenced by the note had been extinguished. This defense was predicated upon the principle that, where the vendor reserves title to a chattel until the payment of the purchase price, the sale is conditional and dependent for its consummation upon the performance of the condition that the purchase price shall be paid. When the debt becomes due the vendor, in sales of this character, may bring an action to recover the debt, and by this he affirms the sale and waives the reservation of title; or he may elect to take the property and, by doing so, cancels the debt. He may not, however, have both remedies, and, where he elects to retake the property an action to recover on the debt is barred. *Nashville Lumber Co.* v. *Robinson,* 91 Ark. 319, 121 S. W. 350; *Laird* v. *Byrd,* 177 Ark. 1114, 9 S. W. (2d) 571.

It was established that the car had been retaken by the Alcorn Motor Company, and, applying the principles announced, the court submitted to the jury the question of whether or not the retaking of the car was authorized by the appellant, and instructed the jury that, if it should so find, its verdict should be for the defendants (appellees). There was a verdict in favor of the defendants, and the appellant, on appeal, insists that there was no

evidence that there was a conditional sales contract or that he authorized the appellees to negotiate with the Alcorn Motor Company on the question of accepting the car in settlement of the debt, or that the car had been retaken with his consent.

We find no positive testimony tending to establish the fact that the automobile was sold under a conditional sales contract, but that was an inference growing out of the testimony, and is sufficient to warrant the jury in believing that it was so sold. Mrs. Fender, one of the appellees, testified in effect that it was her understanding that it was a conditional sales contract, and the fact that the car was retaken supports that view. As suggested by the appellees, they were not in possession of the contract, and, if there had been none such, there appears to have been no difficulty on the part of the appellant in establishing that fact.

From the testimony of McCain there can be no doubt but that the Alcorn Motor Company, at the time of the assignment of the note to him, was solvent. This was only one of many transactions of a similar nature between McCain and the motor company, and he was satisfied with its financial responsibility for the payment of its notes which he purchased. It may be legitimately gathered from McCain's testimony that the motor company frequently repossessed cars with the knowledge of McCain, who held the notes, and that this matter was left up to the best judgment of the motor company, and that, when such action was taken, it was satisfactory to McCain. There is no dispute as to whether or not Mrs. Fender had a conversation with McCain, at the time she paid the interest in December, relating to repairs to the car and its being retaken. She testified that she asked Mr. McCain to take the car back because she could not get repairs for it, and that he told her that she would have to see Mr. Alcorn about taking the car back. She accordingly did see Mr. Alcorn, who later repossessed the car, and in this connection McCain stated that at the time of the conversation Alcorn was solvent, and the note could have been collected from him, and that he (McCain) was not interested in Mrs. Fender.

We conclude that this testimony was sufficient to warrant the court in submitting to the jury the question stated above, and that it was sufficient to warrant the verdict. The judgment is correct, and will therefore be affirmed.

[redacted]